



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 19, 2013

Ms. Danielle Folsom
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2013-22203

Dear Ms. Folsom:

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# 509069 (GC No. 20887).

The City of Houston Human Resources Department (the "department") received a request for the civil service file for a named former police officer. You state the department will release some of the information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.117 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the requestor seeks information from the named officer's civil service file. You state the information submitted as Exhibit 3 is maintained in the officer's internal police department file. *See* Local Gov't Code § 143.089 (providing for two different types of personnel files for police officers). Accordingly, we conclude Exhibit 3 is not responsive to the request for information. This ruling does not address the public availability of information that is not responsive to a request, and the department need not release any non-responsive information. Therefore, we will not address your arguments against disclosure for Exhibit 3.

Next, you acknowledge the department failed to comply with the procedural requirements in section 552.301 of the Government Code in asking this office for a ruling. *See* Gov't

¹We understand you to raise sections 552.102 and 552.117 based on the information you marked.

Code § 552.301(b). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption the information is public and must be released. Information presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 630 (1994). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Your arguments under sections 552.101, 552.102, and 552.117 of the Government Code can provide compelling reasons for non-disclosure; therefore we will consider the applicability of these arguments to the responsive information at issue.

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 exception 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.

Occ. Code § 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 in Exhibit 2 consists of confidential medical records. The department must

withhold this information under section 552.101 of the Government Code in conjunction with section 159.002 of the Occupations Code.²

Section 552.101 of the Government Code also encompasses section 611.002 of the Health and Safety Code, which provides “[communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.” Health & Safety Code § 611.002(a). Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate, or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See id.* § 611.001(2). You claim the remaining information in Exhibit 2 is confidential under section 611.002. However, upon review, we find this information does not involve a communication with a “professional” for purposes of section 611.002. Accordingly, the department may not withhold the remaining information in Exhibit 2 under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses section 143.1214 of the Local Government Code, which provides:

(a) The human resources director for the [fire or police] department promptly shall order that the records of a disciplinary action that was taken against a fire fighter or police officer be expunged from each file maintained on the fire fighter or police officer by the [fire or police] department if the disciplinary action was entirely overturned on appeal by the commission, an independent third-party hearing examiner, or a court of competent jurisdiction. Documents that must be expunged under this subsection include all documents that indicate disciplinary action was recommended or taken against the fire fighter or police officer, such as the recommendations of a disciplinary committee or a letter of suspension. This subsection does not apply if the fire fighter or police officer is charged with using excessive force that results in a death or injury and the charge is being investigated by a law enforcement or criminal justice agency other than the [fire or police] department. This subsection does not require that records of an internal affairs division or other similar internal investigative division be expunged.

(b) The [fire or police] department shall maintain an investigatory file that relates to a disciplinary action against a fire fighter or police officer that was overturned on appeal, or any document in the possession of the [fire or police] department that relates to a charge of misconduct against a fire fighter or police officer, regardless of whether the charge is sustained, only in a file created by the [fire or police] department for the [fire or police] department’s

²As our ruling is dispositive for this information, we do not address your arguments against disclosure.

use. The [fire or police] department may only release information in those investigatory files or documents relating to a charge of misconduct:

- (1) to another law enforcement agency or fire department;
- (2) to the office of a district or United States attorney; or
- (3) in accordance with Subsection (c).

(c) The department head or the department head's designee may forward a document that relates to disciplinary action against a fire fighter or police officer to the director or the director's designee for inclusion in the fire fighter's or police officer's personnel file maintained under Sections 143.089(a)–(f) only if:

- (1) disciplinary action was actually taken against the fire fighter or police officer;
- (2) the document shows the disciplinary action taken; and
- (3) the document includes at least a brief summary of the facts on which the disciplinary action was based.

Local Gov't Code § 143.1214(a)–(c). You argue the information submitted in Exhibit 4 consists of records in the officer's civil service file that relate to disciplinary action that was rescinded, and this information should be removed from the officer's civil service file and placed in the police department's confidential internal file. However, upon review, we find the officer at issue did receive disciplinary action for purposes of chapter 143. Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *Id.* §§ 143.051–.055. Accordingly, we conclude the information submitted as Exhibit 4 meets the requirements of section 142.1214(c) for inclusion in the police officer's civil service file and the department may not withhold this information under section 552.101 of the Government Code in conjunction with section 143.1214 of the Local Government Code.

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 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. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). However, this

office has also found the public has a legitimate interest in information relating to employees of governmental bodies and their employment qualifications and job performance. *See* Open Records Decision Nos. 562 at 10 (1990), 542 at 5 (1990); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). Furthermore, criminal history information obtained by a law enforcement agency in the process of hiring a peace officer is a matter of legitimate public interest. Upon review, we find the information we marked in Exhibit 2 satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. The department must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy. The remaining information is not highly intimate or embarrassing, or it is of legitimate public concern. Accordingly, the department may not withhold any of the remaining information in Exhibit 2 under section 552.101 of the Government Code.

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.”³ Gov’t Code § 552.102(a). The Texas Supreme Court 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). Accordingly, the department must withhold the date of birth you marked under section 552.102(a) of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, 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). 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 may 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 under section 552.024 the information be kept confidential. To the extent the individual whose information is at issue timely requested confidentiality, the department must withhold the information we marked under section 552.117(a)(1) of the Government Code.⁴ The remaining information you marked is not subject to section 552.117 and may not be withheld on that basis.

³The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body but ordinarily will not raise other exceptions.

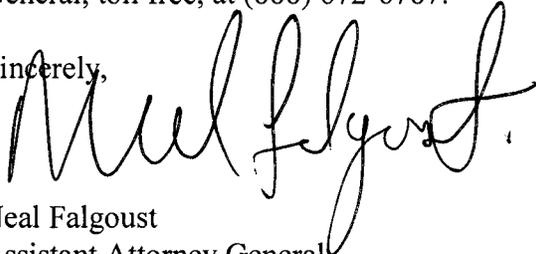
⁴Regardless of whether the individual made an election, section 552.147 of the Government Code permits a governmental body to withhold the social security number of a living person without requesting a decision from this office. *See* Gov’t Code § 552.147(b).

In summary, the department must withhold the medical records we marked under section 552.101 of the Government Code in conjunction with section 159.002 of the Occupations Code. The department must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The department must withhold the date of birth you marked under section 552.102(a) of the Government Code. To the extent the individual whose information is at issue timely requested confidentiality, the department must withhold the information we marked under section 552.117(a)(1) of the Government Code. The department must release the remaining responsive information.

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,



Neal Falgoust
Assistant Attorney General
Open Records Division

NF/som

Ref: ID# 509069

Enc. Submitted documents

c: Requestor
(w/o enclosures)