



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 31, 2013

Ms. Savannah Gonzalez
Assistant District Attorney
Hidalgo County
100 North Closner, Room 303
Edinburg, Texas 78539

OR2013-19029

Dear Ms. Gonzalez:

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# 504157.

The Hidalgo County District Attorney's Office (the "district attorney's office") received a request for the personnel file for a named former employee. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.1175, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We understand you to raise section 552.102 of the Government Code for all of the submitted information. Section 552.102(a) 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 as announced in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976). 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 has expressly disagreed with *Hubert's* interpretation of section 552.102(a) and held the privacy standard under section 552.102(a) 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 also considered the applicability of section 552.102(a) and held it excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *See id.* at 348. Accordingly, the district attorney's office must withhold the dates of birth we marked under section 552.102(a) of the Government Code. However, no portion of the remaining information is subject to section 552.102(a) of the Government Code, and the district attorney's office may not withhold any of the remaining information on that basis.

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 6103(a) of title 26 of the United States Code, which makes 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[.]" *See* 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 Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *aff'd in part*, 993 F.2d 1111 (4th Cir. 1993). Accordingly, the district attorney's office must withhold the tax return information we marked under section 552.101 of the Government Code in conjunction with section 6103 of title 26 of the United States Code.

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 and its attachments "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 I-9 form and attachments we marked in response to this request for information would be for purposes other than for enforcement of the referenced federal statutes. Accordingly, the submitted I-9 form and attachments we marked are confidential and the district attorney's office must withhold them under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code.

Section 552.101 of the Government Code also encompasses the Family Medical Leave Act (the "FMLA"), section 2654 of title 29 of the United States Code. Section 825.500 of chapter V of title 29 of the Code of Federal Regulations identifies the record-keeping requirements for employers that are subject to the FMLA. Subsection (g) of section 825.500 states:

[r]ecords and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files. If the Genetic

Information Nondiscrimination Act of 2008 (GINA) is applicable, records and documents created for purposes of FMLA containing family medical history or genetic information as defined in GINA shall be maintained in accordance with the confidentiality requirements of Title II of GINA (see 29 C.F.R. 1635.9), which permit such information to be disclosed consistent with the requirements of FMLA. If the [Americans with Disabilities Act (the “ADA”), as amended, is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements . . . , except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee’s physical or medical condition might require emergency treatment; and
- (3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g). Upon review, we find the information we marked is confidential under section 825.500 of title 29 of the Code of Federal Regulations. Further, we find none of the release provisions of the FMLA applies to this information. Accordingly, the district attorney’s office must withhold the information we marked under section 552.101 of the Government Code in conjunction with the FMLA.¹

Section 552.101 of the Government Code also encompasses section 560.003 of the Government Code, which provides, “[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act].” Gov’t Code § 560.003; *see id.* §§ 560.001(1) (“biometric identifier” means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry), .002(1)(A) (governmental body may not sell, lease, or otherwise disclose biometric identifier unless individual consents to disclosure). Accordingly, the district attorney’s office must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code.

Section 552.101 of the Government Code also encompasses section 1701.454 of the Occupations Code, which governs the public availability of information submitted to the Texas Commission on Law Enforcement Officer Standards and Education (“TCLEOSE”)

¹As our ruling is dispositive for this information, we do not address any remaining arguments against its disclosure.

under subchapter J of chapter 1701 of the Occupations Code. Section 1701.454 provides as follows:

- (a) All information 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 subchapter, a [TCLEOSE] member or other person may not release information submitted under this subchapter.

Occ. Code § 1701.454. The submitted information includes F-5 forms that were submitted to TCLEOSE pursuant to subchapter J of chapter 1701 of the Occupations Code. Furthermore, these forms do not indicate the named individual resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses. Therefore, the district attorney's office must withhold the information we marked under section 552.101 in conjunction with section 1701.454 of the Occupations Code.

Section 552.101 of the Government Code also encompasses section 1701.306 of the Occupations Code, which provides:

- (a) [TCLEOSE] 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 [TCLEOSE]. A declaration is not public information.

Id. § 1701.306(a), (b). Section 1701.306 is applicable to L-2 Declaration of Medical Condition and L-3 Declaration of Psychological and Emotional Health forms. Upon review, we find the submitted information does not contain either of these forms. Accordingly, the district attorney's office may not withhold any of the submitted information under section 552.101 of the Government Code on this basis.

Section 552.101 of the Government Code also encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides:

(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). 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 and information obtained from those records. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Upon review, we find the information we marked consists of confidential medical records. Accordingly, the district attorney's office must withhold the information we marked under section 552.101 of the Government Code in conjunction with the MPA.

Section 552.101 of the Government Code also encompasses section 550.065(b) of the Transportation Code, which states, except as provided by subsection (c) or (e), accident reports are privileged and confidential. Transp. Code § 550.065(b). Section 550.065(c)(4) provides for the release of crash reports to a person who provides two of the following three pieces of information: (1) the date of the accident; (2) the name of any person involved in the accident; and (3) the specific location of the accident. *Id.* § 550.065(c)(4). Under this provision, the Texas Department of Transportation or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more pieces of information specified by the statute. In this case, the requestor has not provided the district attorney's office with two of the three pieces of information. Accordingly, the district attorney's office must withhold the CR-3 crash report we marked under section 552.101 of the Government Code in conjunction with section 550.065(b) of the Transportation Code.

Section 552.101 of the Government Code also encompasses the doctrine of 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.*, 540 S.W.2d at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *See id.* at 681–82. The types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation. Id.* at 683. This office has concluded personal financial information not relating to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. *See* ORD 600 (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). However, there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 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 (1990) (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common-law privacy). Furthermore, this office has concluded 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), 392 (1982) (reasons for employee’s resignation ordinarily not private). Upon review, we find the information we marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the district attorney’s office must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.117(a)(2) of the Government Code excepts from disclosure the home address, home telephone number, emergency contact information, social security number, and family member information of a peace officer, as defined by article 2.12 of the Code of Criminal Procedure, regardless of whether the peace officer made an election under section 552.024 of the Government Code, when that information is held in an employment context. Gov’t Code § 552.117(a)(2); Open Records Decision No. 622 (1994). We note section 552.117 encompasses a personal cellular telephone or pager number, unless the cellular or pager service is paid for by a governmental body. *See* Open Records Decision No. 506 at 5–7 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). However, a post office box number is not a “home address” for purposes of section 552.117. *See* ORD 622 at 6 (legislative history makes clear purpose of section 552.117 is to protect public employees from being harassed at home). Accordingly, to the extent the personal information we marked relates to an individual who is still a peace officer and that information is held in an employment context, the district attorney’s office must withhold

that information under section 552.117(a)(2) of the Government Code. However, the cellular telephone number we marked must be withheld under section 552.117(a)(2) only if the cellular service was paid for with personal money.

If any of the personal information we marked does not relate to an individual who is still a peace officer but it is held in an employment context, it might be subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) of the Government Code protects the same information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Thus, information must be withheld under section 552.117(a)(1) only on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request it be kept confidential under section 552.024. We note the submitted information indicates the named former employee elected to keep only his home address and home telephone number confidential. Accordingly, if any of the personal information we marked concerns an individual who is not still a peace officer and the information is held in an employment context, then the district attorney's office must withhold that information under section 552.117(a)(1) of the Government Code if the individual to whom it relates timely requested that it be kept confidential under section 552.024 of the Government Code. If the individual did not elect to keep that information confidential, then the district attorney's office may not withhold it under section 552.117(a)(1) of the Government Code.²

Section 552.1175 of the Government Code excepts from disclosure the home address, home telephone number, emergency contact information, date of birth, social security number, and family member information when that information is held by a governmental body in a non-employment context and the individual elects to keep the information confidential. *See* Gov't Code § 552.1175. Section 552.1175 applies, in part, to "peace officers as defined by Article 2.12, Code of Criminal Procedure." *Id.* § 552.1175(a)(1). Accordingly, to the extent the personal information we marked concerns a peace officer, the information is not held in an employment context, and the individuals elect to keep this information confidential, the district attorney's office must withhold the information we marked under section 552.1175 of the Government Code.

Section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle operator's or driver's license or permit and a motor vehicle title or registration

²The district attorney's office is authorized to withhold the social security number of a living person without requesting a decision from this office, regardless of the applicability of section 552.117 of the Government Code. *See* Gov't Code § 552.147(b).

issued by an agency of this state or another state or country. *Id.* § 552.130(a)(1)–(2). Accordingly, the district attorney’s office must withhold the information we marked under section 552.130 of the Government Code.³

Section 552.136(b) 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 id.* § 552.136(a) (defining “access device”). This office has concluded insurance policy numbers constitute access device numbers for purposes of section 552.136. Accordingly, the district attorney’s office must withhold the information we marked under section 552.136 of the Government Code.⁴

Section 552.137 of the Government Code provides, “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). *Id.* § 552.137(a)–(c). Accordingly, the district attorney’s office must withhold the e-mail addresses we marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release.

In summary, the district attorney’s office must withhold the dates of birth we marked under section 552.102(a) of the Government Code. The district attorney’s office must withhold the following information under section 552.101 of the Government Code: (1) the tax return information we marked in conjunction with section 6103 of title 26 of the United States Code, (2) the I-9 form and attachments we marked in conjunction with section 1324a of title 8 of the United States Code, (3) the information we marked in conjunction with the FMLA, (4) the information we marked in conjunction with section 560.003 of the Government Code, (5) the information we marked in conjunction with section 1701.454 of the Occupations Code, (6) the information we marked in conjunction with the MPA, (7) the CR-3 crash report we marked in conjunction with section 550.065 of the Transportation Code, and (8) the information we marked in conjunction with common-law privacy. To the extent the personal information we marked relates to an individual who is still a peace officer and that information is held in an employment context, the district attorney’s office must withhold that information under section 552.117(a)(2) of the Government Code. We note, however, the district attorney’s office must withhold the cellular telephone number we

³Section 552.130(c) of the Government Code permits a governmental body to redact motor vehicle record information without requesting a decision from this office, but the governmental body must provide notice to the requestor. *See Gov’t Code* § 552.130(c)–(e).

⁴Section 552.136 of the Government Code authorizes a governmental body to withhold an access device number without requesting a decision from this office, but the governmental body must provide notice to the requestor. *See Gov’t Code* § 552.136(c)–(e).

marked only if the cellular service is paid for with personal money. If any of the personal information we marked concerns an individual who is not still a peace officer and the information is held in an employment context, then the district attorney's office must withhold that information under section 552.117(a)(1) of the Government Code if the individual timely requested it be kept confidential. To the extent the personal information we marked concerns a peace officer, the information is not held in an employment context, and the individuals elect to keep this information confidential, the district attorney's office must withhold the information we marked under section 552.1175 of the Government Code. The district attorney's office must withhold the information we marked under section 552.130 and the information we marked under section 552.136 of the Government Code. The district attorney's office must withhold the e-mail addresses we marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their release. The remaining information must be released.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.

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

Sincerely,



Paige Lay
Assistant Attorney General
Open Records Division

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⁵Open Records Decision No. 684 (2009) serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information without requesting a decision from this office, including: a Form I-9 and attachments under section 552.101 in conjunction with section 1324a of title 8 of the United States Code, W-2 and W-4 forms under section 552.101 in conjunction with section 6103 of title 26 of the United States Code, a fingerprint under section 552.101 in conjunction with section 560.003 of the Government Code, and an e-mail address of a member of the public under section 552.137 of the Government Code.

Ref: ID# 504157

Enc. Submitted documents

c: Requestor
(w/o enclosures)