



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 31, 2009

Mr. Loren B. Smith  
Olson & Olson, L.L.P.  
2727 Allen Parkway, Suite 600  
Houston, Texas 77019

OR2009-12304

Dear Mr. Smith:

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# 353859.

The Memorial Villages Police Department (the "department"), which you represent, received a request for the personnel files of two named department officers. You state the department has released some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.115, 552.117, 552.1175, 552.130, and 552.137 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

We first note that a portion of the submitted information, which we have marked, is not responsive to the instant request because it does not pertain to the two named officers. The department need not release non-responsive information in response to this request and this ruling will not address that information.

Next, we note that 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

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<sup>1</sup>We note you raise section 552.1175 of the Government Code as an exception to disclosure for information pertaining to the two named officers. However, because the department holds this information as an employer of the two named officers, the proper exception to raise is section 552.117 of the Government Code.

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), .301(e)(1)(D). 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. *See id.* § 552.147. Further, the previous determination issued in Open Records Decision No. 670 (2001) authorizes a governmental body to withhold the home addresses and telephone numbers, personal cellular phone and pager numbers, social security numbers, and family member information of peace officers, as defined by article 2.12 of the Code of Criminal Procedure, under section 552.117(a)(2) without the necessity of requesting a decision from this office. You do not assert, however, nor does our review of our records indicate, that you have been authorized to withhold any of the remaining redacted information without seeking a ruling from this office. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 (2000). As such, these types of 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 most of the redacted information; thus, being deprived of that information does not inhibit our ability to make a ruling. In the future, however, the department should refrain from redacting any information that it submits to this office in seeking an open records ruling. For the redacted information that we are unable to discern, the department has failed to comply with section 552.301, and such information is presumed public under section 552.302. *See* Gov't Code §§ 552.301(1)(D), .302. Thus, we conclude that the department must release the remaining redacted information to the requestor. If you believe that the remaining redacted information is confidential and may not lawfully be released, you must challenge this ruling in court pursuant to section 552.324 of the Government Code.

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. The submitted documents include W-4 forms. Section 552.101 of the Government Code encompasses section 6103(a) of title 26 of the United States Code. This office has held that 26 U.S.C. 6103(a) renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 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." *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). Consequently, the department must withhold the submitted W-4 forms, which we have marked, pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

The submitted information also contains an L-3 Declaration of Psychological and Emotional Health form required by the Texas Commission on Law Enforcement Officer Standards and

Education ("TCLEOSE"). This form is 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:

(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). Thus, we find the department must withhold the L-3 declaration we have marked under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.

Next, you raise the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-8. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 ("Privacy Rule"); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, except as provided by parts 160 and 164 of the Code of Federal Regulations. *See id.* § 164.502(a).

This office has addressed the interplay of the Privacy Rule and the Act. In Open Records Decision No. 681 (2004), we noted that section 164.512 of title 45 of the Code of Federal

Regulations provides that a covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted that the Act “is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public.” *See* ORD 681 at 8; *see also* Gov’t Code §§ 552.002, .003, .021. We therefore held that the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. *See Abbott v. Tex. Dep’t of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App.—Austin 2006, no pet.); ORD 681 at 9; *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Thus, because the Privacy Rule does not make information that is subject to disclosure under the Act confidential, the department may withhold protected health information from the public only if the information is confidential under other law or an exception in subchapter C of the Act applies. Therefore, we will consider your arguments under the Act for the medical information at issue.

Section 552.101 also encompasses the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part the following:

- (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.

Occ. Code § 159.002(a)-(c). Medical records must be released upon the patient’s signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *Id.* §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). Upon

review, the information we have marked constitutes medical records that may only be released in accordance with the MPA.

Section 552.101 also encompasses section 611.002 of the Health and Safety Code, which governs the public availability of mental health records. Section 611.002 provides in part:

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

Health & Safety Code § 611.002(a); *see id.* § 611.001 (defining “patient” and “professional”). We have marked mental health records that the department must withhold under section 611.002 of the Health and Safety Code in conjunction with section 552.101.

The submitted information also contains fingerprint information. Section 552.101 also encompasses chapter 560 of the Government Code, which 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), 560.002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), 560.003 (biometric identifiers in possession of governmental body exempt from disclosure under the Act). The department does not inform us, and the submitted information does not indicate, that section 560.002 permits the disclosure of the fingerprint information at issue. Therefore, the department must withhold the fingerprints we have marked under section 552.101 in conjunction with section 560.003 of the Government 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). 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 determined 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 individual and a governmental body. *See Open Records Decision Nos.* 600 at 9-12 (1992) (identifying public and private portions of certain state personnel records), 545 at 4 (1990) (financial information not excepted from public disclosure by common-law privacy generally includes those regarding receipt of governmental funds or debts owed to governmental entities), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular

financial transaction between individual and public body). Thus, a public employee's allocation of part of the employee's salary to a voluntary investment program offered by the employer is a personal investment decision, and information about that decision is protected by common-law privacy. *See, e.g.*, Open Records Decision Nos. 600 at 9-12 (details of employee's enrollment in a group insurance program, the designation of the beneficiary of an employee's retirement benefits, participation in TexFlex, and an employee's authorization of direct deposit of the employee's salary are protected by common-law privacy), 545 at 3-5 (1990) (deferred compensation plan). But where a transaction is funded in part by a governmental body, it involves the employee in a transaction with the governmental body, and the basic facts about that transaction are not private under section 552.101. ORD 600 at 9 (basic facts of group insurance provided by governmental body not protected by common-law privacy). Further, some kinds of 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 of the remaining personnel documents, we find that portions of them are highly intimate or embarrassing and not of legitimate public concern. Therefore the department must withhold the personal financial and private information we have marked under section 552.101 in conjunction with common-law privacy. However, we find that none of the remaining information is either intimate or embarrassing or not a matter of legitimate public interest. *See* Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of governmental employees); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). Thus, no portion of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy.

Next, you raise section 552.115 of the Government Code for a portion of the remaining information. Section 552.115 excepts from disclosure "[a] birth or death record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official[.]" Gov't Code § 552.115(a). Section 552.115 is applicable only to information maintained by the bureau of vital statistics or local registration official. *See* Open Records Decision No. 338 (1982) (finding that statutory predecessor to section 552.115 excepted only those birth and death records which are maintained by the bureau of vital statistics and local registration officials.) Because section 552.115 does not apply to information held by the department, the submitted birth certificates may not be withheld on this basis.

Section 552.117(a)(2) of the Government Code excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member

information regarding a peace officer regardless of whether the officer elected under section 552.024 or 552.1175 of the Government Code to keep such information confidential.<sup>2</sup> Gov't Code § 552.117(a)(2). Section 552.117 also encompasses a personal cellular telephone number, provided that a governmental body does not pay for the cell phone service. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). We note, however, the protection afforded by section 552.117 does not extend to information relating to a deceased family member. *Cf.* Attorney General Opinions JM-229, H-917 (1976) (“We are . . . of the opinion that the Texas courts would follow the almost uniform rule of other jurisdictions that the right of privacy lapses upon death.”); Open Records Decision No. 272 (1981). Thus, the department must withhold the information we have marked under section 552.117(a)(2) of the Government Code.

The remaining documents also contain information pertaining to peace officers who are not employed by the department. Section 552.1175 of the Government Code provides in part:

(b) Information that relates to the home address, home telephone number, or social security number of [a peace officer as defined by article 2.12 of the Code of Criminal Procedure], 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(b). We note that section 552.1175 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1998). If the individuals in question are still peace officers and elect to restrict access to their personal information in accordance with section 552.1175, the department must withhold the information we have marked under section 552.1175. *See, e.g.,* Open Records Decision No. 678 (2003). Otherwise, this information 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 permit issued by an agency of this

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<sup>2</sup>“Peace officer” is defined by Article 2.12 of the Texas Code of Criminal Procedure.

state [or] a motor vehicle title or registration issued by an agency of this state.”<sup>3</sup> Gov’t Code § 552.130(a). We note that section 552.130 of the Government Code does not apply to out-of-state motor vehicle information. The department must withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code.

Section 552.137 of the Government Code 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). *See id.* § 552.137(a)-(c). The e-mail addresses at issue are not a type specifically excluded by section 552.137(c). Accordingly, the department must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their disclosure.<sup>4</sup>

In summary, the department must withhold the marked W-4 forms pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code. The medical records we have marked may only be released in accordance with the MPA. The department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with: (1) section 611.002 of the Health and Safety Code; (2) section 560.003 of the Occupations Code; (3) section 1701.306 of the Occupations Code; and (4) common-law privacy. The department must withhold the information we have marked under section 552.117(a)(2) of the Government Code. If the individuals in question are still peace officers and elect to restrict access to their personal information in accordance with section 552.1175, the department must withhold the information we have marked under section 552.1175 of the Government Code. The department must withhold the information we have marked under section 552.130 of the Government Code. The department must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their disclosure. The remaining information, including the remaining redacted 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

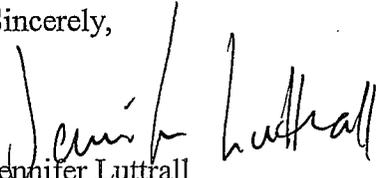
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<sup>3</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

<sup>4</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure.

responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](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,

  
Jennifer Luttrall  
Assistant Attorney General  
Open Records Division

JL/dls

Ref: ID# 353859

Enc. Submitted documents

c: Requestor  
(w/o enclosures)