



**ATTORNEY GENERAL OF TEXAS**  
**GREG ABBOTT**

August 25, 2003

Mr. Joe Hegar  
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OR2003-5954

Dear Mr. Hegar:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 186429.

The Katy Police Department (the "department"), which you represent, received a written request for all "employment records" of two named police officers. You indicate that some of the responsive information will be released to the requestor. You contend, however, that the remaining information coming within the scope of the request is excepted from required disclosure pursuant to sections 552.101, 552.102, 552.117, 552.1175, and 552.130 of the Government Code.

We note at the outset that you have blacked out many of the social security numbers, addresses, telephone numbers, driver's license numbers, and other information contained in the submitted information. In Open Records Decision No. 670 (2001), the attorney general determined that all governmental bodies may withhold the home address, home telephone number, personal cellular phone number, personal pager number, social security number, and information that reveals whether the individual has family members, of any individual who meets the definition of peace officer set forth in article 2.12 of the Code of Criminal Procedure, without the necessity of requesting an attorney general decision as to whether the exception under section 552.117(2) applies. However, with regard to the remaining information you blacked out, we note that section 552.301 of the Government Code requires a governmental body to submit the requested information to this office in a manner that permits us to decide whether the information is excepted from disclosure. By totally obliterating portions of the submitted information, you have made it impossible for this

office to review those portions of the information. You thus failed to request a decision in the manner prescribed by section 552.301. In the future, failure to comply completely with section 552.301 will result in a decision that the requested information is public and must be released in its entirety. See Gov't Code §§ 552.006, .301(e), .302.

We now address your arguments for withholding portions of the submitted documents. Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, *statutory*, or by judicial decision." (Emphasis added.) Some of the records at issue contain individuals' fingerprints. Sections 559.001, 559.002, and 559.003 to the Government Code provide as follows:

Sec. 559.001. DEFINITIONS. In this chapter:

- (1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.
- (2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 559.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

- (1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:
  - (A) the individual consents to the disclosure;
  - (B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or
  - (C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and
- (2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 559.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

The submitted documents include fingerprint information that is governed by these statutes. It does not appear to this office that section 559.002 permits the disclosure of this information to the requestor. Therefore, the department must withhold all fingerprint information pursuant to section 559.003 of the Government Code.

You have also submitted to this office copies of the police officers' medical records. Section 159.002 of the Medical Practice Act (the "MPA"), which is codified at subtitle B of title 3 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.

We have identified the documents that constitute "medical records" for purposes of the MPA. The MPA includes provisions that govern the disclosure of information that it encompasses. *See* Occ. Code §§ 159.003, 159.004, 159.005, 159.006. The department therefore may release these documents only in accordance with the MPA.

Also among the documents you submitted to this office are the psychological evaluations of the named police officers. The release of these documents is governed by chapter 611 of the Health and Safety Code. Section 611.002 of the Health and Safety Code makes confidential "[c]ommunications 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." *See also* Health & Safety Code § 611.001 (defining "patient" and "professional"). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals, including "a person who has the written consent of the patient."<sup>1</sup> Health & Safety Code § 611.004(a)(4). Assuming the mental health information you submitted to this office in fact either was created or is maintained by a "professional," we conclude that the department may release the psychological evaluations that you have submitted only in accordance with the access provisions of chapter 611. Health & Safety Code § 611.002(b); *see id.* §§ 611.004, 611.0045.

We next note that some of the requested information is made confidential under section 1701.306 of the Occupations Code. This section, which makes confidential declarations of medical condition and of psychological and emotional health, provides in part:

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<sup>1</sup>We note that among the documents you submitted to this office is a "Release of Information" form signed by the deceased inmate authorizing the release of his psychiatric records to the requestor.

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

The submitted records also contain confidential criminal history record information ("CHRI"). 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. Consequently, to the extent the department possesses

CHRI, it must be withheld from the public pursuant to section 552.101 of the Government Code.

We next 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 either resigns from the law enforcement agency or whose appointment with the law enforcement agency is terminated. *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 department must withhold the F-5 form pursuant to section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

You also submitted to this office the officers' Employment Eligibility Verification, Form I-9. A Form I-9 is governed by title 8, section 1324a of the United States Code, which provides that the 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. 8 U.S.C. § 1324a(b)(5). Release of these documents under the Public Information Act (the "Act") would be "for purposes other than for enforcement" of the referenced federal statute. Accordingly, we conclude that the Forms I-9 are confidential for purposes of section 552.101 of the Government Code and may only be released in compliance with the federal laws and regulations governing the employment verification system.

We note that the submitted information contains the officers' W-4 Forms. Title 26 section 6103(a) of the United States Code renders tax return information confidential. This term has been interpreted by federal courts to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *Mallas v. Kolak*, 721 F. Supp 748 (M.D.N.C. 1989). Because the W-4 Forms constitute tax return information, the department must withhold this information under section 552.101 in conjunction with federal law.

We also note that the submitted documents contain social security numbers that may be confidential under federal law. Social security numbers are excepted from required public disclosure under section 552.101 of the Government Code in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if the social security numbers were obtained or are maintained by a governmental body pursuant to any

provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). It is not apparent to us that the social security number of any private citizen was obtained or is maintained by the department pursuant to any provision of law enacted on or after October 1, 1990. You have cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes the department to obtain or maintain a social security number. Therefore, we have no basis for concluding that the private citizens' social security numbers were obtained or are maintained pursuant to such a statute and are therefore confidential under section 405(c)(2)(C)(viii)(I). We caution, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing any social security numbers, the department should ensure that the numbers were not obtained and are not maintained by the department pursuant to any provision of law enacted on or after October 1, 1990.

You next contend that some of the submitted information is excepted from public disclosure pursuant to section 552.102(a) of the Government Code. Section 552.102(a) excepts from public disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Section 552.102(a) is designed to protect public employees' personal privacy. The scope of section 552.102(a) protection, however, is very narrow. *See* Open Records Decision No. 336 (1982); *see also* Attorney General Opinion JM-36 (1983). The test for section 552.102(a) protection is the same as that for information protected by common law privacy under section 552.101: the information must contain highly intimate or embarrassing facts about a person's *private* affairs such that its release would be highly objectionable to a reasonable person *and* the information must be of no legitimate concern to the public. *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.—Austin 1983, writ ref'd n.r.e.); *see also Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

In *Industrial Foundation*, the Texas Supreme Court considered intimate and embarrassing information that relates 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. 540 S.W.2d at 683. This office has also determined that common-law privacy protects the following information: the kinds of prescription drugs a person is taking, Open Records Decision No. 455 (1987); the results of mandatory urine testing, *id.*; the fact that a person attempted suicide, Open Records Decision No. 422 (1984); the names of parents of victims of sudden infant death syndrome, Attorney General Opinion JM-81; and information regarding drug overdoses, acute alcohol intoxication, obstetrical/gynecological illnesses, convulsions/seizures, or emotional/mental distress. Open Records Decision No. 343 (1982). Additionally, information revealing a public employee's decision whether to participate in an insurance plan that his or her employer offers (but does not fund), as well as other personal financial decisions and financial background information, is considered intimate and of no legitimate public interest. *See* Open Records Decision No. 600 (1992). We have marked a representative sample of the personal financial

information that the department must withhold on privacy grounds. We particularly note, however, that information revealing a public employee's date of birth is not protected by common-law privacy. Attorney General Opinion MW-283 (1980).

Although you next contend that the police officers' home addresses, home telephone numbers, social security numbers, and family information are excepted from public disclosure pursuant to section 552.1175, in this instance, we believe the more applicable exception is section 552.117(a)(2), which requires the department withhold such information pertaining to "a peace officer as defined by Article 2.12, Code of Criminal Procedure." Unlike civilian public employees, a peace officer need not affirmatively claim confidentiality for this information. Open Records Decision No. 488 (1988); *see also* Open Records Decision No. 506 (1988). We have marked the information the department must withhold pursuant to section 552.117(a)(2). We particularly note that an officer's place of birth is not protected under section 552.117(a)(2).

We next note that the submitted documents contain photographs of the named police officers. Section 552.119 requires the withholding of a photograph of 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). The submitted copies of photographs depict peace officers and it does not appear that any of the exceptions are applicable in this instance. You have not informed us that the peace officers have executed any written consents to disclosure. We therefore conclude that the department must withhold the photographs depicting peace officers in accordance with section 552.119 of the Government Code.

Section 552.130(a)(1) of the Government Code requires the department to withhold "information [that] relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state." Accordingly, the department must withhold all Texas driver's license numbers pursuant to section 552.130(a)(1) of the Government Code. Also, section 552.130(a)(2) of the Government Code requires the withholding of information relating to "a motor vehicle title or registration issued by an agency of this state." Additionally, section 552.130(a)(3) requires the withholding of information relating to "a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document." We have marked the information the department must withhold pursuant to section 552.130 of the Government Code.

Finally, we note that the submitted documents contain private e-mail addresses. Section 552.137 of the Government Code makes certain e-mail addresses confidential and provides in relevant part:

(a) 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 this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release. [Emphasis added.]

We have marked the private e-mail addresses that must be withheld pursuant to section 552.137 unless the department receives an affirmative consent to release from the person to whom an e-mail address belongs. We note that section 552.137 does not apply to a public employee's governmental e-mail address.

In summary, the department must withhold the information we have marked as coming within the protection of sections 552.101, 552.102, 552.117, 552.119, 552.130, and 552.137 of the Government Code. The medical and psychological records we have identified may be released only in accordance with the MPA and the access provisions of chapter 611 of the Health and Safety Code, respectively. The remaining submitted information must be released to the requestor.

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 Dep't of Pub. 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,



Sarah I. Swanson  
Assistant Attorney General  
Open Records Division

SIS/RWP/seg

Ref: ID# 186429

Enc: Submitted documents

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