



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 6, 2009

Mr. B. Chase Griffith
Attorney for Town of Flower Mound
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740 East Campbell Road, Suite 800
Richardson, Texas 75081

OR2009-09220

Dear Mr. Griffith:

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# 347960.

The Town of Flower Mound Police Department (the "department"), which you represent, received a request for thirteen categories of information related to a specified incident, all incidents at a particular location during the past twenty-four months, and a named police officer's personnel file. You state that some responsive information will be released to the requestor. You state that the department will redact social security numbers pursuant to section 552.147 of the Government Code.¹ You also state that home addresses and telephone numbers, personal cellular telephone numbers, and family member information of the department's peace officers will be redacted under section 552.117(a)(2) of the Government Code pursuant to the previous determination issued in Open Records Decision No. 670 (2001).² See Gov't Code § 552.301(a); Open Records Decision Nos. 673 (2001) (previous

¹We note that section 552.147(b) 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.

²We note that a post office box number is not a "home address" for purposes of section 552.117. See Gov't Code § 552.117; Open Records Decision No. 622 at 4 (1994) (legislative history makes clear that purpose of section 552.117 is to protect public employees from being harassed *at home*) (citing House Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985) (emphasis added)).

determinations), 670 (concluding that all governmental bodies subject to Act may withhold information that is subject to predecessor to section 552.117(a)(2) without necessity of seeking decision from this office). You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.108, 552.119, 552.130, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We begin by noting that one of the submitted documents is not responsive to the instant request for information, as it was created after the date that the department received the request. This ruling does not address the public availability of any information that is not responsive to the request, and the department need not release that information in response to this request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986) (governmental body not required to disclose information that did not exist at time request was received).

Section 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 exception encompasses information that other statutes make confidential. Section 552.101 encompasses section 1703.306 of the Occupations Code, which 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] Board 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 submitted information contains information acquired from polygraph examinations. It does not appear that the requestor falls into any of the categories of individuals who are authorized to receive the submitted polygraph information under section 1703.306(a). Accordingly, we conclude that the department must withhold the information acquired from a polygraph examination that we have marked under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.

Section 552.101 also encompasses section 1701.306 of the Occupations Code, which pertains to an L-2 Declaration of Medical Condition and an L-3 Declaration of Psychological and Emotional Health required by the Texas Commission on Law Enforcement Officer Standards and Education ("TCLEOSE"). Chapter 1701 of the Occupations Code is applicable to TCLEOSE. Specifically, section 1701.306 provides 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.

Id. § 1701.306(a), (b). Upon review, we find that none of the submitted information consists of an L-2 or L-3 declaration. Thus, we conclude the department may not withhold any portion of the submitted information under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.

You claim that the submitted information includes an F-5 form, Report of Resignation or Separation of License Holder, which is also a TCLEOSE report encompassed by

section 552.101 of the Government Code. Section 1701.454 of the Occupations Code provides in relevant part that “[a] report or statement submitted to the commission under this subchapter is confidential and is not subject to disclosure under Chapter 552 of the Government Code.” Occ. Code § 1701.454(a). Upon review, however, we find that none of the submitted information consists of an F-5 form. Therefore, the department may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

Section 552.101 also encompasses criminal history record information (“CHRI”) generated by the National Crime Information Center or by the Texas Crime Information Center. 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 law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Texas Department of Public Safety (“DPS”) maintains, except that DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code.³ *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 chapter 411, subchapter F. In addition, information relating to routine traffic violations is not excepted from release under section 552.101 on this basis. *Cf. id.* § 411.082(2)(B). Upon review, we conclude that the department must withhold the CHRI we have marked under section 552.101 of the Government Code in conjunction with federal law and chapter 411 of the Government Code.

Next, you claim some of the remaining information is confidential under section 552.101 in conjunction with the Medical Practice Act (“MPA”), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in pertinent 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.

³Although you assert that release of a portion of the submitted information is prohibited by section 411.085 of the Government Code, that provision merely provides the penalties for the “Unauthorized Obtaining, Use, or Disclosure of Criminal History Record Information.” Gov’t Code § 411.085. Section 411.083 is applicable to the dissemination of CHRI.

(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(a), (b), (c). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Upon review, we find none of the information at issue consists of communications between a physician and a patient, nor is it records of the identity, diagnosis, evaluation, or treatment of a patient by a physician. Thus, we conclude the department may not withhold any portion of the submitted information under section 552.101 of the Government Code in conjunction with the MPA.

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 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 personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate and embarrassing. *See* Open Records Decision No. 545 (1990). Upon review, we find that the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the department must withhold the information we have marked under section 552.101 of the Government Code pursuant to common-law privacy.

Next, we address your argument under section 552.108 of the Government Code. Section 552.108(a) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a). Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). We note the submitted information

includes a copy of a citation. Because the citation has been provided to the individual who was cited, we find that release of this information will not interfere with the detection, investigation, or prosecution of crime. See Gov't Code § 552.108(a)(1). Therefore, the department may not withhold the citation, which we have marked, under section 552.108(a)(1). You state that a portion of the remaining information relates to a pending criminal investigation. Based on this representation and our review, we conclude section 552.108(a)(1) is applicable to the information at issue. See *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), writ ref'd n.r.e. per curiam, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases).

Section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). Section 552.108(c) refers to the basic front-page information held to be public in *Houston Chronicle*. See 531 S.W.2d at 186-88. Thus, the department must release basic information, including a detailed description of the offense, even if the information does not literally appear on the front page of an offense or arrest report. See Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). With the exception of the citation and basic information, the department may withhold the information we have marked under section 552.108(a)(1) of the Government Code.⁴

You assert that the officer's photographs should be withheld from disclosure under section 552.119 of the Government Code, which provides as follows:

(a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under Section 51.212, Education Code, the release of which would endanger the life or physical safety of the officer, is excepted from [required public disclosure] unless:

- (1) the officer is under indictment or charged with an offense by information;
- (2) the officer is a party in a fire or police civil service hearing or a case in arbitration; or
- (3) the photograph is introduced as evidence in a judicial proceeding.

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

(b) A photograph exempt from disclosure under Subsection (a) may be made public only if the peace officer or security officer gives written consent to the disclosure.

Gov't Code § 552.119. Upon review, we find that the department has failed to demonstrate that release of the photographs would endanger the officer's life or physical safety. Accordingly, the photographs at issue may not be withheld under section 552.119 of the Government Code.

Portions of the remaining information are subject to section 552.130 of the Government Code, which provides that information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. *Id.* § 552.130(a)(1), (2). Because this exception protects personal privacy, the requestor has a right of access to his own Texas motor vehicle record information under section 552.023 of the Government Code, and the department may not withhold the requestor's information under section 552.130. *See id.* § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself).⁵ We have marked the Texas motor vehicle record information that the department must withhold under section 552.130 of the Government Code.

We note that some of the remaining information is excepted from public disclosure under section 552.136 of the Government Code. This section 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."⁶ *Id.* § 552.136. This office has concluded that insurance policy numbers constitute access device numbers for purposes of section 552.136. Accordingly, the department must withhold the insurance policy number we have marked under section 552.136 of the Government Code.

You seek to withhold an e-mail address in the remaining records pursuant to section 552.137 of the Government Code. Section 552.137 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). You do not inform us that the owner of the e-mail address has affirmatively consented to release of the e-mail address. Therefore, unless the department receives consent to release

⁵Section 552.023(a) provides that "[a] person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests." Gov't Code § 552.023(a).

⁶The Office of the Attorney General will raise a mandatory exception like section 552.136 of the Government Code on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

the marked e-mail address, the department must withhold it under section 552.137 of the Government Code.

In summary: The department must withhold the following information under section 552.101 of the Government Code: 1) the polygraph information we have marked in conjunction with section 1703.306 of the Occupations Code, 2) the CHRI we have marked in conjunction with federal law and chapter 411 of the Government Code, and (3) the information we have marked under section 552.101 of the Government Code pursuant to common-law privacy. With the exception of the citation and basic information, the department may withhold the information we have marked under section 552.108(a)(1) of the Government Code. The department must also withhold the information we have marked under sections 552.130 and 552.136 of the Government Code. Unless the department receives consent to release, you must withhold the marked e-mail address under section 552.137 of the Government Code. 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 347960

Enc. Submitted documents

c: Requestor
(w/o enclosures)