



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 16, 2008

Michelle T. Rangel
Assistant County Attorney
Fort Bend County Attorney
301 Jackson Street, Suite 728
Richmond, Texas 77469-3108

OR2008-17129

Dear Ms. Rangel:

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# 330122.

The Fort Bend County Sheriff's Office (the "sheriff") received a request for the personnel file of a named officer. You claim that the requested information is excepted from disclosure under sections 552.101, 552.117, 552.130, 552.136, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note you have redacted portions of 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), (e)(1)(D). You do not assert, nor does our review of the records indicate, you have been authorized to withhold any of the redacted information without seeking a ruling from this office. *See id.* § 552.301(a); Open Records Decision 673 (2000). As such, the 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 sheriff should refrain from redacting any information it submits to this office in seeking an open records ruling. Redaction of such information may result in a determination that the information must be released. *See*

Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). We now address your arguments against disclosure.

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov't Code § 552.101. This exception encompasses information protected by other statutes, such as section 6103(a) of title 26 of the United States Code. Prior decisions of this office have held 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). 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). 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), *aff'd in part*, 993 F.2d 1111 (4th Cir. 1993). Accordingly, the sheriff must withhold the W-4 tax forms we have marked under section 552.101 of the Government Code in conjunction with section 6103(a).

The submitted information also contains L-2 Declaration of Medical Condition forms and L-3 Declaration of Psychological and Emotional Health forms required by the Texas Commission on Law Enforcement Officer Standards and Education (“TCLEOSE”). These forms are confidential under section 1701.306 of the Occupations Code, which is also encompassed by section 552.101 of the Government Code. Section 1701.306 provides as follows:

(a) [TCLEOSE] 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 [TCLEOSE]. A declaration is not public information.

Occ. Code § 1701.306(a), (b). Upon review, the sheriff 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 section 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 Reports 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 this instance, it does not appear that the named officer resigned due to substantiated incidents of excessive force or violations of the law other than traffic offenses. Accordingly, the sheriff must withhold the F-5 forms we have marked under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code. However, the none of the remaining submitted TCLEOSE forms are 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.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information that (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). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Because there is a legitimate public interest in the qualifications and job performance of public employees, the department may not withhold this 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). In addition, this office has 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 No. 600 (1992) (finding personal financial information to include designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care). Further, this office has found that medical information or information indicating disabilities or specific illnesses is excepted from required public disclosure under 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). Upon review, we find that the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the sheriff must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.

You assert that some of the remaining information is excepted from disclosure under section 552.117(a)(2) of the Government Code. Section 552.117(a)(2) excepts from required public disclosure the current and former home address, home telephone number, social security number, and the family member information of a peace officer as defined by article 2.12 of the Code of Criminal Procedure. *See* Open Records Decision No. 622 (1994). We note that section 552.117(a)(2) also encompasses personal cellular telephone and pager numbers, only if the cellular telephone or pager service is paid for by the officer with his or her own funds. *See* Open Records Decision No. 670 at 6 (2001). You do not indicate which of the individuals are currently licensed peace officers. Accordingly, if the individuals listed

in the submitted information are currently licensed peace officers, the sheriff must withhold the information we have marked under section 552.117(a)(2).¹

To the extent that these individuals are not a currently licensed peace officers, section 552.117(a)(1) may apply. Section 552.117(a)(1) excepts from disclosure the current and former home addresses and home telephone numbers, social security numbers, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the sheriff may only withhold information under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. You inform us, and have submitted documents showing, that one of the individuals at issue made a timely election to keep his personal information confidential under section 552.024. Accordingly, the sheriff must withhold this individual's personal information, which we have marked, under section 552.117(a)(1). However, you have not informed us whether the remaining individuals at issue have made timely elections for confidentiality under section 552.024. Accordingly, if these individuals timely elected to keep their personal information confidential, the sheriff must withhold the marked information under section 552.117(a)(1). The sheriff may not withhold the marked information under section 552.117(a)(1) if these individuals did not make a timely election to keep this information confidential.²

The remaining records contain the personal information of a peace officer who is not employed by the sheriff. Because this information does not pertain to an employee of the sheriff, section 552.117 is not applicable to it. However, section 552.1175 of the Government Code may be applicable to this information.³ This section provides in part:

(a) This section applies only to:

¹ We note that in Open Records Decision No. 670 (2001), the attorney general determined that all governmental bodies may withhold information that reveals a peace officer's home address, home telephone number, personal cellular phone number, personal pager number, social security number, and information that reveals whether the individual has family members without the necessity of requesting an attorney general decision as to whether the exception under section 552.117(a)(2) applies.

² 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 office under the Act.

³ 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).

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure;

...

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(a), (b). Thus, if the peace officer who is not employed by the sheriff elects to restrict access to this information in accordance with section 552.1175(b), the sheriff must withhold the personal information we have marked under section 552.1175 of the Government Code. If an election is not made, the information we have marked under section 552.1175 must be released.

Section 552.130 of the Government Code excepts from disclosure information that relates to "a motor vehicle operator's or driver's license [or] motor vehicle title or registration issued by an agency of this state." *Id.* § 552.130(a)(1), (2). We note that this provision does not protect out-of-state motor vehicle record information. Accordingly, the sheriff must withhold the information we have marked under section 552.130 of the Government Code.

Some of the submitted information contains insurance policy numbers that are subject to section 552.136 of the Government Code, which 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." *Id.* § 552.136(b). We have marked the insurance policy numbers the sheriff must withhold under section 552.136 of the Government Code.

We note the remaining information 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. *See id.* § 552.137(b). The e-mail address at issue is not a type specifically excluded by section 552.137(c). You do not inform us that the owner of the e-mail address affirmatively consented to its release. Therefore, the sheriff must withhold the e-mail address we have marked under section 552.137 of the Government Code.

In summary, the sheriff must withhold, pursuant to 552.101 of the Government Code: (1) the marked W-4 forms in conjunction with section 6103(a) of title 26 of the United States Code; (2) the marked L-2 and L-3 forms in conjunction with section 1701.306 of the Occupations Code; (3) the marked F-5 forms in conjunction with 1701.454 of the Occupations Code; and (4) the information we have marked in conjunction with common-law privacy. If the individuals at issue in the submitted information are currently licensed peace officers, the sheriff must withhold the information we have marked under section 552.117(a)(2) of the Government Code. If the individual who made a timely election for confidentiality under section 552.024 of the Government Code is not a currently licensed police officer, the sheriff must withhold the information we have marked under section 552.117(a)(1). If the remaining individuals are not currently licensed police officers, the sheriff must withhold the information we have marked under section 552.117(a)(1) for each individual who made a timely election to withhold personal information under section 552.024. If the peace officer who is not employed by the sheriff elects to withhold his personal information, the information we have marked must be withheld under section 552.1175 of the Government Code. The sheriff must also withhold the information we have marked under sections 552.130, 552.136, and 552.137 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 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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/eb

Ref: ID# 330122

Enc. Submitted documents

c: Requestor
(w/o enclosures)