ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 17, 2005

Ms. Jerris Penrod Mapes
Assistant City Attorney
City of Killeen
P. O. Box 1329
Killeen, Texas 76540-1329

OR2005-05383

Dear Ms. Mapes:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 226393.

The Killeen Police Department (the "department") received a request for all personnel and disciplinary records related to a named officer. You state that you have released some information to the requestor, but you claim that the remaining requested information is excepted from disclosure under sections 552.026, 552.101, and 552.117 of the Government Code.[1] We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that certain information has been redacted from the submitted documents. Although Open Records Decision No. 670 (2001) acts as a previous determination that allows all governmental bodies that are subject to the Act to withhold information that is subject to section 552.117(a)(2) without the necessity of seeking a decision from this office, you do not assert, nor has our review of our records indicated, that you have been granted a previous determination to withhold any of the other information that you have redacted from the submitted documents. *See generally* Open Records Decision No. 673 (2001) (describing

[1]We note that you did not raise sections 552.026 or 552.117within the ten-business-day deadline mandated by section 552.301(b) of the Government Code. *See id.* § 552.301(b). However, because the applicability of sections 552.026 and 552.117 are compelling reasons to withhold the submitted information, we will consider your arguments under those sections. *See id.* § 552.302, *see also* Open Records Decision No. 150 at 2 (1977).

nature and criteria of two types of previous determinations issued by this office). We are unable to read the remaining information that has been redacted. You have submitted no unredacted copy of the information to our office. Section 552.301(e)(1)(D) requires a governmental body to submit the requested information or a representative sample of the information if there is a voluminous amount. Section 552.302 of the Government Code provides that failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released, absent a compelling reason to withhold the information. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Because you have not submitted the remaining redacted information, we have no basis for finding it confidential. Thus, we have no choice but to order the redacted information, other than the information that is subject to ORD 670, released per section 552.302.

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 protected by other statutes. We understand that the city of Killeen is a civil service city under chapter 143 of the Local Government Code. Section 143.089 of the Local Government Code contemplates two different types of personnel files, a police officer's civil service file that a city's civil service director is required to maintain, and an internal file that a police department may maintain for its own use. Local Gov't Code § 143.089(a), (g). In cases in which a police department investigates a police officer's misconduct and takes disciplinary action against a police officer, section 143.089(a)(2) requires the department to place all investigatory records relating to the investigation and disciplinary action, including background documents such as complaints, witness statements, and documents of like nature from individuals who were not in a supervisory capacity, in the police officer's civil service file maintained under section 143.089(a).[2] *See Abbott v. Corpus Christi*, 109 S.W.3d 113, 122 (Tex. App.—Austin 2003, no pet.).

All investigatory materials in a case resulting in disciplinary action are "from the employing department" when they are held by or in possession of the department because of its investigation into a police officer's misconduct, and the department must forward them to the civil service commission for placement in the civil service personnel file. *Id.* at 122. Such records are not confidential and are subject to release under the Act unless an exception under the Act applies. *See City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946, 948-49 (Tex. App.—Austin 1993, writ denied); *see also* Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990). Information that reasonably relates to an officer's employment relationship with the police department and that is maintained in a police department's internal file pursuant to section 143.089(g) is

[2]Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See* Local Gov't Code §§ 143.051-.055.

confidential and must not be released. *City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, pet. denied); *City of San Antonio v. Texas Attorney General*, 851 S.W.2d at 949.

You state that Attachment C is maintained in the department's personnel files pursuant to section 143.089(g). Based on your representations and our review, we find that Attachment C is confidential pursuant to section 143.089(g) of the Local Government Code and must be withheld under section 552.101 of the Government Code. You indicate that the remaining submitted information is part of the officer's civil service file maintained by the director of civil service, and we will now address your arguments against disclosure of portions of this information.

You claim that the information submitted in Attachment E is medical records that the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-8, excepts from disclosure. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* HIPAA, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 ("Privacy Rule"); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, except as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

This office recently addressed the interplay of the Privacy Rule and the Act. *See* Open Records Decision No. 681 (2004). In that decision, we noted that section 164.512 of title 45 of the Code of Federal Regulations provides that a covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted that the Act "is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public." *See* Open Records Decision No. 681 at 8 (2004); *see also* Gov't Code §§ 552.002, .003, .021. We therefore held that disclosures under the Act come within section 164.512(a) of title 45 of the Code of Federal Regulations. Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. Open Records Decision No. 681 at 9 (2004); *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the department may withhold requested protected health information from the public only if an exception in subchapter C of the Act applies.

Access to the medical records in Attachment E is governed by the Medical Practices Act ("MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

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

Occ. Code § 159.002(a)-(c). This office has concluded that when a file is created as the result of a hospital stay, all of the documents in the file that relate to diagnosis and treatment constitute either physician-patient communications or records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician. *See* Open Records Decision No. 546 (1990). 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). We have marked the documents in Attachment E to show which are medical records subject to the MPA.

The submitted L-2 Declaration of Medical Condition required by the Texas Commission on Law Enforcement Officer Standards and Education ("TCLEOSE") is confidential pursuant to section 1701.306 of the Occupations Code. Section 1701.306 provides as follows:

> (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.
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> (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). The department must withhold the declaration submitted in Attachment E under section 552.101 in conjunction with section 1701.306 of the Occupations Code.

Attachment D contains a W-4 form. Section 552.101 encompasses section 6103(a) of title 26 of the United States Code, which provides that tax return information is confidential. *See* 26 U.S.C. § 6103(a)(2), (b)(2)(A), (p)(8); *see also* Open Records Decision No. 600 (1992); Attorney General Op. MW-372 (1981). Tax return information is defined as data furnished to or collected by the Internal Revenue Service with respect to the determination of possible existence of liability of any person under title 26 of the United States Code for any tax. *See* 26 U.S.C. § 6103(b). The submitted W-4 form is tax return information and must be withheld unless release is authorized under section 6103(c). *See* 26 U.S.C. § 6103(c) (providing for release of tax return information).

We next address your claim to except the submitted transcript from disclosure. Section 552.101 of the Government Code also encompasses the Family Educational Rights and Privacy Act of 1974 ("FERPA"), section 1232g of Title 20 of the United States Code. 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). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A).

Section 552.026 of the Government Code incorporates FERPA into chapter 552 of the Government Code. *See* Open Records Decision No. 634 at 6-8 (1995). Section 552.026 provides as follows:

> This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

Gov't Code § 552.026. Section 552.114(a) of the Government Code excepts from disclosure "information in a student record at an educational institution funded wholly or partly by state revenue." This office generally has treated "student record" information under section 552.114(a) as the equivalent of "education record" information that is protected by FERPA. *See* Open Records Decision No. 634 at 5 (1995).

We note that the department is not an educational agency or institution. However, FERPA also contains provisions governing access to information in educations records transferred by an educational agency or institution to a third party. FERPA provides that an educational agency or institution may only transfer personal information to a third party "on the condition

that such party will not permit any other party to have access to such information without the written consent of the parents of the student." 20 U.S.C. § 1232g(b)(4)(B). Federal regulations provide that a third party that receives such information from an educational agency may use the information only for the purposes for which the disclosure was made. 34 C.F.R. § 99.33(a)(2). It appears that the submitted transcript may have been received by the department from an educational institution. If the department received the transcript from an educational institution, pursuant to 20 U.S.C. § 1232g(b)(4)(B) and 34 C.F.R. § 99.33(a)(2), the department may only release the transcript upon consent of the named officer. If, however, the department did not receive the transcript from the college at issue, then the department may not withhold the submitted transcript under FERPA, but must withhold information within the transcript that is otherwise confidential.

Section 552.101 also encompasses the doctrine of common-law privacy. Common-law privacy 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). Prior decisions of this office have found that personal financial information not related to a financial transaction between an individual and a governmental body is generally protected by common law privacy. *See* Open Records Decision Nos. 600 (1992) (public employee's withholding allowance certificate, designation of beneficiary of employee's retirement benefits, direct deposit authorization, and employee's decisions regarding voluntary benefits programs, among others, are protected under common law privacy), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history protected under common law privacy), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common law privacy). We have marked the information in Attachment D that must be withheld under section 552.101 on the basis of common-law privacy.[3]

You assert that the marked portions of Attachment D are excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(2) excepts from public disclosure the home address, home telephone number, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 or 552.1175. Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. We agree that the information that you have marked in Attachment D must be withheld from the requestor under section 552.117(a)(2). We have marked additional information in Attachment D and Attachment E that must also be withheld under section 552.117(a)(2).

You have marked Texas motor vehicle record information in Attachment D. Section 552.130 of the Government Code excepts from disclosure information that "relates

[3]As our ruling on this issue is dispositive, we need not address your argument under section 552.136.

to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state." Gov't Code § 552.130. In accordance with section 552.130 of the Government Code, the department must withhold the Texas motor vehicle record information you have marked in Attachment D, in addition to information that we have marked.[4]

We finally note that Exhibit D contains military discharge information related to the named officer. Section 552.140 of the Government Code provides in relevant part:

> (a) This section applies only to a military veteran's Department of Defense Form DD-214 or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003.

Gov't Code § 552.140(a). Section 552.140 provides that a military veteran's DD-214 form or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003 is confidential for a period of seventy-five years and may only be disclosed in accordance with section 552.140 or in accordance with a court order. *See* Gov't Code § 552.140(a), (b). You do not indicate when the department first came into possession of the information at issue in Attachment D. Therefore, to the extent that the information at issue in Attachment D came into the possession of the department on or after September 1, 2003, we conclude that the department must withhold the information under section 552.140 of the Government Code. If the information was not so obtained, you may not withhold it on this basis, and it must be released, subject to the markings we have made under section 552.117(a)(2).

In summary, the department: (1) must withhold the information in Attachment C pursuant to section 143.089(g) of the Local Government Code in conjunction with section 552.101; (2) must comply with the MPA in regards to the medical records that we have marked; (3) must withhold the L-2 declaration submitted in Attachment E pursuant to section 1701.306 of the Occupations Code in conjunction with section 552.101; (4) must withhold the W-4 tax form submitted in Attachment D pursuant to federal law; (5) must withhold the transcript submitted in Attachment D pursuant to 20 U.S.C. § 1232g(b)(4)(B) and 34 C.F.R. § 99.33(a)(2) if the department received the transcript from an educational institution and the named officer has not consented to its release; however, if the department did not receive the transcript from the college at issue, it must be released in accordance with this ruling; (6) must withhold the information we have marked in Attachment D under the doctrine of common-law privacy in conjunction with section 552.101; (7) must withhold the information marked in Attachment D and E under section 552.117(a)(2); (8) must withhold the marked Texas motor vehicle record information in Attachment D under section 552.130; and (8) must withhold the marked military discharge record in Attachment D under

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[4]As we are able to make this determination, we need not address your argument under section 521.051 of the Transportation Code.

section 552.140 if this information came into the possession of the department on or after September 1, 2003; otherwise this information must be released in accordance with this ruling. 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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).

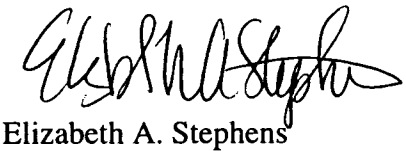
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



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Enc. Submitted documents

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