



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 5, 2012

Mr. Peter Gruning
Attorney for City of Lockhart
Duvall Gruning & Dietz
112 North LBJ Drive
San Marcos, Texas 78666

OR2012-17675

Dear Mr. Gruning:

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# 469927.

The Lockhart Police Department (the "department"), which you represent, received a request for information pertaining to a named former department officer. You state some information will be released. You state the department will withhold some information as permitted by Open Records Decision No. 684 (2009).¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.115, 552.117, 552.122, and 552.130 of the Government Code.² We have considered the claimed exceptions 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

¹We note Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including W-2 and W-4 forms under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code and L-2 and L-3 declarations under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code, without the necessity of requesting an attorney general decision.

²Although you also raise section 552.1175 of the Government Code, section 552.117 is the proper exception to raise for information the department holds in its capacity as an employer.

Code § 552.101. Section 552.101 encompasses information made confidential by other statutes. For information to be confidential under section 552.101, the provision of law must explicitly require confidentiality. You assert the some of the submitted information is protected under the federal Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), 42 U.S.C. §§ 1320d-1320d-8. At the direction of Congress, the Secretary of Health and Human Services (“HHS”) promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. pts. 160, 164 (“Privacy Rule”); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, except as provided by parts 160 and 164 of the Code of Federal Regulations. *See id.* § 164.502(a).

This office has addressed the interplay of the Privacy Rule and the Act. In Open Records Decision No. 681 (2004), we noted section 164.512 of title 45 of the Code of Federal Regulations provides a covered entity may use or disclose protected health information to the extent such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted the Act “is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public.” ORD 681 at 8; *see also* Gov’t Code §§ 552.002, .003, .021. Therefore, we held the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. *See Abbott v. Tex. Dep’t of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App.—Austin 2006, no pet.); ORD 681 at 9; *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Thus, because the Privacy Rule does not make information that is subject to disclosure under the Act confidential, the department may withhold protected health information from the public only if the information is confidential under other law or an exception in subchapter C of the Act applies.

We note that some of the submitted information is subject to the Americans with Disabilities Act of 1990 (the “ADA”), 42 U.S.C. §§ 12101 *et seq.* The ADA provides that a covered entity may require a medical examination after an employee has been made a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination provided that information about the medical conditions and medical histories of applicants or employees must be 1) collected and maintained on separate forms, 2) kept in separate medical files, and 3) treated as a confidential medical record. 42 U.S.C. § 12112(d)(3)(B); *see also* 29 C.F.R. § 1630.14(b); Open Records Decision No. 641 (1996). The submitted information

contains two "Post-Offer Evaluation" summaries of physical examinations conducted upon a candidate for the position of police officer. Accordingly, you must withhold these evaluations, which we have marked, pursuant to section 552.101 in conjunction with the ADA.³

Section 552.101 of the Government Code also encompasses section 1324a of title 8 of the United States Code, which provides that an Employment Eligibility Verification Form I-9 "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). The release of the submitted I-9 form in response to this request for information would be for purposes other than for enforcement of the referenced federal statutes. Accordingly, the I-9 form you have marked is excepted from disclosure under section 552.101 of the Government Code in conjunction with federal law and may be released only for purposes of compliance with the federal laws and regulations governing the employment verification system.

Section 552.101 of the Government Code also encompasses section 58.007 of the Family Code. Section 58.007 provides, in relevant part:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

(1) if maintained on paper or microfilm, kept separate from adult files and records;

(2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and

(3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapters B, D, and E.

Fam. Code § 58.007(c). Thus, under section 58.007, law enforcement records relating to a juvenile engaged in delinquent conduct or conduct indicating a need for supervision on or after September 1, 1997, are confidential. *See id.* § 51.03(a)-(b) (defining "delinquent conduct" and "conduct indicating a need for supervision"). For purposes of section 58.007(c), a "child" is a person who is ten years of age or older and under seventeen

³Because our ruling is as to this information is dispositive, we do not address your remaining argument against its disclosure.

years of age at the time the conduct occurred. *See id.* § 51.02(2). Upon review, we find the information we have marked consists of law enforcement records relating to juvenile delinquent conduct. This information is confidential under section 58.007(c) and must be withheld under section 552.101. However, we note section 58.007(c) is only applicable to law enforcement records and files. Upon review, we find the remaining information you seek to withhold under section 58.007 either does not involve a juvenile or consists of administrative records that are not law enforcement records for purposes of section 58.007. As such, this information is not confidential under section 58.007 and may not be withheld under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses chapter 411 of the Government Code, which pertains to criminal history record information (“CHRI”) generated by the National Crime Information Center or by the Texas Crime Information Center. *See Gov’t Code* § 411.083(a). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual laws with respect to the CHRI it generates. *See id.* Section 411.083 of the Government Code deems confidential CHRI the Texas Department of Public Safety (“DPS”) maintains, except DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See Gov’t Code* § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-.127. Similarly, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 in conjunction with chapter 411, subchapter F of the Government Code. We note section 411.083 does not apply to active warrant information or other information relating to one’s current involvement with the criminal justice system. *See id.* § 411.081(b) (police department allowed to disclose information pertaining to person’s current involvement in the criminal justice system). Further, CHRI does not include driving record information. *See id.* § 411.082(2)(B). Upon review, we find the information we have marked constitutes confidential CHRI. Thus, the department must withhold the marked information under section 552.101 of the Government Code in conjunction with federal law and chapter 411 of the Government Code. However, the remaining information you have marked does not constitute CHRI for purposes of chapter 411 of the Government Code and may not be withheld under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses section 611.002 of the Health and Safety Code. Section 611.002 provides “[c]ommunications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.” Health & Safety Code § 611.002(a). Section 611.001 defines a “professional” as (1) a person authorized to practice

medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See id.* § 611.001(2). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* ORD 565. These sections permit disclosure of mental health records to a patient, a person authorized to act on the patient's behalf, or a person who has the written consent of the patient. *See* Health & Safety Code §§ 611.004-.0045. Upon review, we find the information we have marked constitutes mental health records that are confidential under section 611.002 of the Health and Safety Code. Therefore, the marked information may only be released in accordance with sections 611.004 and 611.0045 of the Health and Safety Code.

Section 552.101 of the Government Code also encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code §§ 151.001-168.202. The MPA governs access to medical records. Section 159.002 provides, in part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Id. § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Medical records must be released upon the patient's signed, written consent from the patient pursuant to sections 159.004 and 159.005. *See* Occ. Code §§ 159.004-.005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); ORD 565 at 7. Upon review, we find the information we have marked consists of a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that was created by a physician or someone under the supervision of a physician. Therefore, the marked information constitutes a confidential medical record and may be released only in accordance with the MPA.

However, we find the remaining information you seek to withhold does not constitute medial records for purposes of the MPA and may not be withheld under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses section 1701.454 of the Occupations Code, which governs the public availability of an F-5 form submitted to TCLEOSE under subchapter J of chapter 1701 of the Occupations Code. We note the F-5 form you have marked was created prior to the effective date of the amendment of section 1701.454 by the Seventy-ninth Legislature. *See* Act of May 25, 2005, 79th Leg., R.S., ch. 1298, § 4, 2005 Tex. Gen. Laws 4094, 4096. Thus, the F-5 form you have marked is governed by the previous version of section 1701.454. *See id.* § 6.⁴ Section 1701.454 previously provided as follows:

(a) A report or statement submitted to [TCLEOSE] under this subchapter is confidential and is not subject to disclosure under [the Act], unless the person resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses.

(b) Except as provided by this subsection, a [TCLEOSE] member or other person may not release the contents of a report or statement submitted under this subchapter. The report or statement may be released only by the [TCLEOSE] employee having the responsibility to maintain the report or statement and only if:

(1) the head of a law enforcement agency or the agency head's designee makes a written request on the agency's letterhead for the report or statement accompanied by the agency head's or designee's signature; and

(2) the person who is the subject of the report or statement authorizes the release by providing a sworn statement on a form supplied by [TCLEOSE] that includes the person's waiver of liability regarding an agency head who is responsible for or who takes action based on the report or statement.

⁴Section 6 of the amending legislation states that "[t]he changes in law made by this Act in relation to employment termination reports apply only to an employment termination report under Subchapter J, Chapter 1701, Occupations Code, regarding a resignation or termination that occurs on or after the effective date of this Act. An employment termination report regarding a resignation or termination that occurs before the effective date of this Act is governed by the law as it existed immediately before the effective date, and that law is continued in effect for that purpose." Act of May 25, 2005, 79th Leg., R.S., ch. 1298, § 6, 2005 Tex. Gen. Laws 4094, 4096.

Occ. Code § 1701.454. Upon review, we find the F-5 form you have marked is not subject to release under the provisions of section 1701.454. Accordingly, the department must withhold the F-5 form you have marked under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

Section 552.101 of the Government Code also encompasses the common-law right to 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 met. *Id.* at 681-82. This office has found that common-law privacy generally protects the identifying information of juvenile offenders. *See* Open Records Decision No. 394 (1983); *cf.* Fam. Code §§ 58.007(c). We have also determined that some kinds of medical information or information indicating disabilities or specific illnesses are generally highly intimate or embarrassing. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). In addition, this office has found financial information that does not relate to a financial transaction between an individual and a governmental body ordinarily satisfies the first requirement of the test for common-law privacy. For example, information related to an individual's mortgage payments, assets, bills, and credit history is generally protected by the common-law right to privacy. *See* Open Records Decision Nos. 545 (1990), 523 (1989); *see also* Open Records Decision No. 600 (1992) (public employee's withholding allowance certificate, designation of beneficiary of employee's retirement benefits, direct deposit authorization, and employee's decisions regarding voluntary benefits programs are protected under common-law privacy). 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 employee participation 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). Whether the public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis. *See* Open Records Decision No. 373 at 4 (1983). Upon review, we find the information we have marked and indicated is highly intimate or embarrassing and of no legitimate public interest. The department must withhold the marked and indicated information under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find the remaining information you seek to withhold is not private and may not be withheld under section 552.101 on that basis.

Section 552.115 of the Government Code excepts from disclosure "[a] birth or death record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official[.]" Gov't Code § 552.115(a). Section 552.115 is applicable only to information maintained by the bureau of vital statistics or local registration official. *See*

Open Records Decision No. 338 (1982). In this instance, the department maintains the birth certificate contained in the submitted information. We therefore conclude the department may not withhold the submitted birth certificate under section 552.115 of the Government Code.

Section 552.122 of the Government Code excepts from disclosure “a test item developed by a . . . governmental body[.]” Gov’t Code § 552.122(b). In Open Records Decision No. 626 (1994), this office determined the term “test item” in section 552.122 includes “any standard means by which an individual’s or group’s knowledge or ability in a particular area is evaluated,” but does not encompass evaluations of an employee’s overall job performance or suitability. ORD 626 at 6. The question of whether specific information falls within the scope of section 552.122(b) must be determined on a case-by-case basis. *Id.* Traditionally, this office has applied section 552.122 where release of “test items” might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Section 552.122 also protects the answers to test questions when the answers might reveal the questions themselves. *See* Attorney General Opinion JM-640 at 3 (1987); ORD 626 at 8. You seek to withhold the results of a firearms qualification test under section 552.122. However, you have not explained how the information at issue tests any specific knowledge of an applicant. Therefore, you have failed to demonstrate the information at issue constitutes a test item for purposes of section 552.122. Accordingly, the information you have marked does not constitute a test item under section 552.122(b) and may not be withheld on this basis.

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). We understand you to assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 of the Government Code. *See Indus. Found.*, 540 S.W.2d at 685. In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the Third Court of Appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court expressly disagreed with *Hubert*’s interpretation of section 552.102(a) and held its privacy standard differs from the *Industrial Foundation* test under section 552.101. *See Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The supreme court then considered the applicability of section 552.102, and 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. *See id.* at 347-48. We have marked the information that must be withheld under section 552.102(a) of the Government Code. The remaining information is not excepted under section 552.102(a) and may not be withheld on that basis.

Section 552.117(a)(2) of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family

member information of a peace officer, regardless of whether the peace officer made an election under section 552.024 or 552.1175 of the Government Code to keep such information confidential. Gov't Code § 552.117(a)(2); *see also id.* § 552.024. Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Accordingly, the department must withhold the information we have marked and indicated under section 552.117(a)(2). We find the remaining information you seek to withhold under section 552.117(a)(2) is not subject to that section and may not be withheld on that basis.

Section 552.130 of the Government Code excepts from disclosure information that relates to a motor vehicle operator's or driver's license, title, or registration issued by an agency of this state or another state or country. *Id.* § 552.130(a)(1)-(2). Therefore, the department must withhold the information you have marked, and the additional information we have marked, under section 552.130.

In summary, the medical record and mental health records we have marked may be released only in accordance with the MPA and chapter 611 of the Health and Safety Code, respectively. The department must withhold under section 552.101 of the Government Code (1) the information we have marked under the ADA; (2) the I-9 form you have marked under section 1324a of title 8 of the United States Code; (3) the information we have marked under section 58.007(c) of the Family Code; (4) the information we have marked under chapter 411 of the Government Code; (5) the F-5 form you have marked under section 1701.454 of the Occupations Code; and (6) the information we have marked and indicated under common-law privacy. The department must also withhold the information we have marked under section 552.102 of the Government Code, the information we have marked and indicated under section 552.117(a)(2) of the Government Code, and the information you have marked, and the additional information we have marked, under section 552.130 of the Government Code. The remaining information must be released to the requestor.⁵

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.

⁵We note Open Records Decision No. 684 (2009), discussed above, also authorizes governmental bodies authorizing to withhold a Form I-9 and attachments under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code and direct deposit authorization forms under section 552.101 in conjunction with common-law privacy without the necessity of requesting an attorney general decision. In addition, the information to be released contains a social security number that does not belong to the officer at issue. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting an attorney general decision under the Act. *See* Gov't Code § 552.147(b).

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 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,



Misty Haberer Barham
Assistant Attorney General
Open Records Division

MHB/som

Ref: ID# 469927

Enc. Submitted documents

c: Requestor
(w/o enclosures)