



ATTORNEY GENERAL OF TEXAS
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April 12, 2013

Ms. Elizabeth L. White
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OR2013-05931

Dear Ms. White:

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# 483860 (Seabrook File No. 3957-1).

The Seabrook Police Department (the "department"), which you represent, received a request for all civil services files, employment file and records relating to sustained disciplinary actions and events regarding two named officers. You state you will release some information with redactions under section 552.117(a)(2) of the Government Code pursuant to Open Records Decision No. 670 (2001).¹ You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.102, 552.114, 552.115, 552.117, 552.119, 552.122, 552.130, 552.136, 552.137, 552.140, and 552.147 of the

¹Open Records Decision No. 670 (2001) is a previous determination that authorizes all governmental bodies to withhold the home addresses and telephone numbers, personal cellular telephone and pager numbers, social security numbers, and family member information of peace officers under section 552.117(a)(2) of the Government Code, without the necessity of requesting an attorney general decision.

Government Code.² We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses section 143.089 of the Local Government Code. You state the City of Seabrook is a civil service city under chapter 143 of the Local Government Code. Section 143.089 provides for the existence of two different types of personnel files relating to a police officer: one that must be maintained as part of the officer’s civil service file and another that the police department may maintain for its own internal use. *See* Local Gov’t Code § 143.089(a), (g). Under 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 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; *see* Attorney General Opinion JC-0257 (written reprimand is not disciplinary action for purposes of Local Gov’t Code chapter 143). 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 police department must forward them to the civil service commission for placement in the civil

²Although you also raise section 552.024 of the Government Code as an exception to disclosure, we note this section is not an exception to public disclosure under the Act. Rather, this section permits a current or former official or employee of a governmental body to choose whether to allow public access to certain information relating to the current or former official or employee that is held by the employing governmental body. *See* Gov’t Code § 552.024. Further, although you raise section 552.101 of the Government Code in conjunction with sections 552.114, 552.119, and 552.136 of the Government Code, this office has concluded section 552.101 does not encompass other exceptions found in the Act. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Moreover, although you also raise section 552.1175 of the Government Code, we note section 552.117 is the proper exception for information the department holds in an employment capacity.

³We assume that the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

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).

However, a document relating to a police officer's alleged misconduct may not be placed in his civil service file if there is insufficient evidence to sustain the charge of misconduct. Local Gov't Code § 143.089(b). Information that reasonably relates to a police 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.⁴ *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. Tex. Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You state some of the submitted information is contained within the department's internal files and maintained under section 143.089(g) of the Local Government Code. Thus, the department must withhold the information it seeks to withhold under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code.⁵

Next, we address your arguments for the remaining information in Exhibits A1 and B1 that are not contained in the department's internal files. Section 552.101 of the Government Code also encompasses section 6103(a) of title 26 of the United States Code, which renders tax return information confidential. *See* Attorney General Opinion H-1274 (1978) (tax returns). 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 by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] 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). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Chamberlain v. Kurtz*, 589

⁴Section 143.089(g) of the Local Government Code requires a police department that receives a request for information maintained in a personnel file under section 143.089(g) to refer that requestor to the civil service director or the director's designee. Local Gov't Code § 143.089(g).

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

F.2d 827, 840-41 (5th Cir. 1979); *Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *aff'd in part*, 993 F.2d 1111 (4th Cir. 1993). Consequently, the department must withhold 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.

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. The type of information considered highly intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has found that 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 (1992) (finding personal financial information to include designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and 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). Therefore, the department must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. However, we find none of the remaining information is highly intimate or embarrassing and of no legitimate public interest. Therefore, none of the remaining information may be withheld on that basis.

The department 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 department rather than the Texas Municipal Retirement System maintains all of the information at issue. Therefore, the department may not withhold the information at issue under section 855.115.

Section 552.102 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.” *Id.* § 552.102(a). The Texas Supreme Court recently 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). Upon review, we find the department must withhold the birth dates we have marked under section 552.102 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). However, the department is not an educational institution funded wholly or in part by state revenue. We therefore conclude the department may not withhold any of the remaining information under section 552.114 of the Government Code.

You assert the submitted birth certificates are excepted from disclosure under section 552.115 of the Government Code. Section 552.115 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[.]” *Id.* § 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). Therefore, because the submitted birth certificates are maintained by the department, they may not be withheld under section 552.115 of the Government Code.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home addresses, home telephone numbers, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with section 552.024 of the Government Code or section 552.1175 of the Government Code.⁶ Gov’t Code § 552.117(a)(2). Accordingly, the department must withhold the information we have marked in the remaining information under section 552.117(a)(2) of the Government Code.⁷

Section 552.130 of the Government Code provides information relating to a motor vehicle operator’s license, driver’s license, motor vehicle title or registration, or a personal identification document issued by an agency of this state or another state or country is excepted from public release. *Id.* § 552.130. Upon review, we find the department must withhold the driver’s license information and motor vehicle record information we have marked in the remaining information under section 552.130 of the Government Code.

⁶“Peace officer” is defined by Article 2.12 of the Texas Code of Criminal Procedure.

⁷As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

Section 552.136(b) of the Government Code states “[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). Upon review, we find you have failed to establish any of the remaining information consists of an access device number for purposes of section 552.136. Accordingly, none of the remaining information may be withheld on this basis.

Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). Upon review we find none of the remaining information at issue contains e-mail addresses subject to section 552.137 of the Government Code. Therefore, none of the remaining information may be withheld on this basis.

Lastly, the department asserts sections 552.119, 552.122, and 552.140 of the Government Code. However, the department did not submit the officer’s photograph, test items, or a DD-214 form. Thus, the department may not withhold information under these exceptions. *See id.* §§ 552.119 (excepts peace officer’s photograph from disclosure if release would endanger officer’s life), .122 (excepts test items from disclosure), .140 (makes confidential DD-214 form under certain circumstances). The department also seeks to withhold a Form I-9, information subject to the American with Disabilities Act of 1990, and information subject to section 12.003 of the Human Resources Code. *See* 8 U.S.C. § 1324a(b)(5) (Form I-9 “may not be used for purposes other than for enforcement of this chapter”); 42 U.S.C. §§ 12101 *et seq.* (information about the medical conditions and medical histories of applicants or employees must be treated as confidential); Hum. Res. Code § 12.003 (makes confidential information concerning persons applying for or receiving assistance from health agencies’ assistance programs). However, the department also did not submit any such information. Section 552.301(e)(1)(A) requires a governmental agency to submit the requested information or a representative sample of such information and the arguments for the information it seeks to withhold. Gov’t Code § 552.301(a)(1)(A). Thus, the department should only submit assertions for information that it actually submits to this office seeking to withhold. Accordingly, the department may not withhold any requested information under these provisions.

In summary, the department must withhold the following information under section 552.101 of the Government Code: (1) the information you seek to withhold under section 143.089(g) of the Local Government Code; (2) the W-4 forms we have marked under section 6103(a) of title 26 of the United States Code; and (3) the information we have marked under common-law privacy. The department must withhold the dates of birth we have marked under section 552.102. The department must withhold the officers’ personal information under section 552.117(a)(2) of the Government Code. The department must withhold the

motor vehicle record information we have marked under section 552.130 of the Government Code. The remaining information must be released.⁸

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 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,



Thana Hussaini
Assistant Attorney General
Open Records Division

TH/som

Ref: ID# 483860

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁸We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including 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 DD-214 forms under section 552.140 of the Government Code, without the necessity of requesting an attorney general decision.