



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

November 25, 2003

Ms. Myrna S. Reingold  
Galveston County Legal Department  
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Galveston, Texas 77550-1454

OR2003-8552

Dear Ms. Reingold:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 191802.

The Galveston County Sheriff's Department (the "department") received a request for all documents relating to the credentials and employment history of Helen Rikard. The request includes, but is not limited to the following information: (1) appraisals or evaluations; (2) records indicating any discipline and/or counseling, including suspensions, reprimands, or transfers; (3) records pertaining to any complaints against Helen Rikard by fellow officers; (4) records pertaining to the investigation of any complaints against the named officer and the disposition of these complaints; (5) records pertaining to any commendations or work related training; and (6) records showing the reasons why Helen Rikard left her employment with the department. You note that you have released some of the requested information. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.102, 552.114, 552.115, 552.117, 552.1175, 552.119 and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

First, we address your claims under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information made confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information another statute makes confidential. The submitted documents contain fingerprint information that is subject to sections 560.001, 560.002, and 560.003 of the Government Code. They provide as follows:

Sec. 560.001. 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. 560.002. 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. 560.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

Gov't Code §§ 560.001, 560.002, 560.003.<sup>1</sup> We have marked the submitted information that is confidential under section 560.003. There is no indication that the requestor has a right of access to this information under section 560.002. Therefore, the department must

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<sup>1</sup> These sections, formerly found at chapter 559 of the Government Code as sections 559.001, 559.002, and 559.003, were renumbered by the Regular Session of the Seventy-eighth Legislature, effective September 1, 2003. See Act of May 20, 2003, 78<sup>th</sup> Leg., R.S., ch. 1275, 2 (78), 2003 Tex. Sess. Law Serv. 4140, 4144.

withhold the marked fingerprint information under sections 552.101 and 560.003 of the Government Code.

The submitted documents also contain confidential criminal history record information ("CHRI"). Criminal history record information 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). Furthermore, "[n]o agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself." 28 C.F.R. § 20.21(c)(2). 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. The information submitted for our review is CHRI generated by TCIC. Accordingly, the information is excepted from required public disclosure by section 552.101 of the Government Code.

You contend that the declarations of medical condition and psychological and emotional health are confidential under section 1701.306 of the Occupations Code. This section provides in part:

(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). We agree that the submitted Declaration of Medical Condition and Declaration of Psychological and Emotional Health are confidential under section 1701.306 of the Occupations Code. Consequently, the department must withhold these documents pursuant to section 552.101 of the Government Code.

You also submitted to this office the officer's Employment Eligibility Verification, Form I-9. 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 this document under the Public Information Act would be "for purposes other than for enforcement" of the referenced federal statute. Accordingly, we conclude that Form I-9 is confidential under 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.

The submitted information also contains the officer's W-4 Form. 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 Form constitutes tax return information, the department must withhold this form under section 552.101 in conjunction with federal law.

Section 552.101 also encompasses statutes such as the Medical Practice Act (the "MPA"). Section 159.002 of the Occupations Code reads, 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 in 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.

The submitted information contains a confidential medical record that is subject to the MPA. This document may be released only in accordance with the MPA. Open Records Decision No. 598 (1991). See Occ. Code §§ 159.002(c), .004, .005. We have marked the medical record subject to the MPA.

The submitted information also contains a mental health record. Section 611.002 of the Health and Safety Code applies to “[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”). We have marked the information in the submitted documents that is within the scope of section 611.002 and may not be released except in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. Health & Safety Code § 611.002(b); *see id.* §§ 611.004, 611.0045.

Section 552.101 of the Government Code encompasses the doctrine of common-law privacy. Common-law privacy protects information when (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the public has no legitimate interest in the information. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type 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. Having reviewed the submitted information, we find that some of the information is protected by common-law privacy and must therefore be withheld pursuant to section 552.101. We have marked this information.

Next, we address your arguments under section 552.117 of the Government Code. Section 552.117(a)(2) excepts from disclosure the present and former home addresses and telephone numbers, social security number, and family member information of a peace officer regardless of whether the officer requests confidentiality for that information under section 552.024.<sup>2</sup> You state that although the named officer is no longer employed by the department, the named officer is still a licensed peace officer in another jurisdiction. Therefore, the department must withhold the information we have marked under section 552.117(a)(2).

You next assert that the submitted information contains student records that must be withheld pursuant to section 552.114 of the Government Code. The Family Education Rights and Privacy Act (“FERPA”) provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student’s education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student’s parent. *See* 20 U.S.C. § 1232g(b)(1). This office generally applies the same analysis under section 552.114 and FERPA. *See* Open Records Decision No. 539 (1990). FERPA generally does not govern access to records in

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<sup>2</sup> “Peace Officer” is defined by article 2.12 of the Code of Criminal Procedure.

the custody of governmental bodies that are not educational agencies or institutions. *See* Open Records Decision No. 390 at 3 (1983). Because the department is not an education institution, the department may not withhold the information under section 552.114 or FERPA.

You assert that the officer's birth certificate is excepted under section 552.115 of the Government Code. This section provides that a birth record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official is excepted from required public disclosure except that "a birth record is public information and available to the public on and after the 50th anniversary of the date of birth as shown on the record filed with the bureau of vital statistics or local registration official." Section 552.115 only applies to a birth certificate maintained by the bureau of vital statistics or local registration official. In this case, the department maintains the requested record as the former employer of this officer. We therefore conclude that the department may not withhold the birth certificate under section 552.115 of the Government Code. *See* Open Records Decision No. 338 (1982).

The submitted documents also contain a photograph of the peace officer. Section 552.119 of the Government Code excepts from public disclosure 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. In this instance, you have not demonstrated, nor is it apparent from our review of the submitted information, that release of the photograph at issue would endanger the life or physical safety of the officer. We therefore determine that the department may not withhold the photograph of the officer in the submitted documents pursuant to section 552.119.

Finally, the submitted documents contain information that may be excepted from disclosure pursuant to section 552.130 of the Government Code. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

Accordingly, you must withhold the Texas motor vehicle information we have marked.

In summary, we conclude that the department must withhold the biometric information we have marked under section 552.101 in conjunction with section 560.003. The department must withhold any responsive CHRI obtained from DPS or any other criminal justice agency under section 552.101 in conjunction with Chapter 411 of the Government Code. The department must withhold the Declarations of Medical Condition and Psychological and Emotional Health under section 552.101 in conjunction with section 1701.306 of the Occupations Code. The Form I-9 and W-4 Form are also excepted from disclosure under section 552.101 in conjunction with federal laws. The marked medical record may only be released as provided under the MPA. The marked mental health record may not be released except in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. Private information we have marked must be withheld under section 552.101. Section 552.117 information pertaining to peace officers must be withheld, and the department must withhold the Texas driver's license and motor vehicle information under section 552.130. The remaining 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,



Debbie K. Lee  
Assistant Attorney General  
Open Records Division

DKL/seg

Ref: ID# 191802

Enc. Submitted documents

c: Ms. Lisa A. Brown  
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(w/o enclosures)