



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 22, 1996

Sandra D. Hachem
Assistant County Attorney
Harris County
1001 Preston, Suite 634
Houston, Texas 77002-1891

OR96-1230

Dear Ms. Hachem:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 22969.

The Harris County Sheriff's Office (the "sheriff's office") received a request for a copy of "any and all records available" in a deputy sheriff's personnel and internal affairs files. You have submitted a representative sample of the information sought and assert the confidentiality of the information pursuant to section 157.904 of the Local Government Code, which you maintain removes the information from the purview of the Open Records Act, chapter 552 of the Government Code.

Section 552.001(a)(1) of the Government Code specifically provides that all information "collected, assembled, or maintained" by a governmental body pursuant to a law or ordinance is public information unless the information comes within one of the Open Records Act's specific exceptions to disclosure listed in subchapter C of Government Code chapter 552.

Section 552.101 protects "information deemed confidential by law, either constitutional, statutory, or by judicial decision." Section 157.904 of the Local Government Code governs the creation and maintenance of permanent personnel files by the sheriff's office of a county with a population of 2,000,000 or more. Section 157.904 requires the sheriff's office to maintain a permanent personnel file for each employee of the department and prescribes the contents of the file. It provides for the removal of records relating to disciplinary action taken against the employee which is found either to have been taken without just cause or to be based on insufficient evidence. Local

Government Code § 157.904(e). The provision also requires employees to be notified of the addition to the file of employee misconduct or other notations of negative impact, affords employees an opportunity to respond to the negative record in writing, allows employees to have the response included in the file, and grants employees the right to receive copies of records in the file. *Id.* § 157.904(f),(g).

Section 157.904 also addresses the release of information from the file. Specifically, it states that

[t]he sheriff or the sheriff's designee may not release an employee record or other information contained in an employee's permanent personnel file without first obtaining the employee's written permission, unless the release of the record or information is required by law.

Id. § 157.904(h). You do not indicate whether the sheriff has received the deputy's written permission to release any information from the file, but that notwithstanding, you assert that section 157.904 makes confidential all information from an employee's permanent file.

You contend that section 157.904 should be construed in harmony with chapter 552 of the Government Code to require an employee's written consent to disclosure only in instances when information is otherwise excepted from public disclosure under sections 552.101, 552.103, 552.117, or 552.119.

In an analogous situation, this office has interpreted section 143.089 of the Local Government Code, a provision substantially identical to section 157.904.¹ *See* Open Records Decision No. 562 (1990). (Section 143.089 addresses police officers' and fire fighters' personnel files required to be maintained by cities). Section 143.089 contains a provision limiting access to information in a personnel file maintained by the civil service department:

¹The primary difference between the two provisions is that section 143.089 authorizes the creation of two separate personnel files, one by the director of the civil service commission and one by the employing department. *See* Local Gov't Code § 143.089(a), (g). The sheriff's office personnel file compiled pursuant to section 157.904 is equivalent to the civil service personnel file authorized by section 143.089(a). The second kind of personnel file authorized by section 143.089(g) was intended to allow a department to assemble information which may not be placed in the civil service file. Section 143.089(g) places severe restrictions on the dissemination of information from the department's personnel file. *See City of San Antonio v. Attorney General*, 851 S.W.2d 946 (Tex. App.--Austin 1993, writ denied) (addressing confidentiality of files created pursuant to section 143.089(g)); *see also* Open Records Decision No. 562 (1990). A provision authorizing a sheriff to compile a file similar to the department personnel file authorized under section 143.089(g) was deleted from the bill adopting section 157.904 prior to its enactment. *See* House Comm. on County Affairs, Bill Analysis H.B. 1289, 72d Leg. (1991).

(f) The director [of the civil service department] or the director's designee may not release any information contained in a fire fighter's or police officer's personnel file without first obtaining the person's written permission, *unless the release of the information is required by law.* (Emphasis added.)

Local Government Code § 143.089(f). After reviewing the legislative history of section 143.089, this office concluded that the italicized language above signaled the legislature's intent that chapter 552 of the Government Code was to apply to personnel files compiled pursuant to subsection (a). The provision thus was read to prohibit the release of information in the file without the employee's written permission "unless disclosure is required by the Open Records Act or other law." Open Records Decision No. 562 (1990) at 5-6.² It forbids public disclosure

only in situations not governed by the Open Records Act or other laws that require disclosure. For example, there may be occasions where particular information in a personnel file would be excepted from disclosure under the Open Records Act, but the [officer for public records] may wish to waive the exception and make such information public. In such instances, section 143.089 would require the [employee] to give his written consent to disclosure of the information before its release.

Id. at 6. Information in the file therefore is not removed from scrutiny under chapter 552 of the Government Code and may only be withheld from public disclosure if it falls within a specific exception provided in subchapter C of chapter 552 of the Government Code. *Id.* at 8.

Given that section 157.904 is virtually identical to section 143.089 we conclude that section 157.904(h) must be construed to prohibit disclosure of personnel file information only when the information in question is excepted under subchapter C of chapter 552 of the Government Code. However, in those instances when the sheriff's office decides to waive an applicable exception and make certain information public, it must first obtain the written permission of the employee prior to releasing the information, unless the information is otherwise made confidential by law.

You advance no arguments that the information in the employee's personnel file is protected by any of the exceptions contained in subchapter C of chapter 552 of the Government Code. Ordinarily, the failure to assert exceptions to disclosure would result

²Thus, as interpreted in Open Records Decision No. 562 (1990), the employee consent requirement is relevant only to information that otherwise is not subject to required public disclosure. It has no application to information that the Open Records Act or other law requires to be disclosed.

in a waiver of permissive exceptions. See Open Records Decision Nos. 522 (1989), 473 (1987). As noted above, however, we interpret section 143.089 and 157.904 to prevent a governmental body's waiver of permissive exceptions without employee consent. These statutes embody the legislative intent to grant these types of employees a level of control over public disclosure of personnel file information. It would be inconsistent with this policy to conclude that permissive exceptions may be waived merely by the governmental body's failure to assert any exceptions to disclosure.

In view of the legislative policy, we believe that section 157.904 requires a governmental body to make a good faith effort to determine whether information requested from a personnel file compiled under this provision may have been excepted from disclosure under chapter 552 of the Government Code by a discretionary exception. If information in the file could have been withheld pursuant to a permissive exception to disclosure, it may not be released without the employee's written consent.³

However, the Office of the Attorney General will raise mandatory exceptions like sections 552.101 and 552.117 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987). Accordingly, we have examined the information in the personnel file and note that some of the documents, which we have marked, were prepared by physicians. The documents are medical records for purposes of the Medical Practice Act because they are "records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." V.T.C.S. art. 4495b, § 5.08(b). See Attorney General Opinion JM-229 (1984). Medical records are confidential and may not be disclosed except as provided by the act. V.T.C.S. art. 4495b, § 5.08(b). Additionally, there is no indication that the requestor is acting as the authorized representative of the deputy sheriff so as to permit the release of the records pursuant to section 552.023 of the Government Code. Consequently, the sheriff's office may not release these documents.

Another document in the file consists of an emergency leave of absence for personal reasons. The information is excepted by both common-law and constitutional privacy. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977) (test for common-law privacy under chapter 552 of the Government Code); Open Records Decision No. 343 (1982) (constitutional privacy protects information relating to, among other areas, family relationships.). We have marked the document and the sheriff must withhold this information.

³The availability of a permissive exception to disclosure usually will depend on the facts and circumstances of a given case. Also with the exception of information deemed confidential pursuant to section 552.101 of the Government Code, this office cannot invoke exceptions on behalf of a governmental body under chapter 552 of the Government Code. Attorney General Opinion JM-672 (1987). Consequently, unless the requested information discloses the applicability of an exception on its face, this office cannot make the determination required by section 157.904.

The file also contains documents that reflect the home address and home telephone number of the employee. The address and telephone number must be withheld from disclosure under section 552.117(2) of the Government Code unless the employee gives written permission to release this information from the personnel file. Local Gov't Code § 157.904(h). *See generally* Open Records Decision No. 532 (1989) (discussing application of section 552.117).⁴

We note the presence of financial information in the personnel files. This office has determined that some personal financial information is highly intimate or embarrassing and thus it meets the first part of the *Industrial Foundation* test under

Section 552.101 which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."⁵ Open Records Decision Nos. 545 (1990), 523 (1989). We have marked the information to be withheld.

Also, social security numbers may be withheld in some circumstances under section 552.101 of the Government Code. We have reviewed and noted the instances where social security numbers occur in the documents and observe that a social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994) at 2-3. These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 of the Open Records Act on the basis of that federal provision.⁶

⁴You may not, however, withhold this information if the employee had not made a request for confidentiality under section 552.024 at the time this request for the documents was made. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 (1989) at 5.

⁵However, information concerning financial transactions between an employee and a public employer is generally of legitimate public interest. Open Records Decision Nos. 545 (1990), 523 (1989). Therefore, financial information relating to retirement benefits must be disclosed if it reflects the employee's mandatory contributions to the state retirement system. Open Records Decision No. 600 (1992). On the other hand, information is excepted from disclosure if it relates to a voluntary investment that the employee made in an option benefits plan offered by the city or state. *Id.* We have previously determined that information revealing the designation of beneficiaries of insurance and retirement funds is confidential under common-law privacy and excepted from disclosure.

⁶We caution, however, that section 552.353 of the Open Records Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information,

Section 411.083(a) of the Government Code provides that criminal history record information ("CHRI") is confidential. Section 411.083(b) provides that the Department of Public Safety shall grant access to criminal history record information to various persons and entities. In the request at issue, however, the requestor does not fall within any of the provisions of section 4411.083(b) that provide for access to CHRI and the recipient, the sheriff's office may not release any of the CHRI. The sheriff's office must withhold any responsive CHRI.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Janet I. Monteros
Assistant Attorney General
Open Records Division

JIM/rho

Ref.: ID# 22969

Enclosures: Marked documents

cc: Mr. Dallas H. Bingley
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(w/o enclosures)

(Footnote continued)

you should ensure that no such information was obtained or is maintained by the department pursuant to any provision of law, enacted on or after October 1, 1990.