



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 27, 2006

Ms. Alison Holland  
Olsen & Olsen, L.L.P.  
Wortham Tower, Suite 600  
2727 Allen Parkway  
Houston, Texas 77019

OR2006-12718

Dear Ms. Holland:

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# 263138.

The City of Dickinson (the "city"), which you represent, received a request for the personnel file of a named peace officer. You state that some information has been released to the requestor with social security numbers redacted under section 552.147 of the Government Code.<sup>1</sup> You claim that the submitted information is excepted from disclosure under sections 552.101, 552.117, 552.1175, 552.130, and 552.136 of the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted information.

Recently, the United States Department of Education Family Policy Compliance Office (the "DOE") informed this office that the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(a), does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable

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<sup>1</sup>See Gov't Code § 552.147(b) (authorizing governmental body to redact living person's social security number without the necessity of requesting decision from attorney general under the Act).

<sup>2</sup>Although you initially raised sections 552.102, 552.108, 552.119, 552.122, and 552.140 of the Government Code, you have not submitted arguments explaining how these exceptions apply to the submitted information. Therefore, we presume that you have withdrawn these exceptions. See Gov't Code §§ 552.301, 552.302. We note that sections 552.022 and 552.024 are not a exceptions to public disclosure under chapter 552 of the Government Code.

information contained in education records for the purpose of our review in the open records ruling process under the Act.<sup>3</sup> Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which “personally identifiable information” is disclosed. *See* 34 C.F.R. § 99.3 (defining “personally identifiable information”). You have submitted, among other things, unredacted education records for our review, which you assert are confidential under FERPA. Because our office is prohibited from reviewing these education records to determine the appropriate redactions under FERPA, we will not address the applicability of FERPA to any of the submitted records. Such determinations under FERPA must be made by the educational authority in possession of the education records.<sup>4</sup> We will, however, address your remaining claims for the submitted information.

Section 552.101 of the Government Code exempts 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 information contains a W-4 form. Prior decisions of this office have held that section 6103(a) of title 26 of the United States Code renders tax return information confidential. *See* Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). 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 W-4 form constitutes tax return information that must be withheld under section 552.101 of the Government Code in conjunction with federal law.

The submitted information also contains an I-9 form (Employment Eligibility Verification), which is governed by section 1324a of Title 8 of the United States Code. This section provides that an I-9 form and “any information contained in or appended to such 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. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). Release of the form in this instance would be “for purposes other than for enforcement” of the referenced federal statutes. Accordingly, we conclude that the submitted I-9 form is confidential and may only be released in compliance with the federal laws and regulations governing the employment verification system.

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<sup>3</sup>A copy of this letter may be found on the Office of the Attorney General’s website at [http://www.oag.state.tx.us/opinopen/og\\_resources.shtml](http://www.oag.state.tx.us/opinopen/og_resources.shtml).

<sup>4</sup>In the future, if the city does obtain consent to submit unredacted education records and the city seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

You claim that the submitted information contains fingerprint information that is governed by sections 560.001, 560.002, and 560.003 of the Government Code, which are also encompassed by section 552.101 of the Government Code. 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 indicate that section 560.002 does not permit the release of the fingerprint information in this instance. Accordingly, the city must withhold the information you have marked under section 552.101 in conjunction with section 560.003 of the Government Code.

The submitted information contains medical records subject to the Medical Practice Act ("MPA"), chapter 159 of the Occupations Code. Section 552.101 of the Government Code also encompasses MPA. Section 159.002 of the Occupations Code 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). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). 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). We have further found that when a file is created as the result of a hospital stay, all the documents in the file relating to diagnosis and treatment constitute physician-patient communications or "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." Open Records Decision No. 546 (1990).

Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). Such 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). We have reviewed the

submitted information and marked the medical records subject to the MPA. Absent the applicability of an MPA access provision, the city must withhold these medical records pursuant to the MPA.

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). 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 is protected by 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). Furthermore, this office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally protected by common-law privacy. Open Records Decision Nos. 600 (1992) (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history) (1990), 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (common-law privacy protects assets and income source information).

Upon review of the submitted information and your arguments, we agree that some of the portions you have marked under common-law privacy are confidential and must be withheld under section 552.101. However, we find that you have failed to explain how any of the remaining portions constitute highly intimate or embarrassing information for the purposes of common-law privacy. Accordingly, we have marked the information that must be withheld under section 552.101 in conjunction with common-law privacy. See Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute employee's private affairs), 455 (1987) (public employee's job performance or abilities generally not protected by privacy), 444 (1986) (concluding that public has obvious interest in having access to information concerning performances of governmental employees, particularly employees who hold positions as sensitive as those held by members of law enforcement), 423 at 2 (1984) (scope of public employee privacy is narrow), 405 at 2-3 (1983) (public has interest in workplace conduct of public employee), 342 (1982). Thus, none of the remaining submitted information may be withheld on this basis.

You claim that portions of the remaining information are excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(2) excepts from disclosure the

current and former home addresses and telephone numbers, pager 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.<sup>5</sup> Gov't Code § 552.117(a)(2). Section 552.117(a)(1) protects the current and former home addresses and telephone numbers, social security number, and family member information of a current or former employee of a governmental body who requests that the information be kept confidential under section 552.024. *Id.* § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information.

To the extent that the marked personal information pertains to employees who are licensed peace officers, the city must withhold such information under section 552.117(a)(2). Pursuant to section 552.117(a)(1), the city must withhold all other marked personal information of city employees, if the employees made timely elections to keep such information confidential under section 552.024.

The remaining information we have marked may be excepted under section 552.1175 of the Government Code. Section 552.1175 provides in part:

(b) Information that relates to the home address, home telephone number, or social security number of [a peace officer as defined by article 2.12 of the Code of Criminal Procedure], 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). If the individuals in question are still peace officers and elect to restrict access to their personal information in accordance with section 552.1175, the city must withhold the information we have marked on the documents at issue. *See, e.g.,* Open Records Decision No. 678 (2003). Otherwise, this information must be released.

Section 552.130 of the Government Code provides:

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<sup>5</sup>Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure.

(a) Information is excepted from required public disclosure if the information relates to:

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

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

Gov't Code § 552.130(a)(1), (2). The city must withhold the Texas motor vehicle record information you have marked under section 552.130 of the Government Code.

You claim that a portion of the remaining submitted information is subject to section 552.136 of the Government Code. Section 552.136 states 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 information we have marked pursuant to section 552.136 of the Government Code.

The remaining information includes e-mail addresses. Section 552.137 of the Government Code 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 id.* § 552.137(a)-(c). The e-mail addresses in the remaining information do not appear to be of a type specifically excluded by section 552.137(c). Therefore, the city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code.

The remaining information contains social security numbers. Section 552.147 of the Government Code provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. *Id.* § 552.147. Therefore, the city must withhold the social security numbers we have marked in the remaining information under section 552.147.

Finally, we note that some of the submitted information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See Open Records Decision No. 550 (1990).*

In summary, this ruling does not address the applicability of FERPA to the submitted information. Should the city determine the portion of the submitted information that consists of "education records" must be withheld under FERPA, the city must dispose of that information in accordance with FERPA, rather than the Act. The city must withhold the marked W-4 and I-9 forms under section 552.101 of the Government Code in conjunction with federal law. The city must withhold the fingerprint information you have marked under section 552.101 in conjunction with section 560.003 of the Government Code. Absent the applicability of an MPA access provision, the city must withhold the marked medical records pursuant to the MPA. The city must withhold the confidential information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The city must withhold the marked personal information of current peace officers of the city under section 552.117(a)(2) of the Government Code, current or former government employees who timely elected to withhold their personal information under section 552.117(a)(1) of the Government Code, and current peace officers outside the department under section 552.1175 of the Government Code. The city must withhold the remaining marked items: (1) Texas motor vehicle record information under section 552.130 of the Government Code, (2) account numbers under section 552.136 of the Government Code, (3) the e-mail addresses under section 552.137 of the Government Code, and (4) the social security numbers under section 552.147 of the Government Code. The remaining information must be released to the requestor in accordance with any applicable copyright laws.<sup>6</sup>

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

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<sup>6</sup>As this ruling is dispositive, we need not address your remaining argument.

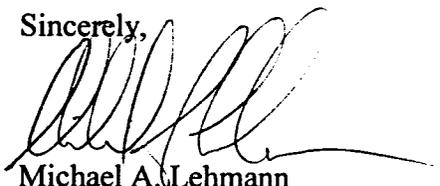
Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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,



Michael A. Lehmann  
Assistant Attorney General  
Open Records Division

MAL/dh

Ref: ID# 263138

Enc. Submitted documents

c: Mr. Bob Hutchins  
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(w/o enclosures)