



ATTORNEY GENERAL OF TEXAS
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October 19, 2009

Mr. Clark McCoy
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OR2009-14743

Dear Mr. McCoy:

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# 358625 (Anna file no. C03029PIR20090727-01).

The Anna Police Department (the "department"), which you represent, received a request for information pertaining to a named officer. You state you will release some information to the requestor. You state some of the requested information does not exist.¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.117, 552.122, 552.130, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 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 information protected by other statutes. The submitted information contains an I-9 form (Employment Eligibility Verification), which is governed by section 1324a of title 8 of the United States Code. This section provides that an I-9 form and "any information contained in or appended to such form, may not be used for purposes other than

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 dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990).

for enforcement of this chapter” and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). Release of the form in this instance would be “for purposes other than for enforcement” of the referenced federal statutes. Accordingly, we conclude that the I-9 form, which we have marked, is confidential and may only be released in compliance with the federal laws and regulations governing the employment verification system.

Section 552.101 of the Government Code also encompasses section 6103(a) of title 26 of the United States Code. Section 6103(a) renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Section 6103(b) defines the term “return information” as a taxpayer’s “identity, the nature, source, or amount of his 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). Thus, the department must withhold the submitted W-4 form 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 L-2 Declaration of Medical Condition and L-3 Declaration of Psychological and Emotional Health forms required by the Texas Commission on Law Enforcement Officer Standards and Education (“TCLEOSE”). 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:

(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 that the department must withhold the L-2 and L-3 declarations we have marked under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code. You also assert that some of the remaining information is confidential under section 1701.306. However, the information you have indicated does not consist of reports required to be filed with TCLEOSE under subchapter J of chapter 1701. Accordingly, none of the remaining information is confidential under section 1701.306, and the department may not withhold it under section 552.101 on that ground.

Section 552.101 of the Government Code also encompasses section 1701.454 of the Occupations Code, which governs the release of reports or statements submitted to the TCLEOSE. Section 1701.454 provides as follows:

(a) A report or statement submitted to the [TCLEOSE] under this subchapter is confidential and is not subject to disclosure under Chapter 552, Government Code, unless the person resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses.

(b) Except as provided by this section, a [TCLEOSE] member or other person may not release the contents of a report or statement submitted under this subchapter. The report or statement may be released only by the [TCLEOSE] employee having the responsibility to maintain the report or statement and only if:

(1) the head of a law enforcement agency or the agency head's designee makes a written request on the agency's letterhead for the report or statement accompanied by the agency head's or designee's signature; and

(2) the person who is the subject of the report or statement authorizes the release by providing a sworn statement on a form supplied by the commission that includes the person's waiver of liability regarding an agency head who is responsible for or who takes action based on the report or statement.

Id. § 1701.454. The submitted information includes F-5 Reports of Separation of License Holder forms. Therefore, the department must withhold the submitted F-5 forms, which we have marked, pursuant to section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

Section 552.101 of the Government Code 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 state agencies 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 Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information in accordance with 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 only release CHRI 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 the DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-411.127. 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 Government Code chapter 411, subchapter F. Thus, the department must withhold the CHRI we have marked under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. *See id.* § 411.083(b)(3). However, we determine that no portion of the remaining information constitutes CHRI generated by either the TCIC or NCIC database. Therefore, no portion of the remaining information is confidential under chapter 411, and none of it may be withheld under section 552.101 on that basis.

The submitted information also contains fingerprint information. Chapter 560 of the Government Code provides that a governmental body may not release fingerprint information except in certain limited circumstances. *See id.* §§ 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 informs us that section 560.002 does not permit 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.

Next, we note that some of the remaining information constitutes medical records. Section 552.101 also encompasses the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code, which governs access to medical records. Section 159.002 of the Occupations Code 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.

Occ. Code § 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). Further, information that is subject to the MPA also includes information that was obtained from medical records. *See* Occ. Code. § 159.002(a)-(c); *see also* Open Records Decision No. 598 (1991). We have marked the medical records that may only be disclosed in accordance with the MPA.

You assert that some of the remaining information is excepted under section 552.102 of the Government Code. Section 552.102(a) of the Government Code excepts from required public disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *Id.* § 552.102(a). This exception applies when the release of information would result in a violation of the common-law right to privacy. *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.). The common-law right to privacy protects information that (1) contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and (2) is of no legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). The types 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 also found personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate or embarrassing. *See* Open Records Decision No. 545 (1990). Upon review, we agree that portions of the submitted personnel information are highly intimate and embarrassing and of no legitimate concern to the public. Thus, we have marked the information that the department must withhold under section 552.102 of the Government Code. However, we find that none of the remaining information is either intimate or embarrassing and not a matter of legitimate public interest. Thus, no portion of the remaining information may be withheld under section 552.102(a).

Section 552.117(a)(2) 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 requested confidentiality under

section 552.024 or 552.1175 of the Government Code.² Gov't Code § 552.117(a)(2). We note that section 552.117 also encompasses personal cellular telephone numbers, provided that the cellular telephone service is not paid for by a governmental body. *See* 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). Accordingly, the department must withhold the information we have marked pursuant to section 552.117(a)(2).

You assert some of the remaining information is excepted under section 552.122 of the Government Code, which excepts from disclosure "a test item developed by a . . . governmental body[.]" Gov't Code § 552.122(b). In Open Records Decision No. 626 (1994), this office determined that the term "test item" in section 552.122 includes "any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated," but does not encompass evaluations of an employee's overall job performance or suitability. Open Records Decision No. 626 at 6 (1994). The question of whether specific information falls within the scope of section 552.122(b) must be determined on a case-by-case basis. *Id.* Traditionally, this office has applied section 552.122 where release of "test items" might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Section 552.122 also protects the answers to test questions when the answers might reveal the questions themselves. *See* Attorney General Opinion JM-640 at 3 (1987); ORD 626 at 8. You assert the information you have marked related to officer qualifications is excepted from disclosure under section 552.122. Upon review, we find the information you have marked does not qualify as test items under section 552.122(b), and therefore may not be withheld on this basis.

You assert some of the remaining information is excepted 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. Gov't Code. § 552.130(a)(1), (2). The department must withhold the Texas motor vehicle record information we have marked under section 552.130.

You next claim that some of the remaining information contains account numbers and/or access device information subject to section 552.136 of the Government Code. Section 552.136 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(b). The department must withhold the information we have marked under section 552.136.

In summary, the department must withhold the following under section 552.101 of the Government Code: 1) the I-9 form we have marked in compliance with the federal laws and

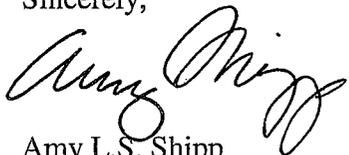
²"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

regulations governing the employment verification system; 2) the W-4 form we have marked in conjunction with federal law; 3) the submitted L-2 and L-3 declaration forms, which we have marked, in conjunction with section 1701.306 of the Occupations Code; 4) the marked F-5 forms in conjunction with section 1701.454 of the Occupations Code; 5) the CHRI we have marked in conjunction with section 411.083 of the Government Code; 6) the fingerprint information we have marked in conjunction with section 560.003 of the Government Code; and 7) the marked medical records in accordance with the MPA. The department also must withhold the information we have marked pursuant to sections 552.102(a), 552.117(a)(2), 552.130, and 552.136 of the Government Code. The remaining information must be released to the requestor.

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, toll free, at (888) 672-6787.

Sincerely,



Amy L.S. Shipp
Assistant Attorney General
Open Records Division

ALS/rl

Ref: ID# 358625

Enc. Submitted documents

cc: Requestor
(w/o enclosures)