



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

December 20, 2002

Ms. Susan Camp-Lee
Sheets & Crossfield, P.C.
309 East Main Street
Round Rock, Texas 78664-5246

OR2002-7328

Dear Ms. Camp-Lee:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 174136.

The City of Hutto (the "city"), which you represent, received a request for "the personnel files of all Hutto Police officers including the Chief of Police." You state that you are releasing some information to the requestor but claim that portions of the records you have submitted to this office are excepted from disclosure under sections 552.101, 552.117, 552.119, 552.122, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

You assert that portions of the submitted records constitute medical records, the release of which is governed by the Medical Practice Act (the "MPA"). Occ. Code §§ 151.001-165.160. Section 159.002 of the Occupations Code 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

¹We assume that the sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). For your convenience, we have marked the documents that are medical records subject to the MPA.

You assert that the requested information includes information that is confidential under federal law. Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information made confidential by statute. You assert that the requested information includes Employment Eligibility Verification, Form I-9. Form I-9 is governed by title 8, section 1324a of the United States Code, which provides that an I-9 form and "any information contained in or appended to such 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 an I-9 and the appended identification forms in this instance would be "for purposes other than for enforcement" of the referenced federal statutes. However, there are no I-9 forms included in the submitted information. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. An I-9 and appended identification forms are confidential and may only be released in compliance with the federal laws and regulations governing the employment verification system.

You also assert state confidentiality statutes apply to portions of the submitted documents. Criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain

from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety (“DPS”) maintains, except that the 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). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). Furthermore, 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 agree that portions of the information you have highlighted in red are confidential under the laws governing CHRI. However, you have also marked officers’ responses to questions posed on the city’s job application. This information was not generated by NCIC, TCIC, or DPS and is thus not confidential under the laws governing CHRI.

You also assert that the submitted information includes information made confidential under section 1701.306 of the Occupations Code. This section, which makes declarations of medical condition and of psychological and emotional health confidential, provides:

(a) The commission may not issue a license to a person as an officer or county jailer 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 physical examination, blood test, or other medical test.

(b) An agency hiring a person for whom a license as an officer or county jailer 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 the commission. *A declaration is not public information.*

Occ. Code § 1701.306 (emphasis added). We have marked the information that must be withheld under section 552.101 pursuant to section 1701.306 of the Occupations Code.

We note that the submitted information also includes a Report of Resignation or Separation of License Holder addressed to the Texas Commission on Law Enforcement (“the commission”). This form, commonly referred to as an “F-5,” is made confidential by section 1701.454 of the Occupations Code. Section 1701.452 requires that a law enforcement agency submit a report to the commission regarding an officer licensed under chapter 1701 who resigns from the law enforcement agency. *See* Occ. Code § 1701.452. Section 1701.454 provides in relevant part:

(a) A report or statement submitted to the commission under this subchapter is confidential and is not subject to disclosure under Chapter 552 of the Government Code.

Occ. Code § 1701.454. Therefore, the city must withhold the F-5 pursuant to section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

You argue that other submitted information is excepted from disclosure by the common law right of privacy. Common law privacy, which is also encompassed by section 552.101, protects information if it (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered intimate and

embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under common law privacy: an individual's criminal history when compiled by a governmental body, *see* Open Records Decision No. 565 (citing *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)), some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), and personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990). We have reviewed the information that you claim is excepted under common law privacy and find that none of it is protected by common law privacy, and it may not be withheld on that basis. *See* Open Records Decision Nos. 444 at 5-6 (1986) (public has interest in public employee's qualifications and performance and circumstances of his resignation or termination), 405 at 2-3 (1983) (public has interest in manner in which public employee performs his job); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow).

You have highlighted in orange information that you assert is excepted from disclosure pursuant to section 552.111 of the Government Code. This section excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ) and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, or opinions, and other material reflecting the policymaking processes of the governmental body. Open Records Decision No. 615 (1993); *see also* *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160;

ORD 615 at 4-5. We have reviewed the reference letters you have marked as being excepted under this section and conclude that they do not constitute intra- or interagency memoranda. Furthermore, they relate solely to administrative personnel matters and do not constitute discussions regarding the city or police department's policymaking. Accordingly, we conclude that none of the information you have marked in orange may be withheld on the basis of section 552.111.

You have also marked information that you believe is excepted under section 552.117 of the Government Code. Section 552.117(1) excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of governmental body who request that this information be kept confidential under section 552.024. Section 552.117(2) excepts the same information regarding a peace officer regardless of whether the officer made an election under section 552.024 of the Government Code.

We note you have marked employees' personal post office box numbers as being excepted under section 552.117. Because such an address is not the employee's current or former "home address," it is not made confidential by section 552.117 and may not be withheld on that basis. *See* Gov't Code § 552.117; Open Records Decision No. 622 at 4 (1994) ("The legislative history of section 552.117(1)(A) makes clear that its purpose is to protect public employees from being harassed *at home*. *See* House Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985); Senate Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985).") (Emphasis added.); *see also* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express and cannot be implied), 478 at 2 (1987) (language of confidentiality statute controls scope of protection), 465 at 4-5 (1987) (statute explicitly required confidentiality).

To the extent that the information you have highlighted in yellow pertains to individuals who were licensed peace officers at the time this request for information was received, it must be withheld, except for post office box numbers, under section 552.117. We note that two of the officers at issue resigned prior to the receipt of this request. If these individuals remained licensed peace officers as defined by article 2.12 of the Code of Criminal Procedure or security officers commissioned under section 51.212 of the Education Code at the time of the request, their information must be withheld under section 552.117(2). If these individuals are no longer licensed officers, their information is still excepted under section 552.117(1) *if* they elected, prior to the date the city received the request for information, to

keep their information confidential. *See* Open Records Decision No. 530 at 5 (1989) (whether information is protected by section 552.117(1) must be determined at the time the request for it is made). In short, the city may not withhold personal information relating to these individuals if they are no longer licensed officers and did not make a timely request for confidentiality under section 552.024. We have marked additional information that must be withheld for those individuals to whom section 552.117 applies. Please note, however, that a pager or mobile phone number is excepted under section 552.117 only if the pager or mobile phone was purchased and privately owned by the employee. *See* Open Records Decision No. 506 at 5 (1988) (one purpose of section 552.117 is to protect public officials and employees from being harassed while at home).

We note that social security numbers that are not otherwise excepted from disclosure under section 552.117 might nevertheless 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). 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 the social security numbers are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security numbers, the city should ensure that it did not obtain or maintain them pursuant to any provision of law enacted on or after October 1, 1990.

You have also marked certain photographs that you believe to be excepted from disclosure. Section 552.119 of the Government Code excepts from public disclosure “[a] photograph that depicts a peace officer” that, if released, would endanger the life or physical safety of the officer unless one of three exceptions applies. The three exceptions are: (1) the officer is under indictment or charged with an offense by information, (2) the officer is a party in a fire or police civil service hearing or a case in arbitration, or (3) the photograph is introduced as evidence in a judicial proceeding. This section also provides that a photograph exempt from disclosure under this section may be made public only if the peace officer gives written consent to the disclosure. Open Records Decision No. 502 (1988). Most of the submitted photographs depict peace officers, and it does not appear that any of the exceptions are applicable. Unless these officers have executed written consents to disclosure, the city must

withhold the requested photographs. However, as noted above, we are uncertain whether the two individuals who resigned were peace officers at the time this request was received. If they were, their photographs must also be withheld. If they were not peace officers at the time this request was received, their photographs would not be protected by this exception. We have marked additional photographs that must be withheld if section 552.119 applies.

You have also marked information that you assert is excepted under section 552.122 of the Government Code. This section excepts from required public disclosure "a test item developed by a . . . governmental body[.]" Gov't Code § 552.122(b). In Open Records Decision No. 626 (1994), this office determined that the term "test item" in section 552.122 includes "any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated," but does not encompass evaluations of an employee's overall job performance or suitability. *Id.* at 6. The question of whether specific information falls within the scope of section 552.122(b) must be determined on a case-by-case basis. *Id.* Traditionally, this office has applied section 552.122 where release of "test items" might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Section 552.122 also protects the answers to test questions when the answers might reveal the questions themselves. *See* Attorney General Opinion JM-640 at 3 (1987); Open Records Decision No. 626 at 8 (1994). The city claims that the information it has highlighted in blue is excepted from disclosure under section 552.122.

Having reviewed the information at issue, we agree that some of the questions evaluate an individual's or group's knowledge or ability in a particular area. Furthermore, the answers to these questions might reveal the questions themselves. We have marked the questions and answers that the city may withhold. We conclude, however, that you have not demonstrated that the remaining information qualifies as test items under section 552.122, and it may not be withheld under section 552.122.

Finally, you have highlighted Texas driver's licenses and driver's license numbers. Section 552.130 of the Government Code excepts from disclosure information that relates to "a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]" Gov't Code 552.130(1). Therefore, under section 552.130, the city must withhold the highlighted drivers licenses and driver's license numbers as well as other information we have marked.

In summary, medical records may be released only as provided under the MPA. An I-9 form and appended identification forms are confidential and may only be released in compliance with the federal laws and regulations governing the employment verification system. The marked CHRI, declarations of medical condition and of psychological and emotional health, and F-5 form are confidential and must be withheld under section 552.101. To the extent that the yellow-highlighted information pertains to individuals who were licensed peace officers at the time this request for information was received or who made timely elections to have their personal information kept confidential, it must be withheld, except for post office box numbers, under section 552.117. Social security numbers must be released unless obtained or maintained pursuant to a law enacted on or after October 1, 1990. Pursuant to section 552.119, the city must withhold any photographs depicting individuals who were licensed peace officers at the time this request for information was received. We have marked information that the city may withhold under section 552.122. The marked Texas driver's license information must be withheld under section 552.130. All other information must be released.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be

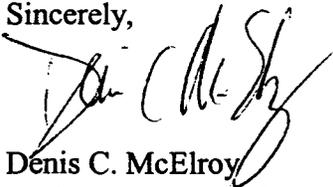
provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

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Enc. Submitted documents

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(w/o enclosures)**