



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 21, 2008

Mr. Leonard V. Schneider
Ross, Banks, May, Cron & Cavin, P.C.
2 Riverway, Suite 700
Houston, Texas 77056-1918

OR2008-06992

Dear Mr. Schneider:

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# 310714.

The City of Seabrook (the "city"), which you represent, received a request for the personnel file of a specific police officer.¹ You state that you have redacted the officer's home address, home telephone number, personal cellular telephone number, personal pager number, social security number, and family member information pursuant to the previous determination issued by this office in Open Records Decision No. 670 (2001).² You claim that the submitted information is excepted from disclosure under sections 552.101, 552.115, 552.117, 552.122, 552.136, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the city's procedural obligations under the Act. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information that it wishes to withhold. Within fifteen business days of receiving

¹ As you have not submitted a copy of the request, we take our description from your brief.

² See Open Records Decision No. 670 at 6 (authorizing all governmental bodies that are subject to the Act to withhold home addresses and telephone numbers, and family member information of peace officers without necessity of requesting attorney general decision under section 552.117(a)(2)); see also Gov't Code § 552.301(a); Open Records Decision No. 673 (2001) (delineating circumstances under which attorney general decision constitutes previous determination under section 552.301).

the request, the governmental body must submit to this office (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e)(1)(A)-(D). In this instance you did not send this office a copy of the written request for information. *See id.* § 552.301(e)(1)(B). Consequently, we find that the city failed to comply with the requirements of section 552.301 in requesting this decision from our office.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Normally, a compelling interest is demonstrated when some other source of law makes the information at issue confidential or third-party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Section 552.122 of the Government Code is a discretionary exception to disclosure that protects a governmental body's interest and may be waived. *See* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Thus, because you have failed to comply with the requirements of section 552.301, the city has waived its claim under section 552.122. However, sections 552.101, 552.115, 552.117, 552.136, and 552.137 can provide compelling reasons to overcome this presumption. Therefore, we will consider your arguments under these exceptions.

Next, we note that you have redacted a driver's license number from the submitted information. Pursuant to section 552.301 of the Government Code, a governmental body that seeks to withhold requested information must submit to this office a copy of the information, labeled to indicate which exceptions apply to which parts of the copy, unless the governmental body has received a previous determination for the information at issue. Gov't Code §§ 552.301(a), .301(e)(1)(D). You do not assert, nor does our review of our records indicate, that you have been authorized to withhold driver's license numbers without seeking a ruling from this office. *See id.* § 552.301(a); Open Records Decision No. 673 (2000). As such, these types of information must be submitted in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. In this instance, we can discern the nature of the redacted information; thus, being deprived of that information does not inhibit our ability to make a ruling. In the future, however, the city should refrain from redacting any information that it submits to this office in seeking an open records ruling.

Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information made confidential by statute, such as section 143.089 of the Local Government Code. This section provides for the existence of two different types of personnel files relating to a police officer: one that must be maintained as part of the officer's civil service file and another that the police department may maintain for its own internal use. See Local Gov't Code § 143.089(a), (g). You inform us that the city is not a civil service city as defined by chapter 143. However, you claim that a portion of the submitted information is confidential under section 143.089 of the Local Government Code as this information relates to a complaint regarding the named police officer while employed with a civil service city. However, we note that section 143.089 only applies to records held by the civil service city. As the information in this instance is held by the city, which is not subject to chapter 143, section 143.089 is not applicable and the information may not be withheld on that basis.

You argue that a portion of the submitted information is excepted from disclosure under section 552.101 in conjunction with section 1701.306 of the Occupations Code. Section 1701.306 governs the release of L-2 (Declaration of Medical Condition) and L-3 (Declaration of Psychological and Emotional Health) forms and provides as follows:

(a) The [Texas Commission on Law Enforcement Officer Standards and Education] 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). The information at issue does not contain any L-2 or L-3 forms; therefore, section 1701.306 of the Occupations Code is inapplicable and the city may not withhold any of the submitted information under section 552.101 on that basis.

Section 552.101 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) provides 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). You state that you seek to withhold any mental health records under chapter 611 of the Health and Safety Code. However, we find that the submitted information does not contain communications between a patient and a professional or records of the identity, diagnosis, evaluation, or treatment of a patient. Therefore, no part of the submitted information is confidential under section 611.002.

Section 552.101 also encompasses section 12.003 of the Human Resources Code. Section 12.003 provides in relevant part:

(a) Except for purposes directly connected with the administration of the [Texas Department of Human Services'] assistance programs, it is an offense for a person to solicit, disclose, receive, or make use of, or to authorize, knowingly permit, participate in, or acquiesce in the use of the names of, *or any information* concerning, persons applying for or receiving assistance if the information is directly or indirectly derived from the records, papers, files, or communications of the [Texas Department of Human Services] or acquired by employees of the [Texas Department of Human Services] in the performance of their official duties.

Hum. Res. Code § 12.003(a) (emphasis added). You state that the city wishes to withhold any documents in the employment file that are confidential under section 12.003. However, we find that you have failed to demonstrate how any of the submitted information discloses information concerning individual applicants for or recipients of assistance programs. Therefore, the city may not withhold any portion of the submitted information under section 552.101 in conjunction with section 12.003 of the Human Resources Code.

You next claim that you wish to withhold any documents made confidential under Title I of the Americans with Disabilities Act (the "ADA"). Section 552.101 encompasses 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 confidential medical records. 29 C.F.R. § 1630.14(c); *see also* Open Records Decision No. 641 (1996). The 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).

Federal regulations define "disability" for purposes of the ADA as "(1) a physical or mental impairment that substantially limits one or more of the major life activities of the individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment." 29 C.F.R. § 1630.2(g). The regulations further provide that:

physical or mental impairment means: (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. § 1630.2(h). Upon review of the information at issue, we find that the city has failed to demonstrate that any portion of the submitted information is confidential under the ADA. Accordingly, the city may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with the ADA.

You next raise section 552.101 in conjunction with section 855.115 of the Government Code. Section 855.115(a) protects "[i]nformation contained in records that are in the custody of [the Texas Municipal Retirement System[.]" Thus, because the submitted information is held by the city rather than the retirement system, we conclude that the submitted information is not confidential under section 855.115 of the Government Code and may not be withheld on that basis under section 552.101.

Section 552.101 also encompasses the Medical Practice Act (the "MPA"), Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(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 subject to the MPA includes both medical records and information obtained from those medical records. *See* Open Records Decision No. 598 (1991). You state you wish to withhold all medical records pursuant to the MPA. Upon review, the city has failed to demonstrate how any portion of the submitted information constitutes medical records for the purposes of the MPA.

Section 552.101 of the Government Code encompasses section 6103(a) of title 26 of the United States Code. Prior decisions of this office have held that section 6103(a) renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms). 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 days, 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). You state that the city wishes to withhold any employee W-4 forms on this basis. However, we find that the submitted information does not contain a W-4 form. Therefore, no portion of the submitted information may be withheld under section 6103(a) of title 26 of the United States Code in conjunction with section 552.101.

Section 552.101 encompasses CHRI generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC"). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that state agencies 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 maintains, except that the department 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 the department or another criminal justice agency; however, those entities may not release CHRI except as

provided by chapter 411. *See generally id.* §§ 411.090-411.127. 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. *See Gov't Code* § 411.082(2)(B) (term CHRI does not include driving record information). Therefore, the city must withhold the CHRI that we have marked under section 552.101 of the Government Code in conjunction with federal law and chapter 411 of the Government Code. However, we determine that no portion of the remaining information constitutes CHRI generated by either the TCIC or NCIC databases. Therefore, no portion of the remaining information is confidential under chapter 411 and none of the remaining information may be withheld under section 552.101 on that basis.

Section 552.101 further encompasses common-law privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has found that the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps) and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). In addition, this office has found that an individual's criminal history when compiled by a governmental body may be protected under common-law privacy. *Cf. United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). This office has also found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 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), 523 (1989) (information related to an individual's mortgage payments, assets, bills, and credit history is excepted from disclosure under the common law right to privacy). Upon review, we find that the information we have marked is confidential under common-law privacy and must be withheld under section 552.101.

You have also marked information relating to the police officer's background under common-law privacy. This information relates solely to the individual's qualifications and ability to execute the duties of a police officer. Because there is a legitimate public interest in the qualifications and job performance of public employees, the city may not withhold the

background information from disclosure based on a right of privacy. *See* Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in having access to information concerning performances of governmental employees), 444 (1986) (employee information about qualifications, disciplinary action and background not protected by privacy), 423 at 2 (1984) (scope of public employee privacy is narrow). Furthermore, we find that no portion of the remaining submitted information is highly intimate or embarrassing and of no legitimate concern to the public. Accordingly, the city must only withhold the information we have marked under section 552.101 in conjunction with common-law privacy.

The city also raises section 552.115 of the Government Code. Section 552.115(a) provides that “[a] birth or death record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official is excepted from the requirements of Section 552.021[.]” Gov’t Code § 552.115(a). Section 552.115 only applies to information maintained by the bureau of vital statistics or local registration official, and not to information held by the city. *See* Open Records Decision No. 338 (1982). Therefore, none of the information may be withheld under section 552.115.

Next, you raise section 552.117 of the Government Code. Section 552.117(a)(2) excepts from public disclosure a peace officer’s home address and telephone number, social security number, and family member information regardless of whether the peace officer made an election under section 552.024 or 552.1175 of the Government Code.³ We note that section 552.117 only applies to records that the governmental body is holding in an employment capacity. Accordingly, the city must withhold the information belonging to the officer at issue we have marked under section 552.117(a)(2).⁴

We note that some of the remaining information may be subject to section 552.1175. This section 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

³ Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure.

⁴ As our ruling is dispositive, we need not address your remaining argument against the disclosure of this information.

(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). The documents contain the home telephone numbers of peace officers who are not employed by the city. If the individuals at issue qualify as peace officers under section 2.12 of the Code of Criminal Procedure and elect to restrict access to their personal information in accordance with section 552.1175, the city must withhold the information we have marked. To the extent the individuals at issue do not elect to keep this information confidential, it may not be withheld on this basis. We note that the city has marked information belonging to a police dispatcher. This information may only be withheld if that individual qualifies as a peace officer under section 2.12 of the Code of Criminal Procedure and elects to restrict access to personal information. Otherwise, this information must be released.

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. Although you raise section 552.136, we find that the city has failed to demonstrate how any portion of the submitted information constitutes a credit card, debit card, charge card, or access device number subject to section 552.136. We therefore conclude that the city may not withhold any portion of the submitted information under section 552.136.

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* Gov't Code § 552.137(a)-(c). The submitted information does not include an e-mail address. Therefore, no part of the submitted information may be withheld under section 552.137.

We note that the submitted documents contain Texas driver's license information.⁵ 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." Gov't Code § 552.130(a)(1). The city must withhold the information we have marked under section 552.130.

In summary, the city must withhold the information we have marked under section 552.101 in conjunction with section 411.083 of the Government Code. The city must withhold the information we have marked under section 552.101 in conjunction with common-law

⁵ The 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).

privacy. The city must withhold the information we have marked under section 552.117. The city must withhold the information we have marked under section 552.1175 if the individuals at issue qualify as "peace officers" under section 2.12 of the Code of Criminal Procedure and elect to restrict access to their personal information. Finally, the city must withhold the information we have marked under section 552.130. 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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,

A handwritten signature in black ink, appearing to read 'CS', with a long horizontal flourish extending to the right.

Chris Schulz
Assistant Attorney General
Open Records Division

CS/mcf

Ref: ID# 310714

Enc. Submitted documents

c: Ms. Dalila Villarreal
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(w/o enclosures)