



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 19, 2007

Ms. Meredith Ladd
Brown & Hofmeister, L.L.P.
740 East Campbell Road, Suite 800
Richardson, Texas 75081

OR2007-02994

Dear Ms. Ladd:

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# 273697.

The McKinney Police Department (the "department"), which you represent, received a request for the personnel records of two named officers. The requestor states that the department may redact the officers' home addresses and social security numbers. You state that the department will release some documents, but claim that the remaining information is excepted from disclosure under sections 552.101, 552.117, and 552.122 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note that the requestor has agreed to the redaction of certain information from the requested documents. The requestor has excluded the officers' home addresses and

¹Although the department asserts section 552.1175, the proper exception is section 552.117 of the Government Code because section 552.117 applies to information the department maintains as the employer of the officers at issue.

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

home addresses and social security numbers from her request. Accordingly, any of this information within the requested documents is not responsive to the present request. This ruling does not address the public availability of any information that is not responsive to the present request, and the department need not release that information in response to this request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed).

We begin by considering the exceptions you claim pursuant to section 552.101, which 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. You contend that the information in Exhibit C consists of copies of the criminal histories of the two named officers that must be withheld under section 552.101 in conjunction with chapter 411 of the Government Code. Criminal history record information (“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 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. However, we note that driving record information is not made confidential by the confidentiality provisions that govern CHRI. *See* Gov’t Code § 411.082(2)(b) (definition of CHRI does not include driving record information). We have marked the information that constitutes CHRI and is confidential under section 411.083, and that therefore must be withheld under section 552.101 of the Government Code.

You assert that Exhibit D consists of medical records access to which is prohibited by section 552.101 in conjunction with the Medical Practices Act (“MPA”), chapters 151 through 165 of the Occupations Code. In relevant part, section 159.002 of the MPA provides that 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 the MPA. Occ. Code § 159.002(b). 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 marked the information in Exhibit D that constitutes medical records subject to the MPA. Accordingly, these records are confidential under section 159.002 of the Occupations Code in conjunction with 552.101 of the Government Code. However, the department has failed to demonstrate how the remaining information constitutes a medical record for purposes of the MPA, and it may not be withheld on this basis.

You maintain that the fingerprint cards contained in Exhibit E are excepted from disclosure by section 552.101 in conjunction with chapter 560 of the Government Code, which 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), 560.002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), 560.003 (biometric identifiers in possession of governmental body exempt from disclosure under the Act). You do not inform us, and the submitted information does not indicate, that section 560.002 permits the disclosure of the submitted fingerprint information. Therefore, we agree that the department must withhold the marked fingerprint information under section 560.003 of the Government Code.

You contend that the L-3 Declaration of Psychological and Emotional Health contained in Exhibit F is excepted from disclosure pursuant to section 552.101 in conjunction with 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(a), (b). Therefore, the L-3 Declaration of Psychological and Emotional Health we have marked is confidential under section 1701.306 of the Occupations Code and must be withheld under section 552.101 of the Government Code. Although you also maintain that the L-1 Report of Appointment/License Application found in Exhibit F is excepted from disclosure pursuant to section 1701.306, we note that L-1 forms are not made confidential by section 1701.306 and therefore may not be withheld under section 552.101 on that basis.

We note that Exhibit F contains the results of a polygraph examination. Section 1703.306 of the Occupations 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.

(b) The [Polygraph Examiners B]oard or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Occ. Code § 1703.306. The requestor does not fall within any of the enumerated categories in section 1703.306(a); therefore, the department must withhold the polygraph information we have marked under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.

We also note the existence of mental health records in Exhibit F. Section 552.101 encompasses section 611.002 of the Health & Safety Code, which provides in part:

(a) 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.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b). 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. *See id.* § 611.001(2). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See Open Records Decision No. 565 (1990)*. These sections permit disclosure of mental health records to a patient, a person authorized to act on the patient’s behalf, or a person who has the written consent of the patient. Health & Safety Code § 611.004, .0045. In this instance, the requestor does not fall within any of these categories. Thus, the department may only release the marked mental health records in accordance with sections 611.004 and 611.0045 of the Health and Safety Code.

You also assert that the W-9 form in Exhibit I is confidential under section 552.101 in conjunction with 6103(a) of title 26 of the United States Code. Prior decisions of this office have held that section 6103(a) of title 26 of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Federal courts have construed the term “return information” expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer’s liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *dismissed in part, aff’d in part, vacated in part, and remanded*, 993 F.2d 1111 (4th Cir. 1993). Section 6103(b) defines the term “return information” as “a taxpayer’s identity, the nature, source, or amount of . . . income, payments, tax withheld, deficiencies, overassessments or tax payments . . . or any other data, *received by, recorded by, prepared by, furnished to, or collected by the Secretary* [of the Internal Revenue Service] with respect to a return or . . . the determination of the existence, or possible existence, of *liability* . . . for any tax, penalty, . . . or offense[.]” *See* 26 U.S.C. § 6103(b)(2)(A) (emphasis added). We find that Form W-9 does not fall within the purview of section 6103 because it does not constitute return information as contemplated by section 6103. Therefore, the department may not withhold the submitted Form W-9 under section 552.101 in conjunction with section 6103 of title 26 of the United States Code.

You also assert that the submitted documents contain sensitive, personal information about the named officers that the department believes is protected by the right to privacy incorporated into section 552.101. This section encompasses the common-law right to privacy. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). 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. The types 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. This office has found that personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure under common law privacy. See Open Records Decision Nos. 600, 545 (1990), 523 (1989). Generally, however, the public has a legitimate interest in information that relates to public employment and public employees. See Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 542 at 5 (1990) (information in public employee's resume not protected by constitutional or common law privacy under statutory predecessors to 552.101 and 552.102). Information that pertains to an employee's actions as a public servant generally cannot be considered to be beyond the realm of legitimate public interest. See Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 444 at 5-6 (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).

Section 552.101 also encompasses constitutional privacy. The constitutional right to privacy protects two interests. Open Records Decision No. 600 at 4 (1992) (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)). The first is the interest in independence in making certain important decisions related to the "zones of privacy" recognized by the United States Supreme Court. Open Records Decision No. 600 at 4 (1992). The zones of privacy recognized by the United States Supreme Court are matters pertaining to marriage, procreation, contraception, family relationships, and child rearing and education. See *id.* The second interest is the interest in avoiding disclosure of personal matters. The test for whether information may be publicly disclosed without violating constitutional privacy rights involves a balancing of the individual's privacy interests against the public's need to know information of public concern. See Open Records Decision No. 455 at 5-7 (1987) (citing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981)). The scope of information considered private under the constitutional doctrine is far narrower than that under the common law; the material must concern the "most intimate aspects of human affairs." See Open Records Decision No. 455 at 5 (1987) (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)).

After reviewing the submitted information and considering your arguments, we agree that some of the documents contain information protected by the common-law right of privacy. Accordingly, the department must withhold the information we have marked. However, the department has failed to demonstrate how any portion of the remaining documents contains information that is highly intimate or embarrassing for the purposes of common-law privacy. Further, the department has failed to demonstrate how any of the remaining information falls within the zones of privacy or implicates the officers' privacy interests for purposes of constitutional privacy. Therefore, none of the remaining information may be withheld on these bases.

We now turn to your section 552.117 argument. Section 552.117(a)(2) of the Government Code excepts the current and former home address and telephone number, social security number, and the family member information of a peace officer regardless of whether the officer made an election under section 552.024 of the Government Code or complies with section 552.1175 of the Government Code. *See* Gov't Code § 552.117(a)(2). This section applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Thus, the department must withhold the information we have marked pursuant to section 552.117(a)(2) of the Government Code.

We now consider your final argument that Exhibit G is excepted from disclosure pursuant to section 552.122 of the Government Code. Section 552.122 excepts from required public 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. *Id.* at 6. 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). In this instance, you contend that the submitted Scantron-type answer sheet is excepted from disclosure under section 552.122(b) of the Government Code. You state that the release of this answer sheet will compromise the results of future entrance examinations. Having considered your argument and reviewed the information at issue, we conclude that the Scantron-type answer sheet does not contain the examination questions or corresponding answers, nor does it provide any indication of the nature or content of the examination questions or corresponding answers. Therefore, we find that it is not protected under section 552.122.

We note the existence of motor vehicle record information.³ Section 552.130 of the Government Code provides that information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1), (2). This provision does not protect out-of-state motor vehicle record information. Accordingly, the Texas motor vehicle record information we have marked must be withheld from disclosure pursuant to section 552.130.

We also note the existence of account numbers. Section 552.136 of the Government Code provides:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding 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. We have marked the account numbers in the information at issue that must be withheld under section 552.136 of the Government Code.

We also note the existence of a private e-mail address belonging to one of the named officers. 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 address in the submitted information is not of a type specifically excluded by section 552.137(c) and there is no evidence that the named officer consented to the release of his private e-mail address. Therefore, the department must withhold the marked e-mail address in accordance with section 552.137.

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Finally, we note the existence of a social security number belonging to a private citizen. 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. Gov’t Code § 552.147. Therefore, the department must withhold the private citizen’s social security number, which we have marked, under section 552.147.

In summary, the department must withhold the following items pursuant to section 552.101 of the Government Code: the marked CHRI in conjunction with section 411.083; the marked medical records in conjunction with the MPA; the marked fingerprint information in conjunction with section 560.003; the L-3 Declaration of Psychological and Emotional Health in conjunction with section 1701.306 of the Occupations Code; the results of the polygraph examination in conjunction with section 1703.306 of the Occupations Code; the marked mental health records in conjunction with section 611.002 of the Health & Safety Code; and the information we have marked in conjunction with common-law privacy. The department must also withhold the following: the information marked under section 552.117 of the Government Code; the Texas motor-vehicle record information we have marked under section 552.130 of the Government Code; the account information we have marked under section 552.136 of the Government Code; the e-mail address we have marked under section 552.137 of the Government Code; and the social security number we have marked under section 552.147 of the Government Code. The remaining information must be released.

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,



Aries Solis
Assistant Attorney General
Open Records Division

AS/eb

Ref: ID# 273697

Enc. Submitted documents

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