



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 14, 2005

Ms. Barbara Toby Baruch
Assistant Galveston City Attorney
City of Galveston
P.O. Box 779
Galveston, Texas 77553-0779

OR2005-08398

Dear Ms. Baruch:

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# 232168.

The City of Galveston (the "city") received a request for the personnel file of a named former police officer. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.115, 552.117, 552.122, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.103 of the Government Code provides in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The city must meet both prongs of this test for information to be excepted under 552.103(a).

You assert that the submitted information relates to a criminal prosecution that was pending when the city received this request for information. However, the city is not a party to the pending criminal litigation. *See* Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990) (stating that predecessor to section 552.103 only applies when governmental body is party to litigation). Accordingly, the city may not withhold any portion of the submitted information under section 552.103 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov't Code § 552.101. This section encompasses information made confidential by other statutes. The submitted documents include an 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 this document in this instance would be “for purposes other than for enforcement” of the referenced federal statute. Accordingly, we conclude that the marked Form I-9 is 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.

The submitted documents also include a W-4 form. Section 552.101 of the Government Code also 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). Therefore, the city must withhold the marked W-4 form under section 552.101 of the Government Code in conjunction with section 6103 of title 26 of the United States Code.

Section 1703.306 of the Occupations Code, which is also encompassed by section 552.101 of the Government Code, provides as follows:

- (a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

Occ. Code § 1703.306. Here, you inform us that the requestor may be the representative of one of the examinees. Section 1703.306(a)(1) expressly provides an examinee or other person specifically designated in writing by the examinee with access to information acquired from the examinee's polygraph examination. *See id.* Therefore, pursuant to section 1703.306(a)(1), you must release the marked polygraph information regarding the requestor's client if the requestor provides the city with written authorization from his client to do so. However, the polygraph information that pertains to an individual who is not the requestor's client must be withheld under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.

The submitted information includes L-2 Declarations of Medical Condition and L-3 Declarations of Psychological and Emotional Health required by the Texas Commission on Law Enforcement Officer Standards and Education (the "commission"). These declarations are confidential pursuant to section 1701.306 of the Occupations Code, which 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. Therefore, the city must withhold the marked L-2 and L-3 declarations pursuant to section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.

A portion of the submitted information constitutes medical record information, access to which is governed by the Medical Practice Act (“MPA”), chapter 159 of the Occupations Code. Section 159.002 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 information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b), (c). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Further, information that is subject to the MPA also includes information that was obtained from medical records. *See* Occ. Code. § 159.002(a), (b), (c); *see also* Open Records Decision No. 598 (1991).

Medical records must be released upon the governmental body’s receipt of 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. *See* 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. *See* Open Records Decision No. 565 at 7 (1990). We have marked the records that are subject to the MPA. Absent the applicability of an MPA access provision, the city must withhold this information pursuant to the MPA.

Section 552.101 of the Government Code encompasses confidentiality statutes relating to criminal history record information (“CHRI”). CHRI generated by the National Crime Information Center or by the Texas Crime Information Center 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 subchapter F of chapter 411 of the Government Code. We have marked the CHRI that is excepted from required public disclosure pursuant to section 552.101 of the Government Code in conjunction with subchapter F of chapter 411 of the Government Code.

Section 552.101 of the Government Code also encompasses the doctrine of common law privacy. Information must be withheld from disclosure under the common law right to privacy when 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. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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.

In addition, this office has found that the following types of information are excepted from required public disclosure under common law privacy: 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) (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 that must be withheld under section 552.101 of the Government Code in conjunction with common law privacy. Upon review of the remaining information at issue, however, we find that it relates solely to the officer's application, qualifications, and conditions for continued employment. Since there is a legitimate public interest in the qualifications of a public employee and how that employee performs job functions and satisfies employment conditions, the city may not withhold any of the remaining information at issue from public disclosure based on the common law right to privacy. *See generally Open Records Decision Nos. 470 at 4 (1987) (public has legitimate*

interest in job performance of public employees), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow).

You assert that the submitted birth certificate is excepted from disclosure under section 552.115 of the Government Code. Birth or death records maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official are excepted from required public disclosure under section 552.115. However, because the city is not the bureau of vital statistics or a local registration official, birth certificates held by the city may not be withheld under section 552.115.

Section 552.117(a)(2) of the Government Code 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 of the Government Code.¹ Gov't Code § 552.117(a)(2). The city states that the officer at issue was a licensed peace officer at the time the request was received. Accordingly, we conclude that the city must withhold the information we have marked under section 552.117(a)(2) of the Government Code.

You raise section 552.122 of the Government Code for portions of the submitted information. Section 552.122 excepts from 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. Open Records Decision No. 626 at 6 (1994). 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).

Upon review, we find that the questions at issue are general questions evaluating an applicant’s general workplace skills and overall suitability for employment and do not test any specific knowledge of an applicant. Accordingly, we determine that none of the questions at issue are test items for purposes of section 552.122 of the Government Code; therefore, none of this information may be withheld pursuant to section 552.122 of the Government Code.

We note that some of the remaining information contains Texas motor vehicle record information. Section 552.130 of the Government Code prohibits the release of information

¹ “Peace Officer” is defined by article 2.12 of the Code of Criminal Procedure.

that relates 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. *See* Gov't Code § 552.130. Accordingly, the city must withhold the Texas motor vehicle record information we have marked pursuant to section 552.130 of the Government Code.

The remaining information also includes credit card numbers that are subject to section 552.136 of the Government Code.² This section provides that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. Accordingly, the city must withhold the credit card numbers we have marked pursuant to section 552.136 of the Government Code.

The remaining information includes e-mail addresses that are excepted from disclosure under section 552.137 of the Government Code. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). The e-mail addresses at issue does not appear to be of a type specifically excluded by section 552.137(c). You do not inform us that any relevant member of the public has affirmatively consented to the release of any of the e-mail addresses at issue. The city must, therefore, withhold the e-mail addresses we have marked under section 552.137 of the Government Code.

The remaining information also contains a social security number belonging to an individual other than the officer at issue. Section 552.147 of the Government Code³ provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. Therefore, the city must withhold the marked social security number under section 552.147 of the Government Code.⁴

Finally, we note that, while you inform us that the requestor is the attorney representing the officer at issue in a pending criminal prosecution, you do not assert, and the request itself does not reflect, that the requestor is seeking the submitted records on behalf of his client. Section 552.023 of the Government Code provides a person or a person's authorized representative with a special right of access to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect

² This office will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

³ Added by Act of May 23, 2005, 79th Leg., R.S., S.B. 1485, § 1, sec. 552.147(a) (to be codified at Tex. Gov't Code § 552.147).

⁴ We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

the person's privacy interests. Accordingly, if the requestor is seeking the submitted information on behalf of the officer at issue, pursuant to section 552.023 of the Government Code, the requestor has a special right of access to the information we have marked under section 552.101 of the Government Code in conjunction with common law privacy and sections 552.117(a)(2) and 552.130 of the Government Code.

In summary, we conclude that the city must withhold the I-9 and W-4 forms under section 552.101 of the Government Code in conjunction with federal law. The polygraph information we have marked must be withheld pursuant to section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code; however, upon receipt of proper authorization, the city must release to the requestor the polygraph information pertaining to his client. The marked L-2 and L-3 declarations must be withheld under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code. The marked CHRI must be withheld under section 552.101 of the Government Code in conjunction with subchapter F of chapter 411 of the Government Code. The information we have marked must be withheld under section 552.101 of the Government Code in conjunction with common law privacy. The marked medical records may only be released in accordance with the MPA. The city must withhold the information we have marked under sections 552.117(a)(2), 552.130, 552.136, 552.137, and 552.147 of the Government Code. However, if the requestor is seeking the submitted information on behalf of the officer at issue, pursuant to section 552.023 of the Government Code, the requestor has a special right of access to the information we have marked under section 552.101 of the Government Code in conjunction with common law privacy and sections 552.117(a)(2) and 552.130 of the Government Code. 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

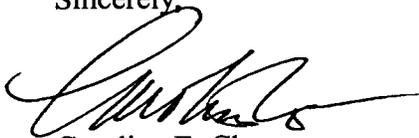
Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor 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); *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 Office of the Attorney General 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. 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,



Caroline E. Cho
Assistant Attorney General
Open Records Division

CEC/sdk

Ref: ID# 232168

Enc. Submitted documents

c: Mr. Bernardo Aldape, Jr.
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(w/o enclosures)