



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 22, 2012

Ms. L. Carolyn Nivens
For City of Seabrook
Ross, Banks, May, Cron & Cavin, P.C.
2 Riverway, Suite 700
Houston, Texas 77056

OR2012-16861

Dear Ms. Nivens:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 468612 (PIR No. 3957-8/T).

The City of Seabrook (the "city"), which you represent, received a request for the complete personnel file of a named police officer. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.114, 552.117, 552.119, 552.122, 552.130, 552.136, and 552.147 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes such as section 143.089 of the Local Government Code. The city is a civil service city under chapter 143 of the Local Government Code. Section 143.089 contemplates two different types of personnel files relating to a police officer: a police officer's civil service file that the civil service director is required to maintain and an internal file that the police department may maintain for its own use. Local Gov't Code § 143.089(a), (g). Under

¹Although you raise section 552.101 of the Government Code in conjunction with sections 552.102, 552.114, 552.117, 552.119, 552.122, 552.130, 552.136, and 552.147 of the Government Code, section 552.101 does not encompass other sections of the Act.

section 143.089(a), the officer's civil service file must contain certain specified items, including commendations, periodic evaluations by the police officer's supervisor, and documents relating to any misconduct in any instance in which the department took disciplinary action against the officer under chapter 143 of the Local Government Code. *Id.* § 143.089(a)(1)-(2). Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *Id.* §§ 143.051-.055. In cases in which a police department investigates a police officer's misconduct and takes disciplinary action against an officer, it is required by section 143.089(a)(2) to place all investigatory records relating to the investigation and disciplinary action, including background documents such as complaints, witness statements, and documents of like nature from individuals who were not in a supervisory capacity, in the police officer's civil service file maintained under section 143.089(a). *See Abbott v. Corpus Christi*, 109 S.W.3d 113,122 (Tex. App.—Austin 2003, no pet.).

All investigatory materials in a case resulting in disciplinary action are "from the employing department" when they are held by or are in the possession of the department because of its investigation into a police officer's misconduct, and the department must forward them to the civil service commission for placement in the civil service personnel file. *Id.* Such records may not be withheld under section 552.101 of the Government Code in conjunction with section 143.089 of the Local Government Code. *See Local Gov't Code* § 143.089(f); Open Records Decision No. 562 at 6 (1990). Information that reasonably relates to an officer's employment relationship with the police department and that is maintained in a police department's internal file pursuant to section 143.089(g) is confidential and must not be released. *See City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, pet. denied); *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

The city states Exhibit B is maintained in its police department's internal personnel file under section 143.089(g). Thus, the city must withhold Exhibit B under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code.²

Next, we consider the city's arguments for the information in the officer's civil service file maintained under section 143.089(a). Section 552.101 of the Government Code also encompasses section 6103(a) of title 26 of the United States Code. Section 6103(a) renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 600 (1992) (W-4 forms). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, . . . or any other data, received

²As our ruling is dispositive, we need not address the city's remaining arguments against disclosure of this information.

by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Treasury] with respect to a return or with respect to the determination of the existence, or possible existence, of liability . . . for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense[.]” 26 U.S.C. § 6103(b)(2)(A). Accordingly, the city must withhold the W-4 forms we marked pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

Section 552.101 of the Government Code also encompasses section 1701.306 of the Occupations Code, which makes confidential L-2 Declaration of Medical Condition and L-3 Declaration of Psychological and Emotional Health forms required by the Texas Commission on Law Enforcement Officer Standards and Education (the “commission”). Section 1701.306 provides in part the following:

(a) The commission may not issue a license to a person unless the person is examined by:

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a blood test or other medical test.

(b) An agency hiring a person for whom a license is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to the commission. A declaration is not public information.

Occ. Code § 1701.306(a), (b). We note the remaining information does not contain a L-2 or L-3 declaration form. Accordingly, section 1701.306 is not applicable to any of the remaining information, and the city may not withhold any of the remaining information under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information if it 1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and 2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records

Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (prescription drugs, illnesses, operations, and physical handicaps). This office has also found personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate or embarrassing. *See generally* Open Records Decision Nos. 600 at 9-10 (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). However, there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* ORDs. 600 at 9 (information revealing that employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure), 545 (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common-law privacy). We have marked the information that is highly intimate or embarrassing and of no legitimate public concern that the city must withhold pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. The city may not withhold any of the remaining information under common-law privacy.

Section 552.102(a) of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). The Texas Supreme Court held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The city must withhold the officer's date of birth we marked under section 552.102(a) of the Government Code.

Section 552.114(a) of the Government Code excepts from disclosure student records "at an educational institution funded wholly or partly by state revenue." Gov't Code § 552.114(a). This office has determined the same analysis applies under section 552.114 and the Family Educational Rights and Privacy Act of 1974 ("FERPA"), section 1232g of title 20 of the United States Code. FERPA governs the availability of student records held by educational institutions or agencies receiving federal funds. We note section 552.114 and FERPA apply only to student records in the custody of an educational institution and records directly transferred from an educational institution to a third party. *See* 34 C.F.R. § 99.33(a)(2). You contend some of the remaining information is confidential under section 552.114. However, the city is not an educational institution. *See* Open Records Decision No. 309 at 3 (1983) (City of Fort Worth not an "educational agency" for purposes of FERPA). You do not inform us, and it does not otherwise appear from our review, that the city received any of the submitted information directly from an educational institution. We therefore conclude the

city may not withhold any of the remaining information on the basis of section 552.114 of the Government Code or FERPA.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the current and former home addresses and home telephone numbers, emergency contact information, social security number, and family member information of a peace officer, regardless of whether the peace officer made an election under section 552.024 or section 552.1175 of the Government Code to keep such information confidential. Gov't Code § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. The city must withhold the officer's personal information we have marked under section 552.117(a)(2) of the Government Code.³

Section 552.130(a)(1) of the Government Code provides information relating to a driver's license issued by an agency of Texas or another state or country is excepted from public release. *Id.* § 552.130(a)(1). The city must withhold the driver's license information we have marked under section 552.130 of the Government Code. However, the city must release the state that issued the license because it is not information excepted by section 552.130.

Section 552.136 of the Government Code provides, "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." *Id.* § 552.136(b); *see also id.* § 552.136(a) (defining "access device"). You also seek to withhold the employee identification numbers you have marked in the remaining information. However, you have not provided any arguments explaining how the employee identification numbers, whether used alone or in conjunction with another device, may be used to obtain money, goods, or services, or to initiate a transfer of funds. Thus, we find you have failed to demonstrate how the employee identification numbers constitute an access device for purposes of section 552.136. Therefore, the city may not withhold the employee identification numbers you have marked under section 552.136 of the Government Code.

Next, the city asserts section 855.115 of the Government Code, which is also encompassed by section 552.101 of the Government Code and protects "[i]nformation contained in records that are in the custody of the [Texas Municipal Retirement System.]" Gov't Code § 855.115(a). The city rather than the Texas Municipal Retirement System maintains all of the information at issue. Therefore, the city may not withhold the information under section 855.115.

³As our ruling is dispositive, we need not address the city's remaining arguments against disclosure of this information.

The remaining information contains photocopies of the specified officer's identification cards. Section 552.139(b)(3) of the Government Code provides, "a photocopy or other copy of an identification badge issued to an official or employee of a governmental body" is confidential.⁴ Gov't Code § 552.139(b)(3). Therefore, the city must withhold the photocopies of the identification cards, which we have marked, under section 552.139(b)(3) of the Government Code.⁵

We note you have also raised section 552.122 of the Government Code and 552.101 of the Government Code in conjunction with (1) the Medical Practice Act, subtitle B of title 3 of the Occupations Code, (2) section 1703.306 of the Occupations Code, and (3) section 611.002 of the Health and Safety Code. However, you have not indicated any information you seek to withhold under these exceptions, nor did we find any submitted information that is subject to these exceptions. Accordingly, the city may not withhold any of the submitted information on any of these bases.

In summary, the city must withhold: (1) Exhibit B under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code; (2) the W-4 forms we have marked under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code; (3) the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy; (4) the birth date we have marked under section 552.102 of the Government Code; (5) the information we have marked under section 552.117(a)(2) of the Government Code; (6) the driver's license information we have marked under section 552.130 of the Government Code; and (7) the photocopies of the identification cards we have marked under section 552.139(b)(3) of the Government Code. The city must release the remaining information.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

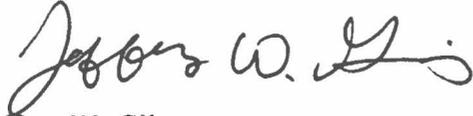
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁵As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeffrey W. Giles". The signature is fluid and cursive, with the first name being the most prominent.

Jeffrey W. Giles
Assistant Attorney General
Open Records Division

JWG/dls

Ref: ID# 468612

Enc. Submitted documents

c: Requestor
(w/o enclosures)