



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 27, 2009

Mr. David M. Swope
Assistant County Attorney
Harris County Attorney
1019 Congress, 15th Floor
Houston, Texas 77002

OR2009-15257

Dear Mr. Swope:

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# 359540 (C.A. File No. 09GEN1279 & C.A. File No. 09GEN1280).

The Harris County Constable Precinct 8 (the "constable") received a request for the personnel files of two named officers. You claim that the some of the requested information is excepted from disclosure under sections 552.101, 552.115, 552.1175, 552.130, 552.136, and 552.147 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we address the constable's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether information is excepted from public disclosure. Pursuant to section 552.301(b) of the Government Code, a governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(a), (b). The constable received the request for information on August 7, 2009. Although you timely raised sections 552.101, 552.1175, 552.130, 552.136, and 552.147 of the Government Code, you did not raise section 552.115

¹Although the constable also raises section 552.102 of the Government Code, the constable has provided no arguments explaining how this exception is applicable to the submitted information. Therefore, we assume that the constable no longer asserts this section. *See* Gov't Code §§ 552.301, .302.

until August 24, 2009. Thus, with respect to section 552.115, the constable failed to comply with the procedural requirements mandated by section 552.301.

Generally, a governmental body's failure to comply with section 552.301 results in the waiver of its claims under the exception at issue, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *City of Dallas v. Abbott*, 279 S.W.3d 806, 811 (Tex. App.—2007, pet. granted); *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason exists when third party interests are at stake or when information is confidential under other law. Open Records Decision No. 177 (1977). Because the applicability of section 552.115 can provide a compelling reason to withhold information, we will consider the applicability of your claim under this exception. Additionally, we will consider the applicability of your claims under sections 552.101, 552.1175, 552.130, 552.136, and 552.147. *See* Gov't Code § 552.302; *see also* Open Records Decision No. 150 at 2 (1977).

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. Section 552.101 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). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return or with respect to the determination of the existence, or possible existence, of liability . . . for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense[.]" *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 constable must withhold the submitted 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.

Section 552.101 also encompasses section 1324a of title 8 of the United States Code, which provides that an Employment Eligibility Verification Form I-9 "may not be used for purposes other than 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 submitted I-9 forms under the Act would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we find the I-9 forms we have marked are confidential under section 552.101 of the Government Code, and

may only be released in compliance with the federal laws and regulations governing the employment verification system.

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), .002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), .003 (biometric identifiers in possession of governmental body exempt from disclosure under the Act). You do not inform us, and the submitted information does not indicate, that section 560.002 permits the disclosure of the submitted fingerprint information. Therefore, the constable must withhold the information we have marked under section 552.101 in conjunction with section 560.003 of the Government Code.

The submitted information also contains L-2 Declaration of Medical Condition and L-3 Declaration of Psychological and Emotional Health forms required by 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 the following:

(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 determine that the constable must withhold the submitted L-2 and L-3 declaration forms we have marked under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information 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. This office has found that personal financial information not relating to the financial transaction between an individual and a governmental body and the compilation of an individual's criminal history are generally excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990); *cf. United States Dep't of Justice v. Reporters Comm.*, 489 U.S. at 764.

Upon review, we find a portion of the remaining information is highly intimate or embarrassing and not of legitimate public interest. Therefore, the constable must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, you have not demonstrated the remaining information you have marked is highly intimate or embarrassing and not of legitimate public interest. Therefore, the remaining information you have marked may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

You assert that some of the remaining information contains confidential criminal history record information ("CHRI"). Section 552.101 also encompasses CHRI generated by the National Crime Information Center or by the Texas Crime Information Center. *See* Title 28 of part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. *See* 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 DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083. We note that the term CHRI does not include driving record information. *See* Gov't Code § 411.082(2)(B). Upon review, we find that none of the remaining information consists of CHRI for the purposes of chapter 411. Accordingly, the constable may not withhold any of this information under section 552.101 on that basis.

Section 552.115(a) of the Government Code provides that "[a] birth or death record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official is excepted from the requirements of Section 552.021[.]" *Id.* § 552.115(a). Section 552.115 only applies to information maintained by the bureau of vital statistics or local registration official, and not to information held by the constable. *See* Open Records Decision No. 338 (1982). Therefore, none of the information at issue may be withheld under section 552.115.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home address, home telephone number, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code.² Gov't Code § 552.117(a)(2). We note that section 552.117 is not applicable to officers' names, ages, work telephone numbers, and birth dates. *Id.* § 552.117(a). Section 552.117(a)(2) only applies to records that a governmental body is holding in an employment capacity. 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 constable must withhold the named officers' information we have marked under section 552.117(a)(2) of the Government Code.³ However, the constable must only withhold cellular telephone numbers we have marked if the officers at issue paid for the service with their own funds.

The personal information of those licensed peace officers who are not current or former employees of the constable may be subject to section 552.1175. 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;

(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

²The 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).

³As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

(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(a), (b). We have marked personal information of individuals who were not employed by the constable. If these individuals are still licensed peace officers and elect to restrict access to their information in accordance with section 552.1175(b), the constable must withhold the marked information under section 552.1175 of the Government Code. If the individuals are no longer licensed peace officers or if no election is made, the constable may not withhold those individuals' personal information under section 552.1175.

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 state [or] a motor vehicle title or registration issued by an agency of this state." *Id.* § 552.130(a)(1), (2). Accordingly, except as we have marked for release, the constable must withhold the driver's license and motor vehicle record information you have marked, as well as the information we have marked, under section 552.130 of the Government Code.

Section 552.136 states that "[n]otwithstanding any other provision of [the Act], 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). An access device number is one that may be used to "(1) obtain money, goods, services, or another thing of value; or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument." *Id.* § 552.136(a). Accordingly, the constable must withhold the information we have marked under section 552.136 of the Government Code.

Finally, section 552.137 of the Government Code provides "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure. *Id.* § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. Gov't Code § 552.137(c). Thus, the constable must withhold the personal e-mail addresses we have marked under section 552.137, unless the owners of the e-mail addresses have affirmatively consented to their public disclosure.

In summary, the constable must withhold the following under section 552.101 of the Government Code: (1) the marked W-4 forms pursuant to section 6103(a) of title 26 of the United States Code; (2) the marked I-9 forms in conjunction with federal law; (3) the marked L-2 and L-3 declaration forms in conjunction with section 1701.306 of the Occupations Code; (4) the marked fingerprint information in conjunction with section 560.003 of the Government Code, and; (5) the information we have marked in conjunction with common-law privacy. The constable must withhold the named officers' information we have marked under section 552.117(a)(2) of the Government Code. However, the constable must only

withhold cellular telephone numbers we have marked if the officers at issue paid for the service with their own funds. The constable must withhold the information we have marked under section 552.1175 of the Government Code, to the extent the individuals whose information is at issue are currently licensed peace officers who elected to restrict public access to their personal information. With the exception of the information we have marked for release, the constable must withhold the information you have marked, as well as the information we have marked, under section 552.130 of the Government Code. The constable must also withhold the marked information under sections 552.136 and 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, toll free, at (888) 672-6787.

Sincerely,



Tamara Wilcox
Assistant Attorney General
Open Records Division

TW/dls

Ref: ID# 359540

Enc. Submitted documents

c: Requestor
(w/o enclosures)