



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

October 8, 2008

Chief Kenneth W. Findley  
City of Deer Park  
P.O. Box 700  
Deer Park, Texas 77536-0700

OR2008-13828

Dear Chief Findley:

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# 324053.

The City of Deer Park (the "city") received a request for the personnel file of a named city police department officer. You state that you will provide the requestor with a portion of the requested information. You also state that you are withholding transcripts obtained directly from educational institutions pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g.<sup>1</sup> You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.117, 552.130, 552.136, and 552.147 of the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that portions of Exhibit A do not pertain to the officer at issue. This information, which we have marked, is not responsive to the instant request. Information that is not responsive to this request need not be released. Moreover, we do not address such information in this ruling.

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<sup>1</sup>This office is prohibited from reviewing education records to determine whether appropriate redactions under FERPA have been made. Such determinations under FERPA must be made by the educational authority in possession of the original education record. We note that the city is not a educational agency. *See* Open Records Decision No. 309 at 3 (1983) (City of Fort Worth is not an "educational agency" within FERPA). Thus, the city must contact the educational agency in possession of the original education record to make the appropriate FERPA determination.

<sup>2</sup>Although you raise section 552.1175 of the Government Code for some of the submitted information, we note that section 552.117(a)(2) of the Government Code is the applicable exception for that type of information.

We now turn to your arguments for the responsive 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. Section 552.101 encompasses information made confidential by statute such as section 550.065(b) of the Transportation Code, which provides that, except as provided by subsection (c), accident reports are privileged and confidential. *See* Transp. Code § 550.065(b). Section 550.065(c)(4) provides for the release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *See id.* § 550.065(c)(4). Under this provision, the Department of Public Safety (the "DPS") or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more pieces of information specified by the statute. *See id.* In this instance, the requestor has not provided the city with at least two of the listed three pieces of information. Accordingly, we conclude that the city must withhold the submitted accident report form in Exhibit F under section 552.101 in conjunction with section 550.065(c)(4) of the Transportation Code.

Next, we note that medical records are governed by the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code, which is also encompassed by section 552.101. *See* Occ. Code § 151.001. Section 159.002 of the MPA provides, in part:

(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.

*Id.* § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See* Open Records Decision No. 598 (1991). Medical records may be released only as provided under the MPA. *Id.* You assert that portions of the remaining information consist of medical records or information taken from medical records that are encompassed by the MPA. However, only the information we have marked in Exhibit Q appears to have been taken from a medical record. Accordingly, this marked information may be released only in accordance with the MPA. The remaining information you have marked under the MPA does not consist of a medical record or

information taken from a medical record for the purposes of the MPA. Thus, the MPA is not applicable to this information, and it may not be withheld on this basis.

You claim that Exhibit D 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 state that section 560.002 does not permit the release of the fingerprint information in this instance. Based upon your representation and our review, we conclude that the city must withhold the information we have marked in Exhibit D under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code. However, the remaining information in Exhibit D does not consist of biometric information, and thus it may not be withheld on this basis.

You claim that Exhibit M contains polygraph information. Section 1703.306 of the Occupations Code, which is also encompassed by section 552.101, 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; therefore, the city must withhold the polygraph information we have marked in Exhibit M under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. None of the remaining information in Exhibit M consists of information acquired from a polygraph examination. Accordingly, none of this information may be withheld under section 1703.306 of the Occupations Code.

You claim that portions of the remaining information contain criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC"). Section 411.083 of the Government Code, which is encompassed by section 552.101 of the Government Code, deems confidential CHRI that the DPS maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. 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. Upon review, we agree that portions of the submitted information, which we have marked, consist of CHRI, and must be withheld under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. However, none of the remaining information consists of CHRI, and it may not be withheld on this basis.

Next, you assert that Exhibit O is confidential under section 58.007 of the Family Code, which is also encompassed by section 552.101. The relevant language of section 58.007(c) reads as follows:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are

separate and distinct from controls to access electronic data concerning adults; and

(3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

Fam. Code § 58.007(c). You state that the information in Exhibit O consists of law enforcement records of a juvenile who engaged in delinquent conduct after September 1, 1997. *See id.* § 51.03 (defining "delinquent conduct" for purposes of section 58.007 of the Family Code). You do not indicate, nor does it appear, that any of the exceptions in section 58.007 apply to the information in the report. Therefore, based on your representations and our review, we conclude that Exhibit O is confidential under section 58.007(c) of the Family Code and must be withheld in its entirety under section 552.101 of the Government Code.

You claim that portions of the remaining information are excepted from public disclosure under section 552.101 of the Government Code in conjunction with common-law privacy. The doctrine of 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). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. 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 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).* Further, this office has also found that personal financial information not relating to a 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 (1992), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history).* Accordingly, based on your representations and our review, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, the remaining information that you seek to withhold under common-law privacy, including the information contained on the submitted CD, consists of information that is not intimate or embarrassing, or consists of information in which there is a legitimate public interest. Thus, none of the remaining information that you have marked under common-law privacy may be withheld on this basis.

Next, section 552.117(a)(2) of the Government Code excepts from disclosure the home address, home telephone 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 of the Government Code. Gov't Code § 552.117(a)(2). We note that section 552.117(a)(2) encompasses a peace officers' cellular telephone and pager numbers if the officer personally pays for the cell or pager service. *See* Open Records Decision No. 670 at 6 (2001); *see also* 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). Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. We understand that the officer whose information is the subject of this request is a peace officer under article 2.12 of the Code of Criminal Procedure. Accordingly, the city must withhold the information we have marked under section 552.117 of the Government Code. Section 552.117 is not applicable to any of the remaining information you have marked, which consists of general background information and information revealing non-family relationships. Thus, this information may not be withheld under section 552.117.

To the extent the social security numbers in the submitted information are not excepted under section 552.117 of the Government Code, they may be excepted under section 552.147 of the Government Code. Section 552.147 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 city may withhold the remaining social security numbers of living persons pursuant to section 552.147 of the Government Code.<sup>3</sup>

You assert that some of the remaining information is excepted under section 552.130 of the Government Code, which provides which provides in part:

(a) Information is excepted from the requirements of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state;
- (2) a motor vehicle title or registration issued by an agency of this state;
- (3) a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document.

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<sup>3</sup>We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this officer under the Act.

Gov't Code § 552.130(a). The city must withhold the Texas motor vehicle record information that it has marked, along with the additional information that we have marked, under section 552.130 of the Government Code.

You claim that portions of the remaining information are subject to section 552.136, which 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.

*Id.* § 552.136. Upon review, we agree that the cellular telephone account number you have marked in Exhibit L and the insurance policy number you have marked in Exhibit P, along with the credit card number we have marked in Exhibit K, must be withheld pursuant to section 552.136 of the Government Code.

The remaining information in Exhibit B also contains an e-mail address that is excepted from disclosure under section 552.137 of the Government Code, which requires a governmental body to withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure.<sup>4</sup> *See Id.* § 552.137 (b). You do not inform us that the owner of the e-mail address has affirmatively consented to release. Therefore, the city must withhold the e-mail address we have marked under section 552.137.

Finally, you assert that Exhibit G is 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

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<sup>4</sup>The Office of the Attorney General will raise a mandatory exception, such as section 552.137, on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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). Accordingly, the submitted information must be released to the requestor in accordance with copyright.

In summary, the city must withhold (1) the submitted accident report forms in Exhibit F pursuant to section 552.101 in conjunction with section 550.065(c)(4) of the Transportation Code; (2) the information we have marked in Exhibit D under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code; (3) the information we have marked in Exhibit M under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code; (4) the CHRI we have marked under section 552.101 in conjunction with chapter 411 of the Government Code; (5) Exhibit O under section 552.101 in conjunction with section 58.007 of the Family Code; (6) the information we have marked under section 552.101 in conjunction with common-law privacy; (7) the information we have marked under section 552.117(a)(2); (8) the Texas motor vehicle record information marked under section 552.130; (9) the information marked under section 552.136; and (10) the e-mail address marked under section 552.137. The information we have marked in Exhibit Q may be released only in accordance with the MPA. The city may withhold any remaining social security numbers of living individuals under section 552.147. As the city does not raise any other exceptions against disclosure, the remaining information must be released, but any copyrighted information must be released in accordance with copyright law.

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). If the governmental body does not file suit over 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

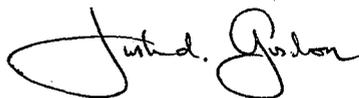
requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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,



Justin D. Gordon  
Assistant Attorney General  
Open Records Division

JDG/eeg

Ref: ID# 324053

Enc. Submitted documents

c: Ms. Erika Lucas  
2000 Smith Street  
Houston, Texas 77002  
(w/o enclosures)