



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 15, 2009

Mr. Christopher Gregg
Gregg & Gregg, P.C.
16055 Space Center Boulevard Suite 150
Houston, Texas 77062

OR2009-00662

Dear Mr. Gregg:

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# 332347.

The League City Police Department (the "department"), which you represent, received a request for personnel information relating to a former employee. We understand you to claim that the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the information you submitted.

We first note that the former employee's social security number, Texas driver's license number, and personal e-mail address appear to have been redacted from some of the submitted documents. 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. The department has no authorization, however, to withhold a Texas driver's license number or personal e-mail address from the public without requesting a decision from this office under the Act. Furthermore, the requestor identifies himself as an attorney for the former employee to whom the redacted information pertains. As the former employee's authorized representative, the requestor has a special right of access to information encompassed by exceptions to disclosure that are intended to protect her personal privacy. *See* Gov't Code § 552.023; Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself); *see also* Gov't Code §§ 552.117(a)(1) (exception for home address and telephone number, social security number, and family member

information of current or former employee of governmental body who timely requests confidentiality pursuant to Gov't Code § 552.024), .130 (exception for information relating to motor vehicle operator's or driver's license or permit, motor vehicle title or registration, or personal identification document issued by Texas agency), .137 (exception for e-mail address of member of public provided for purpose of communicating electronically with governmental body), .147 (exception for living individual's social security number). Therefore, the department may not withhold any of the redacted information under sections 552.117, 552.130, 552.137, or 552.147 of the Government Code. However, we will consider your arguments against disclosure of the submitted records, including the redacted information. In the future, the department should refrain from redacting any information from records that are submitted to this office for the purpose of requesting a decision under the Act, unless the department has specific authorization to do so. *See id.* §§ 552.301(a), .302.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This exception encompasses information that other statutes make confidential. Section 143.089 of the Local Government Code provides for the existence of two different types of personnel files relating to a police officer, including one that must be maintained as part of the police 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). Information maintained in a police department's internal file that is reasonably related to a police officer's employment relationship with the department is confidential under section 143.089(g). *See City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946 (Tex. App.—Austin 1993, writ denied); *City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, no pet. h.); Attorney General Opinion JC-0257 at 6-7 (2000).

We understand that the City of League City is a civil service municipality under chapter 143 of the Local Government Code. You indicate that the information submitted as Exhibit B is contained in an internal file maintained by the department. We understand you to contend that Exhibit B is confidential under section 143.089(g). We note, however, that Exhibit B identifies the former employee to whom the information pertains as a civilian "telecommunicator." Section 143.089(a) requires the civil service director of a civil service municipality to maintain a personnel file on each "police officer." Likewise, section 143.089(g) states that a police department may maintain a personnel file on each "police officer." Thus, both subsections refer to a "police officer." Section 143.003 of the Local Government Code defines a police officer as being a member of a police department or other peace officer who was appointed in substantial compliance with chapter 143 or who is entitled to civil service status under section 143.005, 143.084, or 143.103. *See* Loc. Gov't Code § 143.003(5) (defining "police officer" for purposes of section 143.089). In this instance, neither the information in Exhibit B nor the rest of the submitted records reflect that Exhibit B is related to a police officer, as defined by section 143.003(5) of the Local Government Code. We therefore conclude that the information in Exhibit B is not

confidential under section 143.089(g) of the Local Government Code and may not be withheld on that basis under section 552.101 of the Government Code.

Section 552.101 also encompasses the Americans with Disabilities Act (the "ADA"), 42 U.S.C. §§ 12101 *et seq.* The ADA provides that "[a] covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions." *Id.* § 12112(d)(4)(B). Such information must be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. *See id.* § 12112(d)(4)(C). This office addressed the ADA in Open Records Decision No. 641 (1996), stating:

Title I of the ADA and the EEOC regulations adopted pursuant to specific statutory authority provide for the confidentiality of medical condition and history information collected from applicants and employees. . . . Section 12112(d)(4)(C) provides that information "regarding the medical condition or history of any employee" obtained as part of a work-site based health program also must be maintained on separate forms, in separate files, and be kept confidential. *See also* 29 C.F.R. § 1630.14(d)(1) (providing that this information "*shall* be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record") (emphasis added). As to information obtained from employees' job-related medical examinations or medical inquiries, the interpretive rules make clear that medical condition and medical history information so obtained is subject to the same restrictions. . . .

ORD 641 at 6. However, as this office also noted in ORD 641 with regard to confidential medical records, the ADA further provides that:

- (I) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;
- (ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and
- (iii) government officials investigating compliance with this chapter shall be provided relevant information on request

42 U.S.C. § 12112(d)(3)(B); *see* 29 C.F.R. § 1630.14(d)(1). We find that two of the submitted documents fall within the scope of the ADA. The requestor does not appear to be among the categories of persons that are entitled to have access to such information. We

therefore conclude that the department must withhold the documents that we have marked under section 552.101 of the Government Code in conjunction with the ADA.

Section 552.101 also encompasses the federal Family and Medical Leave Act (the "FMLA"). See 29 U.S.C. § 2801 *et seq.* Section 825.500 of chapter V of title 29 of the Code of Federal Regulations identifies the record-keeping requirements for employers that are subject to the FMLA. Subsection (g) of section 825.500 provides that

[r]ecords and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements[], except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and
- (3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g). We have marked a document that the department must withhold under section 552.101 of the Government Code in conjunction with the FMLA.¹

Criminal history record information ("CHRI") obtained from the National Crime Information Center or the Texas Crime Information Center is confidential under federal and state law. CHRI means "information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions."² Gov't Code § 411.082(2). Federal law governs the dissemination of CHRI obtained from the National Crime Information Center network. Federal regulations prohibit the release to the general public

¹Because we conclude that the submitted medical records must be withheld under section 552.101 in conjunction with the ADA and the FMLA, we do not address the department's arguments against disclosure of those records.

²We note that the statutory definition of CHRI does not encompass driving record information maintained by the Texas Department of Public Safety (the "DPS") under subchapter C of chapter 521 of the Transportation Code. See Gov't Code § 411.082(2).

of CHRI maintained in state and local CHRI systems. *See* 28 C.F.R. § 20.21(c)(1) (“Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given.”) and (c)(2) (“No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself.”). The federal regulations allow each state to follow its own individual law with respect to CHRI that it generates. *See* Open Records Decision No. 565 at 10-12 (1990); *see generally* Gov’t Code ch. 411 subch. F. Sections 411.083(b)(1) and 411.089(a) of the Government Code 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. *See id.* § 411.089(b). We have marked CHRI that the department must withhold under section 552.101 of the Government Code in conjunction with federal law and subchapter F of chapter 411 of the Government Code.³

The submitted information also includes fingerprints, public access to which is governed by chapter 560 of the Government Code. *See id.* §§ 560.001(1) (“biometric identifier” means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry), 560.003 (biometric identifier in possession of governmental body is exempt from disclosure under Act). Section 560.002 of the Government Code provides, however, that “[a] governmental body that possesses a biometric identifier of an individual . . . may not sell, lease, or otherwise disclose the biometric identifier to another person unless . . . the individual consents to the disclosure[.]” *Id.* § 560.002(1)(A). In this instance, the submitted fingerprints are those of the former employee whom the requestor represents. Thus, as her authorized representative, the requestor has a right of access to the former employee’s fingerprints under section 560.002(1)(A). *See* ORD 481 at 4. Therefore, the fingerprints that we have marked must be released to the requestor pursuant to section 560.002 of the Government Code.

Section 552.101 of the Government Code also encompasses common-law privacy, which protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy protects the specific types of information that are held to be intimate or embarrassing in *Industrial Foundation*. *See id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has determined that other types of information also are private under section 552.101. *See generally* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private). We also have determined that common-law privacy protects certain types of personal financial information. Financial information that relates only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an

³We note that an individual can obtain her own CHRI from the DPS. *See* Gov’t Code § 411.083(b)(3).

individual and a governmental body. *See* Open Records Decision Nos. 600 at 9-12 (1992), 545 at 4 (1990), 523 at 4 (1989).

You seek to withhold social security numbers, driver's license information, and information relating to marital status on privacy grounds. Those types of information are generally not protected by common-law privacy. Nevertheless, the submitted documents do contain private medical and personal financial information relating to the former employee whose personnel records are at issue and to other individuals. As previously explained, however, the requestor is an authorized representative of the former employee. As such, the requestor has a right of access to any information relating to his client that the department would be required to withhold from the public to protect her privacy. *See* Gov't Code § 552.023; ORD 481 at 4. Therefore, the department may not withhold any information relating to the former employee from this requestor under section 552.101 in conjunction with common-law privacy. There is no indication, however, that the requestor would have a right of access to private medical and personal financial information relating to individuals other than his client. Therefore, the department must withhold that information, which we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy. The department may not withhold any of the remaining information on privacy grounds under section 552.101.

We next note that the department may be required to withhold some of the remaining information under section 552.117 of the Government Code.⁴ Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, 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 of the Government Code. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request under section 552.024 that the information be kept confidential. We have marked the social security numbers of current or former employees of the department other than the requestor's client. The marked information must be withheld under section 552.117(a)(1) to the extent that the current or former employees concerned timely requested confidentiality for their social security numbers under section 552.024.⁵ We

⁴Unlike other exceptions to disclosure under the Act, this office will raise section 552.117 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

⁵We note that section 552.147(b) of the Government Code authorizes the department 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.

again emphasize that, because the requestor has a right of access to his client's private information, the department may not withhold information relating to her under section 552.117.

The submitted information also includes the personal e-mail address of an individual other than the requestor's client. Section 552.137 of the Government Code states that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure.⁶ Gov't Code § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. The e-mail address that we have marked must be withheld under section 552.137 unless the owner has affirmatively consented to its public disclosure. We again note that the requestor's client's e-mail address may not be withheld under section 552.137 because he also has a right of access to that information.

Lastly, we note that some of the submitted information appears to be protected by copyright. A governmental body must allow inspection of copyrighted information unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information also must comply with copyright law, however, and is not required to furnish copies of copyrighted information. *Id.* A member of the public who wishes to make copies of copyrighted information must do 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 at 8-9 (1990).

In summary: (1) the department must withhold the marked information that is confidential under section 552.101 of the Government Code in conjunction with the ADA and the FMLA; (2) the marked CHRI must be withheld under section 552.101 in conjunction with federal law and subchapter F of chapter 411 of the Government Code; (3) the marked fingerprints must be released pursuant to section 560.002 of the Government Code; (4) the marked medical and personal financial information must be withheld under section 552.101 in conjunction with common-law privacy; (5) the marked social security numbers must be withheld under section 552.117(a)(1) of the Government Code to the extent that the current or former employees concerned timely requested confidentiality for their social security numbers under section 552.024 of the Government Code; and (6) the marked e-mail address must be withheld under section 552.137 of the Government Code unless the owner has

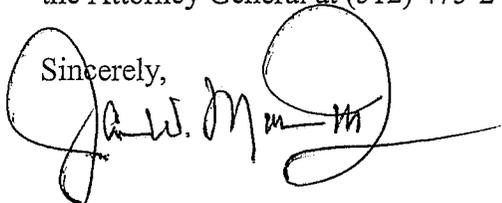
⁶Section 552.137 also is a mandatory exception that may not be waived. Gov't Code §§ 552.007, .352; ORD 674 at 3 n.4.

consented to its disclosure. The rest of the submitted information must be released.⁷ Any information that is protected by copyright must be released in accordance with copyright law.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris III", written over a circular stamp or mark.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/cc

Ref: ID# 332347

Enc: Submitted documents

c: Requestor
(w/o enclosures)

⁷Should the department receive another request for these same records from a person who would not have a right of access to the former employee's private information, the department should resubmit these records and request another decision. See Gov't Code §§ 552.301(a), .302.