



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 16, 2009

Ms. Julia Gannaway
Lynn Pham & Ross, LLP
Attorney for Town of Little Elm
306 West Broadway Avenue
Fort Worth, Texas 76104

OR2009-13078

Dear Ms. Gannaway:

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# 355562.

The Town of Little Elm (the "town"), which you represent, received a request for five categories of information pertaining to five named town police department employees, including the requestor, and any other town police department employee investigated or disciplined for violating a specified general order. You state the town is releasing some of the requested information. You state the town does not possess any information responsive to a portion of the request.¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, some of which is a representative sample.²

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990).

²We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

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. You raise section 552.101 in conjunction with the Americans with Disabilities Act (the "ADA"), 42 U.S.C. §§ 12101 et seq. for the information contained in Exhibit D. 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. Federal regulations define "disability" for the purposes of the ADA as "(1) a physical or mental impairment that substantially limits one or more of the major life activities of the individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment." 29 C.F.R. § 1630.2(g). The regulations further provide that physical or mental impairment means:

(1) any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

See id. § 1630.2(h). You contend the information in Exhibit D is subject to the ADA because “it mentions a person’s medical history or condition.” However, upon review, we find the town has failed to demonstrate how the information at issue pertains to a medical condition for the purposes of the ADA. Accordingly, we find the ADA is not applicable to any portion of the information in Exhibit D, and therefore, none of the information in Exhibit D may be withheld under section 552.101 on that basis.

Section 552.101 also encompasses the Medical Practice Act (“MPA”). *See* Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides in pertinent part:

(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.

Id. § 159.002(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). Medical records must be released upon the governmental body’s receipt of 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. *See* Occ. Code §§ 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. *See* Open Records Decision No. 565 at 7 (1990). We have marked medical records that may only be released in accordance with the MPA.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy. Common-law privacy 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. This office has found certain 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). In addition, this office has found personal financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy, but 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 Nos. 600 (1992), 545 (1990), 373 (1983). This office has also found information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and, therefore, generally not protected from disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute employee's private affairs), 455 (1987) (public employee's job performance or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (scope of public employee privacy is narrow). Upon review, we find the remaining information at issue is either not highly intimate or embarrassing or is of legitimate public interest. Therefore, the town may not withhold any of the remaining information at issue under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.117(a)(2) excepts from public disclosure a peace officer's home address and telephone number, social security number, 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). We also note that section 552.117(a)(2) encompasses peace officers' cellular telephone and pager numbers if the officer personally pays for the cell or pager service. *See* Open Records Decision No. 670 at 6 (2001); *see also* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular mobile phone numbers paid for by governmental body and intended for official use). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Accordingly, the town must withhold the information pertaining to currently licensed peace officers we have marked under section 552.117(a)(2) of the Government Code. However, the town must only withhold the cellular telephone numbers we have marked under section 552.117(a)(2) if the officers at issue paid for the cellular telephone with their own funds. Further, we note section 552.117 only applies to records that the governmental body is holding in an employment capacity. In this case, you indicate one of the individuals at issue is no longer employed by the town's police department. Therefore, since this information is not held by the town in its employment capacity, the town may not withhold this individual's personal information in the documents at issue under section 552.117(a)(2).

We note, however, that section 552.1175 of the Government Code may apply to the former officer whose information is at issue.³ Section 552.1175 provides in part as follows:

(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

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).

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.

Gov't Code § 552.1175(b). If the individual at issue qualifies as a peace officer under section 2.12 of the Code of Criminal Procedure and elects to restrict access to his personal information in accordance with section 552.1175, the town must withhold the information we have marked under section 552.1175 of the Government Code. To the extent this individual does not qualify as a peace officer or does not elect to keep this information confidential, it may not be withheld on this basis and must be released.

You assert that the portions of the remaining information are excepted from disclosure under 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. *See id.* § 552.130. Upon review, we find the town must withhold the Texas driver's license numbers we have marked under section 552.130 of the Government Code.

We note some of the remaining information is 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. The town must withhold the cellular telephone account number we have marked under section 552.136.

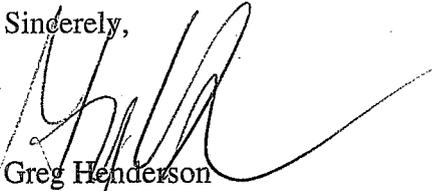
In summary, the marked medical records may only be released in accordance with the MPA. The town must withhold the personal information of currently licensed peace officers under section 552.117(a)(2) of the Government Code. However, the town must only withhold the cellular telephone numbers we have marked under section 552.117(a)(2) if the officers at issue paid for the cellular telephone with their own funds. If the former officer qualifies as a peace officer under section 2.12 of the Code of Criminal Procedure and elects to restrict access to his personal information in accordance with section 552.1175, the town must withhold the information we have under section 552.1175 of the Government Code. The town must also withhold the information we have marked under section 552.130 of the

Government Code and section 552.136 of the Government Code. The remaining information must be released.⁴

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,



Greg Henderson
Assistant Attorney General
Open Records Division

GH/rl

Ref: ID# 355562

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴We note the remaining information contains a social security number. 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.