



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 4, 2009

Mr. W. W. McNeal
Attorney at Law
Attorney for City of Martindale
P.O. Box 1259
Lockhart, Texas 78644

OR2009-05923

Dear Mr. McNeal:

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# 341704.

The Martindale Police Department (the "department"), which you represent, received a request for the personnel file of a named officer, including disciplinary actions, specific disciplinary actions related to the misuse of city credit cards and the misuse of funds by the officer for personal gain, training records, promotional documentation, and history of employment with the City of Lockhart.¹ You indicate you believe portions of the requested information are excepted from disclosure under sections 552.101 and 552.102 of the Government Code. We have considered the exceptions you raise and reviewed the submitted information.

Initially, we note the department has not submitted any information regarding specific disciplinary actions against the named officer related to the misuse of city credit cards and the misuse of funds by the officer for personal gain to this office for review. Thus, we assume any information responsive to this portion of the request has been released to the requestor to the extent it exists. If not, the department must release such information immediately. See Gov't Code §§ 552.301(a), 302; Open Records Decision No. 664 (2000)

¹We note the requestor has specifically excluded from his request the named officer's address, phone number, social security number, and family member names. Therefore, any such information is not responsive to the request for information. The department need not release non-responsive information in response to this request and this ruling will not address it.

(noting if governmental body concludes no exceptions apply to the requested information, it must release the information as soon as possible under circumstances).

Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled the test to be applied to information claimed to be protected under section 552.102(a) is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Act.² See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). Accordingly, we will consider your privacy claims under section 552.101 and section 552.102(a) together.

Common law privacy protects information if it (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Id.* at 685. 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. In addition, this office has found some kinds of medical information or information indicating disabilities or specific illnesses are 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 a portion of the submitted information is protected under common-law privacy. We therefore determine the department must withhold the information we have marked pursuant to sections 552.101 and 552.102 of the Government Code. The remaining information is not confidential under common-law privacy, and the department may not withhold it under section 552.101 or section 552.102 on that ground.

We note a portion of the remaining information contains criminal history record information ("CHRI") that is confidential under section 552.101 of the Government Code. Section 552.101 encompasses statutes, such as section 411.083 of the Government Code. CHRI generated by the National Crime Information Center or by the Texas Crime Information Center is confidential. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual laws with respect to the CHRI it generates. See *id.* Section 411.083 of the

²Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses the doctrine of common-law privacy.

Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except 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. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* ORD 565. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 in conjunction with chapter 411, subchapter F of the Government Code. The remaining submitted information contains CHRI that is confidential under section 411.083. Accordingly, this information, which we have marked, is excepted from required public disclosure by section 552.101 of the Government Code.

Next, we note the remaining information contains fingerprints that are confidential under section 560.003 of the Government Code, which is encompassed by section 552.101 of the Government Code. Fingerprints are governed by chapter 560 of the Government Code, which provides a governmental body may not release fingerprints except in certain limited circumstances. *See id.* §§ 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 biometric identifiers in possession of governmental body are exempt from disclosure under Act). You do not inform us, and the submitted information does not indicate, section 560.002 permits the disclosure of the fingerprints. Therefore, the department must withhold the fingerprints we have marked under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code.

Next, we note the remaining information contains L-2 (Declaration of Medical Condition) and L-3 (Declaration of Psychological and Emotional Health) forms, which are required by the Texas Commission on Law Enforcement Officer Standards and Education (the "commission"). 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 in relevant part as follows:

- (a) The commission may not issue a license to a person as an officer or county jailer unless the person is examined by:
 - (1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test.

(b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to the commission. A declaration is not public information.

Occ. Code § 1701.306(a), (b). Thus, the department must withhold these forms, which we have marked, under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.

Next, we note the remaining information contains information subject to section 552.117 of the Government Code.³ Section 552.117(a)(2), in part, excepts from public disclosure a peace officer's former home addresses and telephone numbers and family member information regardless of whether the peace officer made an election under section 552.024 of the Government Code. Gov't Code § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Accordingly, the department must withhold the information we have marked under section 552.117(a)(2) of the Government Code. The department must also withhold under section 552.117(a)(2) in the submitted birth certificate: (1) boxes 7, 9, and 11, and (2) the address and additional information we marked in "type of document" in "supporting document 2."

A portion of the remaining information may be excepted from disclosure under section 552.1175 of the Government Code. Section 552.1175 provides in part:

(a) This section applies only to:

- (1) peace officers as defined by Article 2.12, Code of Criminal Procedure;
- (2) county jailers as defined by Section 1701.001, Occupations Code;
[and]
- (3) current or former employees of the Texas Department of Criminal Justice or of the predecessor in function of the department or any division of the department[.]

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

(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.

Id. § 552.1175(a)(1)-(3), (b). To the extent the deputy sergeant is a peace officer as defined by article 2.12 of the Code of Criminal Procedure and the correctional officer is a county jailer as defined by section 1701.001 of the Occupations Code or a current or former employee of the Texas Department of Criminal Justice, section 552.1175 applies to them. We have marked the personal information of a deputy sergeant and correctional officer in the remaining information. You do not inform this office, nor does any of the submitted information indicate, whether the deputy sergeant and correctional officer at issue have elected to keep this information confidential in accordance with subsection 552.1175(b). Accordingly, to the extent section 552.1175 applies to the deputy sergeant and correctional officer, if the deputy sergeant and correctional officer elect to restrict access to their information in accordance with section 552.1175(b), then the department must withhold the information we have marked under section 552.1175. If section 552.1175 does not apply to the deputy sergeant and correctional officer or if no election is made, the department must release the information we have marked under section 552.1175.

Next, we note the remaining information contains information subject to section 552.130 of the Government Code, which excepts from disclosure information that relates to a Texas motor vehicle operator's or driver's license or a Texas motor vehicle title or registration. *Id.* § 552.130(a)(1), (2). The department must withhold the Texas driver's license information and Texas motor vehicle record information we have marked under section 552.130.

Finally, we note the remaining information includes an e-mail address subject to section 552.137 of the Government Code, which 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). *Id.* § 552.137(a)-(c). The e-mail address in the remaining information is not specifically excluded by section 552.137(c). The department must withhold this e-mail address, which we have marked, under section 552.137, unless the owner of the address has affirmatively consented to its release.

In summary, the department must withhold (1) the information we have marked under sections 552.101 and 552.102 of the Government Code in conjunction with common-law privacy, (2) the CHRI we have marked under section 552.101 in conjunction with section 411.083 of the Government Code, (3) the fingerprints we have marked under section 552.101 in conjunction with section 560.003 of the Government Code, (4) the L-2 and L-3 forms we have marked under section 552.101 in conjunction with section 1701.306 of the Occupations Code, (5) the information we have marked and the information we have listed in the submitted birth certificate under section 552.117(a)(2) of the Government Code, (6) the information we have marked under section 552.1175, to the extent section 552.1175 applies to the deputy sergeant and correctional officer and to the extent the sergeant and officer elect to restrict access to their personal information in accordance with section 552.1175(b), (7) the Texas driver's license information and Texas motor vehicle record information we have marked under section 552.130 of the Government Code, and (8) the e-mail address we have marked under section 552.137, unless the owner of the e-mail address has affirmatively consented to its release. The remaining information must be released.

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,



Emily Sitton
Assistant Attorney General
Open Records Division

EBS/rl

Ref: ID# 341704

Enc. Submitted documents

c: Requestor
(w/o enclosures)