



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 14, 2013

Mr. George E. Hyde
Counsel for the City of Bay City
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2500 West William Cannon, Suite 609
Austin, Texas 78745

OR2013-08007

Dear Mr. Hyde:

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# 487270.

The Bay City Police Department (the "department"), which you represent, received a request for the personnel and disciplinary files of three named officers. You state the department is releasing some of the requested information with the redaction of certain information under section 552.1175(f) of the Government Code and Open Records Decision No. 684 (2009).¹

¹Section 552.1175(f) of the Government Code authorizes a governmental body to withhold information subject to section 552.1175(b) of the Government Code without requesting a decision from this office. *See* Gov't Code § 552.1175(b), (f). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain information, including L-2 and L-3 declarations under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code; direct deposit authorization forms under section 552.101 in conjunction with common-law privacy; and an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. You state you will redact driver's license numbers and access device numbers pursuant to Open Records Decision No. 684. However, the Texas legislature has amended section 552.130 of the Government Code to allow a governmental body to redact the information described in subsection 552.130(a)(1) without the necessity of seeking a decision from the attorney general. *See id.* § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). Further, the Texas legislature amended section 552.136 of the Government Code to allow a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *See id.* § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e). Thus, the statutory amendments to sections 552.130 and 552.136 of the Government Code supercede Open Records Decision No. 684. Therefore, a governmental body may only redact information subject to subsection 552.130(a)(1) and subsection 552.136(b) in accordance with subsections 552.130(c) and 552.136(c) respectively, not Open Records Decision No. 684.

You claim the requested information is excepted from disclosure under sections 552.101, 552.102, 552.117, 552.115, 552.119, and 552.130 of the 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 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 1324a of title 8 of the United States Code. Section 1324a governs I-9 forms and their related documents. This section provides an I-9 form and “any information contained in or appended to such form, 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. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). Upon review, we find the department must withhold the I-9 form you have marked under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code.⁴

Section 552.101 of the Government Code also encompasses information protected by chapter 411 of the Government Code, which makes confidential 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 that 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 that the Department of Public Safety (“DPS”) maintains, except that 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. Thus, 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. Upon review, we find the

²We understand you to raise sections 552.117 and 552.130 of the Government Code based upon your markings.

³We assume 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.

⁴As our ruling on this information is dispositive, we need not address your remaining argument against its disclosure.

information we have marked consists of CHRI that must be withheld under section 552.101 in conjunction with section 411.083 of the Government Code.

Section 552.101 of the Government Code also encompasses 411.192 of the Government Code, which governs the release of all information maintained by the department concerning the licensure of individuals to carry a concealed handgun, and provides as follows:

(a) The department shall disclose to a criminal justice agency information contained in its files and records regarding whether a named individual or any individual named in a specified list is licensed under this subchapter. Information on an individual subject to disclosure under this section includes the individual's name, date of birth, gender, race, zip code, telephone number, e-mail address, and Internet website address. Except as otherwise provided by this section and by Section 411.193, all other records maintained under this subchapter are confidential and are not subject to mandatory disclosure under the open records law, Chapter 552.

(b) An applicant or license holder may be furnished a copy of disclosable records regarding the applicant or license holder on request and the payment of a reasonable fee.

Id. § 411.192(a), (b). The information we have marked pertains to concealed handgun license information. In this instance, the requestor is neither a criminal justice agency nor the license holder whose information is at issue. We note section 411.193 is not applicable because the submitted information does not constitute a statistical report. *Id.* § 411.193 (making a statistical report including the number of licenses issued, denied, revoked, or suspended by the department during the preceding month available to the public). Therefore, the department must withhold the concealed handgun license information we have marked under section 552.101 in conjunction with section 411.192 of the Government Code.⁵

Section 552.101 of the Government Code also encompasses information protected by the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code §§ 151.001-168.202. Section 159.002 of the MPA 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.

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

(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 that is subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004. Upon review, we find none of the remaining information constitutes medical records or information obtained from medical records. Accordingly, none of the remaining information may be withheld under section 552.101 on the basis of the MPA.

Section 552.101 of the Government Code also encompasses common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) 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 demonstrated. *See id.* at 681-82. This office has found personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure. *See* Open Records Decision Nos. 600 (1992) (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), 455 at 9 (1987) (employment applicant's salary information not private), 423 at 2 (1984) (scope of public employee privacy is narrow). Additionally, this office has found a compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U. S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (finding significant privacy interest in compilation of individual's criminal history by recognizing distinction between public records found in courthouse files and local police stations and compiled summary of criminal history information). Moreover, a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. However, we note the public generally has a legitimate interest in information that relates to public employment and public employees. *See* Open Records Decisions Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 542 (1990), 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2.

Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the department must withhold the marked information under section 552.101 of the Government Code in conjunction with common-law privacy.⁶ However, we find you have not demonstrated how any of the remaining information is highly intimate or embarrassing and not of legitimate public concern. Thus, the remaining information may not be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.102 of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwanted 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, which is noted above. *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*, 354 S.W.3d at 342 (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 346. Upon review, we find the department must withhold the dates of birth you have marked under section 552.102(a) of the Government Code. However, we find none of the remaining information is subject to section 552.102(a) of the Government Code and none of it may be withheld 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 certificates contained in the remaining information. We therefore conclude the department may not withhold the submitted birth certificates under section 552.115 of the Government Code.

Section 552.117(a)(2) of the Government Code excepts from public disclosure a peace officer’s home address and telephone number, social security number, emergency contact information, and family member information regardless of whether the peace officer made an election under section 552.024 of the Government Code. 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

⁶As our ruling on this information is dispositive, we need not address your remaining argument against its disclosure.

Criminal Procedure. Section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). We note section 552.117 is not applicable to a former spouse and does not protect the fact that a governmental employee has been divorced. We also note a post office box number is not a "home address" for purposes of section 552.117.⁷ Upon review, we find the department must withhold the information we have marked under section 552.117(a)(2) of the Government Code; however, the cellular telephone number we have marked may only be withheld if a governmental body did not pay for the associated cellular telephone service. However, none of the remaining information you have marked is subject to section 552.117(a)(2) and none of it may be withheld on that basis.

Section 552.119 of the Government Code provides:

(a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, the release of which would endanger the life or physical safety of the officer, is excepted from [required public disclosure] unless:

- (1) the officer is under indictment or charged with an offense by information;
- (2) the officer is a party in a civil service hearing or a case in arbitration; or
- (3) the photograph is introduced as evidence in a judicial proceeding.

Gov't Code § 552.119(a). Under section 552.119, a governmental body must demonstrate, if the information does not demonstrate on its face, that release of the photograph would endanger the life or physical safety of a peace officer. You state the remaining information contains a photograph of a department officer and you indicate release of the photograph at issue will endanger the life or physical safety of the officer. We understand the officer concerned has not consented to public disclosure of his photograph. Further, you state the photograph at issue is not subject to subsections (1) through (3) of section 552.119(a). Based on your representations and our review, we have determined release of the photograph at issue, which we have marked, would endanger the life or physical safety of the officer at issue. Therefore, the department must withhold the marked photograph under section 552.119 of the Government Code.

⁷*See* Gov't Code § 552.117; Open Records Decision No. 622 at 4 (1994) (legislative history makes clear purpose of Gov't Code § 552.117 is to protect public employees from being harassed at home) (citing House Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985); Senate Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985)) (emphasis added).

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 motor vehicle record information you have marked and the motor vehicle record information we have marked under section 552.130 of the Government Code.

We note a portion of the remaining information is subject to section 552.136 of the Government Code.⁸ Section 552.136 states “[n]otwithstanding any other provision of this chapter, 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. This office has concluded insurance policy numbers constitute access device numbers for purposes of section 552.136. Accordingly, we find the department must withhold the insurance policy number we have marked under section 552.136 of the Government Code.

In summary, the department must withhold: (1) the I-9 form you have marked under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code; (2) the information we have marked under section 552.101 in conjunction with section 411.083 of the Government Code; (3) the information we have marked under section 552.101 in conjunction with in conjunction with section 411.192 of the Government Code; (4) the information we have marked under section 552.101 in conjunction with common-law privacy; and (5) the birth dates you have marked under section 552.102(a) of the Government Code. The department must withhold the information we have marked under section 552.117(a)(2) of the Government Code; however, the cellular telephone number we have marked may only be withheld if a governmental body did not pay for the associated cellular telephone service. The department must withhold the information we have marked under section 552.119 of the Government Code. The department must also withhold the information you have marked and the information we have marked under section 552.130 of the Government Code. The department must withhold the information we have marked under section 552.136 of the Government Code. The remaining information must be released.

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,

⁸The 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).

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,

A handwritten signature in black ink, appearing to read "Jennifer Luttrall". The signature is fluid and cursive, with the first name being more prominent.

Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/som

Ref: ID# 487270

Enc. Submitted documents

c: Requestor
(w/o enclosures)