



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 10, 2007

Ms. Jerris Penrod Mapes
Assistant City Attorney
Killeen Police Department
402 North Second Street
Killeen, Texas 76541-5298

OR2007-10293

Dear Ms. Mapes:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 286323.

The City of Killeen (the "city") received a request for all employment records of an identified police officer. You state that you have released a portion of the responsive information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (allowing interested party to submit comments indicating why requested information should or should not be released).

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 protected by other statutes, such as section 143.089(g) of the Local Government Code. We understand that the city of Killeen is a civil service city under chapter 143 of the Local Government Code. Section 143.089 contemplates two different types of personnel files: a file that must be maintained by the city's civil service director or the director's designee, and another file that may be maintained by the city's police department for its own use. Local Gov't Code § 143.089(a), (g). Information maintained in a police department's personnel file pursuant to section 143.089(g) is confidential and must not be released. *City of San Antonio v. Tex. Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You explain that the information submitted in Attachment D consist of documents that pertain to the officer's employment relationship with the Killeen Police Department (the "department"). You state that this information is contained in a file maintained by the department under section 143.089(g) of the Local Government Code. Based on your representation and our review of the information at issue, we conclude Attachment D must be withheld in its entirety under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code.

You indicate that the remaining information is held in the officer's civil service file. You claim that portions of this information are subject to section 521.051 of the Transportation Code. Section 521.051 provides that the "department may not disclose class-type listings from the basic driver's license file to any person" except in certain situations. *See* Transp. Code § 521.051. However, chapter 521 of the Transportation Code is applicable to records maintained by the Department of Public Safety. *See Id.* § 521.001 (defining "department" as Department of Public Safety). We note that the submitted information at issue is maintained by the city and not the Department of Public Safety. Therefore, we conclude that none of the submitted information may be withheld under section 521.051 of the Transportation Code. *See* Open Records Decision No. 618 (1993) (stating that the purpose of the statutory predecessor to section 521.051 "appears to be to relieve the [Department of Public Safety] of the administrative burden of compiling a list based primarily on location and the existence of traffic convictions[.]")

Next, you claim that the information in Attachment G is excepted from disclosure under section 552.101 in conjunction with 1701.454 of the Occupations Code. Section 1701.454 of the Occupation Code governs the release of reports or statements submitted to the Texas Commission on Law Enforcement Officer Standards and Education ("TCLEOSE") and provides as follows:

(a) A report or statement submitted to the [TCLEOSE] under this subchapter is confidential and is not subject to disclosure under Chapter 552, Government Code, unless the person resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses.

(b) Except as provided by this section, a [TCLEOSE] member or other person may not release the contents of a report or statement submitted under this subchapter. The report or statement may be released only by the [TCLEOSE] employee having the responsibility to maintain the report or statement and only if:

(1) the head of a law enforcement agency or the agency head's designee makes a written request on the agency's letterhead for the report or statement accompanied by the agency head's or designee's signature; and

(2) the person who is the subject of the report or statement authorizes the release by providing a sworn statement on a form supplied by the commission that includes the person's waiver of liability regarding an agency head who is responsible for or who takes action based on the report or statement.

Occ. Code § 1701.454. The submitted information includes a Report of Separation of License Holder ("F-5") as required to be submitted to TCLEOSE by a law enforcement agency under subchapter J of chapter 1701 of the Occupations Code. In his submitted comments, the requestor states that he received the F-5 form from TCLEOSE. He argues that the F-5 form he received was incomplete and now requests the F-5 form from the city. However, this F-5 form "may only be released by the [TCLEOSE] employee having the responsibility to maintain this report[.]" *Id.* § 1701.454(b). Therefore, the city must withhold the F-5 form we have marked under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code. However, the remaining submitted TCLEOSE forms consist of A-1, L-1, and F-7 forms that are not required to be filed with TCLEOSE pursuant to subchapter J of chapter 1701. Therefore, the remaining submitted TCLEOSE forms may not be withheld under section 552.101 in conjunction with section 1701.454 of the Occupations Code.

We note that Attachment G contains the named officer's L-2 Declaration of Medical Condition and L-3 Declaration of Psychological and Emotional Health forms. Section 1701.306 of the Occupations Code 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 city must withhold the L-2 and L-3 declarations we have marked under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.

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. *Id.* § 611.001(b). 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. We have marked the information that constitutes a mental health record, which may only be released in accordance with the access provisions of sections 611.004 and 611.0045 of the Health and Safety Code.

You assert that Attachment F contains medical records, access to which is governed by the Medical Practice Act (“MPA”), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA, which is also encompassed by section 552.101 of the Government 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. 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). You have submitted information that you characterize as medical records. Upon review, we find that none of the remaining information constitutes records created or maintained by a physician or someone under the supervision of a physician. Accordingly, the city may not withhold any of the remaining information under the MPA.

You also claim that portions of the remaining submitted information may be withheld under common law privacy. Section 552.101 of the Government Code also encompasses the common law right of privacy, which protects information if 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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). This office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from public disclosure. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). You indicate that the submitted information contains medical information and reference to an injury that is protected under common law privacy. However, we note that the injury in question occurred while the employee was performing his job. Accordingly, we find that this information is of legitimate public interest. *See generally* Open Records Decision Nos. 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 423 at 2 (1984). Because the injury information is of legitimate public interest, we find that you have failed to establish both prongs of common law privacy and you may not withhold this information. Therefore, the city must withhold only the information we have marked under section 552.101 in conjunction with common law privacy.

You claim that portions of the remaining submitted information are subject to section 552.117 of the Government Code. Section 552.117(a)(2) excepts from disclosure the home address, home telephone number, social security number, and family member information of a peace officer as defined by article 2.12 of the Code of Criminal Procedure. *See* Gov't Code § 552.117(a)(2); Open Records Decision No. 622 (1994). We note that section 552.117 also encompasses a personal cellular telephone number, provided that the service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular mobile phone numbers paid for by governmental body and intended for official use). If the cellular telephone service of the peace officer is not paid for by a governmental body, the telephone number must be withheld under section 552.117(a)(2); otherwise, the cellular telephone number must be released. Accordingly, we have marked the information that the city must withhold under section 552.117(a)(2) of the Government Code.

We note that the submitted information contains Texas driver's license information.¹ 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. Accordingly, the city must withhold the Texas driver's license information we have marked in the submitted information in accordance with section 552.130.

¹The Office of the Attorney General will raise a mandatory exception like section 552.130 of the Government Code on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Lastly, we note that the remaining information includes 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). Section 552.140(c)(6) states that another governmental body may inspect or obtain these otherwise confidential records upon request and presentation of proper identification. *See Id.* § 552.140(c)(6). You do not inform us when the city came into possession of the submitted DD-214 forms. Therefore, if the DD-214 forms came into the possession of the city on or after September 1, 2003, the forms are subject to section 552.140. Thus, if the requestor presents proper identification, the city must release these forms in their entirety. *Id.* If the requestor does not present proper identification the city must withhold these forms in their entirety under section 552.140. On the other hand, if the forms were received by the city before September 1, 2003, the forms are not subject to section 552.140. In that instance, the city must release the forms, subject to the markings we have made under section 552.117 of the Government Code.

In summary, in conjunction with section 552.101 of the Government Code, the city must withhold (1) Attachment D in its entirety in conjunction with section 143.089(g) of the Local Government Code; (2) the F-5 form we have marked under section 1701.454 of the Occupations Code; (4) the L-2 and L-3 forms we have marked under section 1701.306 of the Occupations Code; (5) the mental health records we have marked under section 611.002 of the Health and Safety Code; and (6) the information we have marked under common law privacy. The city must withhold the personal information we have marked pursuant to section 552.117(a)(2) of the Government Code. The motor vehicle information we have marked must be withheld under section 552.130 of the Government Code. If the DD-214 forms came into the possession of the city on or after September 1, 2003, the forms are subject to section 552.140 of the Government Code. Thus, if the requestor presents proper identification, the city must release these forms in their entirety. If the requestor does not present proper identification the city must withhold these forms in their entirety under section 552.140. On the other hand, if the forms were received by the city before September 1, 2003, the forms are not subject to section 552.140. In that instance, the city must release the forms, subject to the markings we have made under section 552.117 of the Government Code. The remaining submitted 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,



M. Alan Akin
Assistant Attorney General
Open Records Division

MAA/jb

Ref: ID# 286323

Enc. Submitted documents

c: Captain Jim McLean
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(w/o enclosures)