



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 12, 2004

Captain Dennis W. Koepp
Comal County Sheriff's Office
3005 West San Antonio Street
New Braunfels, Texas 78130

OR2004-1912

Dear Capt. Koepp:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 197588.

The Comal County Sheriff's Office (the "sheriff") received a request for information regarding a specified job posting, including submitted resumes and applications, typing and spelling test scores, and interview notes. You claim that portions of the submitted information are excepted from disclosure under sections 552.024, 552.101, 552.102, 552.117, 552.130, and 552.137 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

You seek to withhold some of the submitted information pursuant to the Family and Medical Leave Act, section 2654 of title 29 of the United States Code (the "FMLA"). Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses information made confidential by other statutes. Section 825.500 of title 29 of the Code of Federal Regulations provides record-keeping requirements for employers that are subject to the FMLA. Subsection (g) of section 825.500 provides:

¹You claim that some of the information at issue is excepted from disclosure under section 552.024 of the Government Code. However, this provision does not function as an exception to disclosure but instead describes the right of a governmental employee to elect whether to allow public access to certain information concerning the employee. The corresponding exception to disclosure regarding such information is section 552.117 of the Government Code.

Records and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements . . . , except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and
- (3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g). Upon review, we find that none of the submitted information relates to medical certifications, recertifications, or medical histories of employees or employees' families created for the purposes of the FMLA. Therefore, none of the submitted information may be withheld under section 552.101 on that basis.

We note, however, that some of the submitted information must be withheld under section 552.101 in conjunction with common-law privacy. Section 552.101 encompasses the doctrine of common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (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. 540 S.W.2d at 683. In addition, this office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). We have marked the information that must be withheld under section 552.101 in conjunction with common-law privacy. We note, however, that section 552.023 of the Government Code provides the requestor with a special right of access to information that would otherwise be excepted from disclosure in order to protect his privacy. *See* Gov't Code § 552.023 (person has special right of access to

information that is excepted from public disclosure under laws intended to protect that person's privacy interest as subject of information). Thus, information relating to the requestor may not be withheld under section 552.101 and must be released.

You assert that some of the submitted information is excepted from disclosure under section 552.102(b) of the Government Code. Section 552.102(b) protects from public disclosure:

a transcript from an institution of higher education maintained in the personnel file of a professional public school employee, except that this section does not exempt from disclosure the degree obtained or the curriculum on a transcript in the personnel file of the employee.

Gov't Code § 552.102(b). We note that this exception applies only to public school employees. Therefore, we conclude that none of the submitted information may be withheld under section 552.102(b).

You also assert that some of the submitted information, which you have marked, is excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone number, social security number, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is received by the governmental body. *See Open Records Decision No. 530 at 5 (1989)*. You provide documentation showing that two of the submitted applications relate to current employees who have made timely elections for confidentiality under section 552.024 with regard to their home addresses and telephone numbers. Therefore, the sheriff must withhold this information under section 552.117(a)(1). We note that two other submitted applications relate to former employees of the sheriff. Consequently, if the former employees at issue timely elected to keep their social security number, home address and telephone number, and family member information confidential, the sheriff must withhold this information from the applications at issue under section 552.117(a)(1). If the former employees did not timely elect to keep this information confidential, the sheriff may not withhold the information under section 552.117(a)(1).

You also seek to withhold some of the submitted information under subsections 552.117(a)(2), (3), and (5) of the Government Code. Section 552.117(a)(2) excepts from disclosure a licensed peace officer's home address and telephone number, social security number, and family member information regardless of whether the officer made a timely election for confidentiality under section 552.024 or 552.1175 of the Government Code.² Sections 552.117(a)(3) and 552.117(a)(5) except the same information for employees of the

²The term "peace officer" is defined by Article 2.12, Code of Criminal Procedure.

Texas Department of Criminal Justice (“TDCJ”) and commissioned security officers, respectively. You do not inform this office, and review of the submitted information does not indicate, that any of the submitted information relates to a licensed peace officer employed by the sheriff, a TDCJ employee, or a commissioner security officer. Therefore, we find that none of the submitted information may be withheld under subsection 552.117(a)(2), (3), or (5).

We note that the sheriff may be required to withhold portions of the submitted information pursuant to section 552.1175 of the Government Code. Section 552.1175 applies to peace officers and provides in pertinent part:

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov’t Code § 552.1175(b). You indicate that the submitted applications contain home address and telephone numbers of law enforcement officers not employed by the sheriff. If these individuals are peace officers who elect to restrict access to this information in accordance with section 552.1175, these address and telephone numbers must be withheld under section 552.1175. Otherwise, the sheriff must release this information.

You claim that the marked social security numbers are confidential under section 58.001 of the Occupations Code.³ Section 58.001, which is encompassed by section 552.101 of the Government Code, provides:

The social security number of an applicant for or holder of a license, certificate of registration, or other legal authorization issued by a licensing agency to practice in a specific occupation or profession that is provided to the licensing agency is confidential and not subject to disclosure under Chapter 552, Government Code.

³You raise section 56.001 of the Occupations Code with respect to the marked social security numbers. We note, however, that the Seventy-eighth Legislature recently renumbered that provision as section 58.001 of the Occupations Code. See Act of June 21, 2003, 78th Leg., R.S., ch. 1275, § 2(112), 2003 Tex. Sess. Law Serv. 4146. Accordingly, we will address your claim with respect to section 56.001 under section 58.001.

Occ. Code § 58.001. The social security numbers at issue here appear on applications for employment with the sheriff. You do not inform us, nor does it appear from our review of the submitted information, that these social security numbers were provided to the sheriff by the individuals as applicants for or holders of licenses, certificates of registration, or other legal authorizations to practice in a specified occupation or profession. *See id.* Accordingly, we conclude that the sheriff may not withhold these social security numbers under section 552.101 in conjunction with section 58.001 of the Occupations Code.

We note, however, that these social security numbers may be confidential under federal law. A social security number may be withheld in some circumstances 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 or 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 Government Code imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the sheriff pursuant to any provision of law enacted on or after October 1, 1990. We note, however, that the requestor has a special right of access to his own social security number pursuant to section 552.023. *See* Gov't Code § 552.023.

You claim that some of the remaining submitted information is subject to section 552.130 of the Government Code. Section 552.130 excepts from disclosure information relating to a Texas motor vehicle driver's license and information relating to a Texas motor vehicle title or registration. Gov't Code § 552.130. The sheriff must withhold the Texas motor vehicle information you have marked under section 552.130. We note that you have also marked information relating to driver's licenses issued by other states. Section 552.130 does not apply to motor vehicle information relating to another state. Therefore, this information, which we have marked, may not be withheld under section 552.130. We also note that the requestor has a special right of access to his own section 552.130 information pursuant to section 552.023. *See* Gov't Code § 552.023.

You also assert that some of the remaining submitted information is excepted from disclosure under section 552.137 of the Government Code, which provides:

- (a) Except as otherwise provided by this section, 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.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137. Section 552.137 requires a governmental body to withhold certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with the governmental body, unless the relevant members of the public have affirmatively consented to the release of the e-mail addresses. E-mail addresses within the scope of section 552.137(c) are also not excepted from disclosure under section 552.137. We determine that the marked e-mail addresses in the submitted information are within the scope of section 552.137(a). You indicate that the sheriff has not received affirmative consent to disclose the e-mail addresses. Therefore, the sheriff must withhold the marked e-mail addresses under section 552.137. We note, however, that the requestor has a special right of access to his own e-mail address pursuant to section 552.023. See Gov't Code § 552.023.

In summary, the sheriff must withhold the information we have marked under section 552.101 in conjunction with the doctrine of common-law privacy. The sheriff must withhold the marked information under sections 552.117, 552.130, and 552.137. We have indicated

information that the sheriff must withhold under sections 552.117 and 552.1175 if those exceptions apply. The marked social security numbers may be confidential under federal law. 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,



Amy D. Peterson
Assistant Attorney General
Open Records Division

ADP/sdk

Ref: ID# 197588

Enc. Submitted documents

c: Mr. Bennie McGrew
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(w/o enclosures)