



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 3, 2013

Ms. Rachel Saucier
Legal Assistant
City of Georgetown
P.O. Box 409
Georgetown, Texas 78627-0409

OR2013-15306

Dear Ms. Saucier:

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# 498157 (Georgetown HR ORR 2013-296).

The City of Georgetown (the "city") received a request for the requestor's personnel files. You state the city has released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.102 of the Government Code. 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 the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code, which provides in pertinent part:

(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.

Occ. Code § 159.002(b)-(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 the information we have marked constitutes medical records. As such, the marked medical records must be withheld under section 552.101 in conjunction with the MPA.¹

Section 552.101 of the Government Code also encompasses section 1703.306 of the Occupations Code. Section 1703.306 provides the following, in pertinent part:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

(1) the examinee or any other person specifically designated in writing by the examinee[.]

Id. § 1703.306(a)(1). We agree some of the remaining information constitutes information acquired from polygraph examinations of two individuals. However, in this instance, the requestor is one of the polygraph examinees. Thus, the city has the discretion to release the requestor's polygraph information, which we have marked, pursuant to section 1703.306(a)(1). *See* Open Records Decision No. 481 at 9 (1987) (predecessor to section 1703.306 permitted, but did not require, examination results to be disclosed to examinees). Otherwise, the city must withhold the requestor's polygraph information we have marked under section 552.101 in conjunction with section 1703.306(a). Regardless, the city must withhold the polygraph information of the individual who is not the requestor, which we have marked, under section 552.101 in conjunction with section 1703.306(a).² We find, however, you have failed to demonstrate any of the remaining information was acquired from a polygraph examination. As such, none of the remaining information may be withheld under section 552.101 in conjunction with section 1703.306(a).

Section 552.101 of the Government Code also encompasses the common-law right of privacy, which protects information if it (1) contains highly intimate or embarrassing facts,

¹As our ruling is dispositive, we need not address your arguments against disclosure of this information.

²As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. See Open Records Decision No. 455 (1987). We note, however, the public has a legitimate interest in information that relates to public employees and their conduct in the workplace. See, e.g., Open Records Decision 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), 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of government employees), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest), 329 (1982) (reasons for employee's resignation ordinarily not private).

In this instance, we note the requestor is one of the individuals whose privacy rights are implicated. As such, the requestor has a special right of access under section 552.023 of the Government Code to information pertaining to herself that would otherwise be withheld to protect her privacy. See Gov't Code § 552.023(b) (governmental body may not deny access to person or person's representative to whom information relates on grounds that information is considered confidential under privacy principles); ORD 481 at 4 (privacy theories not implicated when individual requests information concerning himself). Accordingly, the city may not withhold the requestor's own information under section 552.101 in conjunction with common-law privacy. Upon review, we find the information we have marked is information pertaining to an individual other than the requestor that satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, the city must withhold the information we have marked under section 552.101 in conjunction with common-law privacy.³ We find you have failed to demonstrate the remaining information pertaining to individuals other than the requestor is highly intimate or embarrassing and not of legitimate public concern. Therefore, the city may not withhold the remaining information under section 552.101 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). You assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101, which is discussed 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

³As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

court ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court has 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. *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 has 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. *Id.* at 347. Thus, under *Texas Comptroller*, section 552.102(a) is applicable to the date of birth of an employee of a governmental body in a record maintained by his or her employer in an employment context. We note the date of birth pertaining to a city employee belongs to the requestor. Because section 552.102(a) protects personal privacy, the requestor has a special right of access to her date of birth. *See Gov't Code* § 552.023(b); ORD 481 at 4. Therefore, the city may not withhold the requestor's date of birth under section 552.102(a). The remaining dates of birth are not held by the city in an employment context. Accordingly, the remaining information is not subject to section 552.102(a) and city may not withhold it on this basis.

We note portions of the remaining information may be subject to section 552.1175 of the Government Code.⁴ Section 552.1175 protects the home address, home telephone number, emergency contact information, date of birth, social security number, and family member information of certain individuals, when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential. *See Act of May 26, 2013, 83rd Leg., R.S., H.B. 1632, § 3* (to be codified as an amendment to Gov't Code § 552.1175). Section 552.1175 applies, in part, to "peace officers as defined by Article 2.12, Code of Criminal Procedure[.]" Gov't Code § 552.1175(a)(1). Section 552.1175 is also applicable to 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)* (statutory predecessor to section 552.117 of the Government Code not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). We have marked information pertaining to an individual that is not held by the city in an employment context. We determine the city must withhold the information we have marked under section 552.1175 if the individual to whom the information pertains is still a licensed peace officer and he elects to restrict access to his information in accordance with section 552.1175(b). However, the city may withhold the cellular telephone number we have marked only if the cellular telephone service is not paid for by a governmental body. If the individual is no longer a licensed peace officer or no election is made, the city may not withhold the individual's information under section 552.1175.

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

Section 552.137 of the Government Code 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). Gov’t Code § 552.137(a)-(c). The e-mail address we have marked is not one of the types specifically excluded by section 552.137(c). Accordingly, the city must withhold the e-mail address we have marked under section 552.137 unless the owner of the address affirmatively consents to its release.⁵

In summary, the city must withhold the medical records we have marked under section 552.101 of the Government Code in conjunction with the MPA. The city has the discretion to release the requestor’s own polygraph information we have marked pursuant to section 1703.306(a)(1) of the Occupations Code, but must withhold the polygraph information we have marked of the individual who is not the requestor under section 552.101 of the Government Code in conjunction with section 1703.306(a) of the Occupations Code. The city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The city must withhold the information we have marked under section 552.1175 of the Government Code if the individual to whom the information pertains is still a licensed peace officer and he elects to restrict access to his information in accordance with section 552.1175(b). However, the city may withhold the cellular telephone number we have marked under section 552.1175(b) of the Government Code only if the cellular telephone service is not paid for by a governmental body. The city must withhold the e-mail address we have marked under section 552.137 of the Government Code unless the owner of the address affirmatively consents to its release. The city must release the remaining information.⁶

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for

⁵We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including 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.

⁶Because the information being released in this instance includes information that is confidential with respect to the general public, if the city receives another request for this information from an individual other than this requestor, the city must again seek a ruling from this office. See Gov’t Code § 552.023(a); ORD 481 at 4.

providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink that reads "Lindsay E. Hale". The signature is written in a cursive style with a large, looping initial "L".

Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/tch

Ref: ID# 498157

Enc. Submitted documents

c: Requestor
(w/o enclosures)