



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 4, 2006

Ms. Myrna S. Reingold
Galveston County Legal Department
4127 Shearn Moody Plaza
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Galveston, Texas 77550-1454

OR2006-04564

Dear Ms. Riengold:

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# 246837.

The Galveston County Sheriff's Department (the "department") received a request for nine categories of information pertaining to a named peace officer. You state that the department has released a portion of the requested information. You claim that portions of the remaining requested information are excepted from disclosure under sections 552.101, 552.117, 552.1175, 552.130, 552.140, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 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 protected by other statutes, such as chapter 1701 of the Occupations Code. The submitted information includes an L-2 Declaration of Medical Condition and an L-3 Declaration of Psychological and Emotional Health required by the Texas Commission on Law Enforcement Officer Standards and Education (the "commission") that are 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.

(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 department must withhold the L-2 and L-3 declarations we have marked under section 552.101 in conjunction with section 1701.306. We note that the department has stapled attachments to the submitted L-2 and L-3 forms. However, the language of section 1701.306 only provides for the confidentiality of the declaration. *See* Occ. Code § 1701.306(b). We note that statutory confidentiality requires express language that information is confidential. Open Records Decision No. 478 (1987). Accordingly, the attachments to these forms are not made confidential by section 1701.306 and may not be withheld under section 552.101 on that basis.

Section 552.101 also encompasses chapter 611 of the Health and Safety Code, which provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) reads as follows:

Communications 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, are confidential.

Health & Safety Code § 611.002(a). Section 611.001 defines a "professional" as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). The attachment to the L-3 form is an evaluation made by a mental health professional. Thus, the document attached to the L-3 form may only be released in accordance with the access provisions of sections 611.004 and 611.0045 of the Health and Safety Code.¹

The department also asserts that the attachments to the L-2 form are excepted under section 552.101 in conjunction with the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in pertinent part:

¹As section 611.002 of the Health and Safety Code is dispositive, we need not address your arguments under the Medical Practice Act or the Americans with Disabilities Act.

(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). The department does not assert, nor do the documents reflect, that any of the records at issue were created by a physician or by someone under the supervision of a physician. *See* Occ. Code § 159.002(b). Thus, we find that the attachments to the L-2 do not constitute medical records for the purposes of the MPA and the department may not withhold them on that basis.

You also claim that the attachments to the L-2 form are excepted from public disclosure under the Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. §§ 12101 *et seq.* The ADA provides that information about the medical conditions and medical histories of applicants or employees must be 1) collected and maintained on separate forms, 2) kept in separate medical files, and 3) treated as a confidential medical record. In addition, an employer's medical examination or inquiry into the ability of an employee to perform job-related functions is to be treated as a confidential medical record. 29 C.F.R. § 1630.14(c); *see also* Open Records Decision No. 641 (1996). Furthermore, the federal Equal Employment Opportunity Commission (the "EEOC") has determined that medical information for the purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). You do not assert, nor do the documents reflect, that the attachments to the L-2 form contain information about any individual's disability, or that the identified individuals have a disability, or that an ADA reasonable accommodation has been provided to the identified individuals. Thus, you have not established that these attachments are confidential under the ADA. Accordingly, the department may not withhold attachments to the L-2 form under section 552.101 of the Government Code in conjunction with the ADA.

The submitted records also include fingerprints. Chapter 560 of the Government Code provides that a governmental body may not release fingerprint information except in certain limited circumstances. *See* Gov't Code §§ 560.001 (defining "biometric identifier" to include fingerprints), .002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), .003 (providing that biometric

identifiers in possession of governmental body are exempt from disclosure under Act). You do not inform us, and the submitted information does not indicate, that section 560.002 permits the disclosure of the submitted fingerprints. Therefore, the department must withhold this information, which it has marked, under section 552.101 in conjunction with section 560.003 of the Government Code.

Section 552.101 also encompasses confidentiality relating to 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. We have marked the CHRI in the submitted records that must be withheld under section 552.101 in conjunction with chapter 411 of the Government Code.

Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102(a) is the same as the test formulated by the Texas Supreme Court in *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976) for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101 of the Act. *See id.* at 683-85. Accordingly, we will consider your privacy claims under section 552.101 and section 552.102(a) together.

In order for information to be protected from public disclosure by the doctrine of common law privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation*. In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable

person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. This office has found that certain personal financial information of an individual is excepted from disclosure under common law privacy. *See* Open Records Decision No. 373 at 4 (1983) (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis). You seek to withhold a portion of the submitted DD-214 forms as personal financial information. However, you have not submitted any arguments explaining, nor do the documents reflect, how this information is protected as personal financial information under the doctrine of common law privacy. *See* Gov't Code 552.301 (providing that it is governmental body's burden to explain the applicability of claimed exceptions to disclosure). Accordingly, you may not withhold the information you have marked on the DD-214 forms under common law privacy.

You also seek to withhold the officer's former salary and other sources of income information as personal financial information under common law privacy. Generally, information regarding an applicant's current salary is of legitimate public interest because a governmental body considers such information in its hiring decision. *See* Open Records Decision No. 444 at 5-6 (1986) (public has interest in public employee's qualifications and performance). Accordingly, the department may not withhold the former salary information it has marked under common law privacy. Furthermore, since the other information you seek to withhold reflects a financial transaction between the individual and a governmental entity, we conclude that there is also a legitimate public interest in the release of this information. *See* Open Records Decision No. 545 at 4 (1990) (attorney general has found kinds of financial information not excepted from public disclosure by common law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities). Accordingly, the department may not withhold the other source of income information it has marked under common law privacy. We have marked the documents accordingly.

You also assert that the submitted information contains criminal history information that is confidential under common law privacy. A compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Furthermore, we find that a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. However, information relating to routine traffic violations does not constitute criminal history record information and may not be withheld as part of a criminal history compilation. *See* Gov't Code § 411.082(2)(B) (defining criminal history record information). Some of the information you seek to withhold is a compilation of a private citizen's criminal history. Accordingly, this information, which we have marked, must be withheld under section 552.101 in conjunction with common law privacy. You have also marked a portion of the submitted information that relates to the background information of the peace officer. Since there is a legitimate public interest in the background

and qualifications of public employees, especially those who work in law enforcement, we conclude that this information may not be withheld under common law privacy. *See* ORD 444 at 5-6. Therefore, we have marked this information for release.

You also claim that the submitted documents contain information subject to section 552.117 of the Government Code. Section 552.117(a)(1) excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, 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. Section 552.117(a)(2) protects the same information regarding a peace officer regardless of whether the officer made an election under section 552.024 or section 552.1175 of the Government Code.² Thus, we agree that the information the department has marked must be withheld under section 552.117(a)(2).³ We have also marked a small amount of additional information to be withheld under section 552.117(a)(2).

The submitted records also contain Texas motor vehicle record information. Section 552.130 of the Government Code excepts from disclosure information 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." 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. *See* Gov't Code § 552.130. We have also marked a small amount of additional information to be withheld pursuant to section 552.130.

The submitted information also includes two DD-214 forms. Section 552.140 of the Government Code 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 inform us when the department came into possession of the submitted DD-214 forms. Therefore, if the DD-214 forms came into the possession of the department on or after September 1, 2003, the department must withhold these forms in their entirety under section 552.140. Otherwise, the forms must be released, subject to the markings the department has made under section 552.117 of the Government Code.

Finally, we note that the remaining submitted information contains the social security numbers of individuals other than peace officers. Section 552.147 of the Government Code provides that "[t]he social security number of a living person is excepted from" required

²"Peace officer" is defined by article 2.12 of the Code of Criminal Procedure

³As section 552.117 of the Government Code is dispositive, we do not address your arguments under section 552.1175 for this information.

public disclosure under the Act. Therefore, the department must also withhold the social security numbers of individuals it has marked, along with the social security numbers we have marked, under section 552.147.⁴

In summary, the marked mental health record may only be released in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. The department must withhold: 1) the L-2 and L-3 declarations we have marked under section 552.101 in conjunction with section 1701.306 of the Occupations Code; 2) the fingerprints the department has marked under section 552.101 in conjunction with section 560.003 of the Government Code; 3) the CHRI we have marked pursuant to section 552.101 in conjunction with chapter 411 of the Government Code; 4) the marked information pursuant to section 552.101 of the Government Code in conjunction with common law privacy; 5) information marked pursuant to section 552.117(a)(2) of the Government Code; 6) the marked Texas motor vehicle record information pursuant to section 552.130 of the Government Code; and 7) the social security numbers marked in the submitted information under section 552.147 of the Government Code. Additionally, the military discharge records which we have marked must be released or withheld in compliance with section 552.140 of the Government Code. 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, 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

⁴We 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.

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,



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Assistant Attorney General
Open Records Division

CMD/krl

Ref: ID# 246837

Enc. Submitted documents

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