



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 5, 2013

Mr. William C. Ferebee
City Attorney
City of Shenandoah
29955 IH-45 North
Shenandoah, Texas 77381

OR2013-21176

Dear Mr. Ferebee:

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# 507605.

The Shenandoah Police Department (the "department") received a request for all records pertaining to a named officer. You claim the submitted information is excepted from disclosure under sections 552.102, 552.117, 552.1175, and 552.130 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."² Gov't Code § 552.101. Section 552.101 encompasses information protected by other statutes, such as section 1324a of title 8 of the United States Code which governs I-9 forms and their related documents. This section provides an I-9 form and "any information contained in or appended to such

¹Although you do not cite to section 552.130 of the Government Code in your brief to this office, we understand you to raise section 552.130 based on the substance of your arguments.

²The 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 (1987), 480 (1987), 470 (1987).

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). Release of the submitted I-9 form in this instance would be “for purposes other than enforcement” of the referenced federal statutes. Accordingly, we conclude the submitted I-9 form and its attachments, which we have marked, are confidential pursuant to section 1324a of title 8 of the United States Code and must be withheld under section 552.101 of the Government Code.³

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* 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, 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 Treasury] 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 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 form 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.⁴

Section 552.101 of the Government Code also encompasses laws that make criminal history record information (“CHRI”) confidential. CHRI generated by the National Crime Information Center or by the Texas Crime Information Center is confidential under federal and state law. CHRI means “information collected about a person by a criminal justice

³As our ruling is dispositive, we need not address your remaining argument against disclosure of this information. We note Open Records Decision No. 684 authorizes a governmental body to withhold, without the necessity of requesting an attorney general decision, 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.

⁴As our ruling is dispositive, we need not address your remaining argument against disclosure of this information. We note Open Records Decision No. 684 authorizes a governmental body to withhold, without the necessity of requesting an attorney general decision, a W-4 form under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions.” Gov’t Code § 411.082(2). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI obtained from the National Crime Information Center network or other states. *See* 28 C.F.R. § 20.21. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. Open Records Decision No. 565 at 7 (1990). 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). Thus, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. We note section 411.083 does not apply to active warrant information or other information relating to an individual’s current involvement in the criminal justice system. *Id.* § 411.081(b) (police department allowed to disclose information pertaining to person’s current involvement with the criminal justice system). Further, CHRI does not include driving record information. *Id.* § 411.082(2)(B). Upon review, we find the information we have marked constitutes confidential CHRI. The department must withhold this information under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code and federal law.⁵

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. Section 159.002 of the MPA provides in 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.

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

Id. § 159.002. 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). We have marked medical records the department must withhold under section 552.101 of the Government Code in conjunction with the MPA.⁶

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. 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 satisfied. *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). This office has also found 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. 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). We note the public generally has a legitimate interest in information that relates to public employment and public employees, particularly those who are involved in law enforcement. *See* Open Records Decision Nos. 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 genuine interest in information concerning law enforcement employee's qualifications and performance and circumstances of termination or resignation), 432 at 2 (1984) (scope of public employee privacy is narrow). However, this office has determined a public employee's net pay is protected by common-law privacy even though it involves a financial transaction between the employee and the governmental body. *See* Attorney General Opinion GA-0572 at 3-5 (2007) (stating that net salary necessarily involves disclosure of information about personal financial decisions and is background financial information about a given individual that is not of legitimate concern to the public). Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.⁷

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

⁷As our ruling is dispositive, we need not address your remaining argument against disclosure of this information. We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold specific categories of information without the necessity of requesting an

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. 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 346. Accordingly, the department must withhold the date of birth we have marked throughout the submitted information under section 552.102(a) of the Government Code.⁸ However, we find none of the remaining information may be withheld under section 552.102(a).

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.⁹ Gov’t Code § 552.117(a)(2). We note section 552.117(a)(2) is not applicable to a former spouse or the fact that a government employee has been divorced. We also 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). Accordingly, to the extent the information we have marked pertains to a licensed peace officer currently or formerly employed by the department, the department must withhold the information we have marked under section 552.117(a)(2) of the Government Code; however,

attorney general decision, including a direct deposit authorization form under section 552.101 of the Government Code in conjunction with common-law privacy.

⁸As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

⁹“Peace officer” is defined by Article 2.12 of the Texas Code of Criminal Procedure.

the department may only withhold the marked cellular telephone numbers if the cellular service was not paid for by a governmental body.¹⁰

To the extent the information we have marked pertains to a current or former department employee who is no longer a licensed peace officer, section 552.117(a)(1) of the Government Code may apply to his personal information. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, emergency contact information, and family member 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)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or 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. As previously noted, 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* ORD 506 at 5-7. The submitted documents reveal the employee at issue timely elected confidentiality under section 552.024. Therefore, to the extent the information we have marked pertains to a current or former department employee who is no longer a licensed peace officer, the department must withhold the information we have marked under section 552.117(a)(1) of the Government Code; however, the department may only withhold the marked cellular telephone numbers if the cellular service was not paid for by a governmental body.¹¹

Section 552.1175 of the Government Code 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* 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 also encompasses a personal cellular telephone or pager number, unless the cellular or pager service is paid for by a governmental body. *See* ORD 506 at 5-7. Thus, to the extent the information we have marked relates to

¹⁰Open Records Decision No. 670 (2001) authorizes all governmental bodies to withhold the current and former 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. ORD 670 at 6.

¹¹Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See* Gov't Code § 552.024(c)(2).

peace officers who elect to restrict access to the information in accordance with section 552.1175(b) it must be withheld from disclosure under section 552.1175 of the Government Code; however, the cellular telephone number may only be withheld under section 552.1175 if a governmental body does not pay for the cellular service.¹² If the individuals whose information is at issue are not currently licensed peace officers or do not elect to restrict access to the information in accordance with section 552.1175(b), the marked information may not be withheld under section 552.1175.

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. Gov't Code § 552.130(a). Upon review, we find the department must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.¹³

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). This office has determined an insurance policy number is an access device for purposes of section 552.136. Therefore, the department must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.¹⁴

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 owner of the e-mail address consents to its release or the e-mail address falls within the scope of section 552.137(c). *See id.* § 552.137(a)-(c). Section 552.137 is not applicable to the work e-mail address of an employee of a governmental body because such an address is not that of the employee as a "member of the public" but is instead the address of the individual as a government employee. The

¹²Section 552.1175(f) of the Government Code authorizes a governmental body to redact under section 552.1175(b), without the necessity of requesting a decision from this office, the home addresses and telephone numbers, emergency contact information, date of birth, social security number, and family member information of a peace officer as defined by article 2.12 of the Code of Criminal Procedure who properly elects to keep this information confidential. *See* Gov't Code § 552.1175(f).

¹³Section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsection 552.130(a) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 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).

¹⁴Section 552.136 of the Government Code permits a governmental body to withhold the information described in section 552.136(b) without the necessity of seeking a decision from this office. *See* Gov't Code § 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).

department must withhold the e-mail addresses we have marked under section 552.137 of the Government Code unless the owners affirmatively consent to their public disclosure.¹⁵

Section 552.140 of the Government Code provides a military veteran's DD-214 form or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003, is confidential for a period of seventy-five years and may be disclosed only in accordance with section 552.140 or a court order. *See id.* § 552.140(a)-(b). We note section 552.140 applies to only the DD-214 form itself or other military discharge records and not references to the form or records. Based on the submitted information, it appears the department came into possession of the submitted military discharge records after September 1, 2003. Accordingly, we conclude the department must withhold the military discharge records we have marked under section 552.140 of the Government Code.¹⁶

In summary, the department must withhold (1) the I-9 form and its attachments, which we 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 W-4 form 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; (3) the confidential CHRI we have marked under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code and federal law; (4) the medical records we have marked under section 552.101 of the Government Code in conjunction with the MPA; (5) the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy; (6) the date of birth we have marked throughout the submitted information under section 552.102(a) of the Government Code; (7) the information we have marked under section 552.117(a)(2) of the Government Code to the extent it pertains to a licensed peace officer currently or formerly employed by the department; however, the department may only withhold the marked cellular telephone numbers if the cellular service was not paid for by a governmental body; (8) the information we have marked under section 552.117(a)(1) of the Government Code, to the extent the information pertains to a current or former department employee who is no longer a licensed peace officer; however, the department may only withhold the marked cellular telephone numbers if the cellular service was not paid for by a governmental body; (9) the information we have marked under section 552.1175 of the Government Code, to the extent the information relates to peace officers who elect to restrict access to it in accordance with section 552.1175(b); however, the cellular telephone number may only be

¹⁵We note Open Records Decision No. 684 authorizes a governmental body to withhold, without the necessity of requesting an attorney general decision, an e-mail address of a member of the public under section 552.137 of the Government Code.

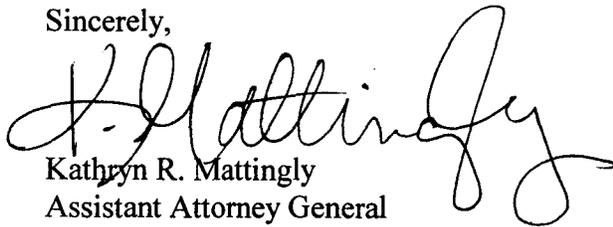
¹⁶We note Open Records Decision No. 684 authorizes a governmental body to withhold, without the necessity of requesting an attorney general decision, a DD-214 form under section 552.140 of the Government Code.

withheld under section 552.1175 if a governmental body does not pay for the cellular service; (10) the motor vehicle record information we have marked under section 552.130 of the Government Code; (11) the insurance policy numbers we have marked under section 552.136 of the Government Code; (12) the e-mail addresses we have marked under section 552.137 of the Government Code unless the owners affirmatively consent to their public disclosure; and (13) the military discharge records we have marked under section 552.140 of the Government Code. The department must release the remaining information to the requestor.

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,



Kathryn R. Mattingly
Assistant Attorney General
Open Records Division

KRM/bhf

Ref: ID# 507605

Enc. Submitted documents

c: Requestor
(w/o enclosures)