



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 1, 2009

Ms. Myrna S. Reingold
Staff Attorney
Galveston County
722 Moody, 5th Floor
Galveston, Texas 77550-2317

OR2009-16951

Dear Ms. Reingold:

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# 362787.

Galveston County (the "county") received a request for the personnel file of a named individual and any documents concerning the basis for the demotion of the named individual. You state you have released some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.117, 552.1175, 552.122, 552.130, and 552.147 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section 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:

¹Although you failed to raise sections 552.117 and 552.1175 of the Government Code within the ten business-day time period prescribed by section 552.301(b), we will address your arguments under these sections, as they are mandatory exceptions to disclosure that a governmental body may not waive. See Gov't Code §§ 552.007, .301, .302, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

(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). Upon review, we find information we have marked constitutes confidential medical records. We note the requestor's client is the individual at issue in the marked medical records. As such, the requestor may have a right of access to the marked medical records under the MPA. Medical records must be released on receipt of a signed, written consent from the patient, provided 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. If the requestor provides proper consent in accordance with the MPA, the marked medical records must be released. If the requestor does not provide proper consent, the marked medical records must be withheld under section 552.101 of the Government Code in conjunction with the MPA.

Next, you assert the submitted information includes fingerprints, the public availability of which is governed by chapter 560 of the Government Code. *See* Gov't Code §§ 560.001(1) ("biometric identifier" means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry), .003 (biometric identifier in possession of governmental body is exempt from disclosure under Act). Section 552.101 of the Government Code also encompasses chapter 560 of the Government Code. Section 560.002 provides, however, that "[a] governmental body that possesses a biometric identifier of an individual . . . may not sell, lease, or otherwise disclose the biometric identifier to another person unless . . . the individual consents to the disclosure[.]" *Id.* § 560.002(1)(A). We note that some of the fingerprints in the submitted information belong to the requestor's client. Thus, the requestor has a right of access to his client's fingerprints under section 560.002(1)(A). *See* Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Therefore, the fingerprints belonging to the requestor's client, which we have marked, must be released to this requestor pursuant to section 560.002 of the Government Code. However, the remaining fingerprints you have marked must be withheld under section 552.101 in conjunction with section 560.003 of the Government Code.

Section 552.101 also encompasses chapter 411 of the Government Code which pertains to criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center. *See* Gov't Code § 411.083(a). 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. *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 the DPS may disseminate this information as provided in 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 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. We note, however, that records relating to routine traffic violations are not considered criminal history information. *Cf.* Gov't Code § 411.082(2)(B) (criminal history record information does not include driving record information). Upon review, we agree that a portion of the remaining information, which we have marked, constitutes CHRI for purposes of section 411.083, and must be withheld under section 552.101 of the Government Code. However, the county has failed to establish how any portion of the remaining information you have marked constitutes CHRI for the purposes of chapter 411 of the Government Code. Therefore, no portion of the remaining information may be withheld on that basis.

Section 552.101 of the Government Code also encompasses the Americans with Disabilities Act (the "ADA"), which provides for the confidentiality of certain medical records of employees and applicants. Specifically, the ADA provides that information about the medical conditions and medical histories of applicants or employees must be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. In addition, an employer's medical examination or inquiry into the ability of an employee to perform job-related functions is to be treated as a confidential medical record. 29 C.F.R. § 1630.14(c); *see also* Open Records Decision No. 641 (1996). The Equal Employment Opportunity Commission determined medical information for the purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as, general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). 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). Upon review, we find the county has failed to demonstrate the ADA is applicable to any portion of the remaining information. Accordingly, the county may not withhold any of the remaining information under section 552.101 on that basis.

The submitted information also contains the named officer's 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 county must withhold the submitted L-2 and L-3 declarations you 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. 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). 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 some 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). Upon review, we find that the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the county must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. The county has failed to demonstrate, however, how the remaining information it has marked is highly intimate or embarrassing and not of legitimate public interest. Therefore, the county may not withhold any portion of the remaining information it has marked under section 552.101 in conjunction with common-law privacy.

You also raise section 552.117 of the Government Code for a portion of the remaining information. Section 552.117(a)(2) excepts from disclosure the home address, home telephone number, social security number, and the family member information of a peace officer as defined by article 2.12 of the Code of Criminal Procedure regardless of whether the officer requested confidentiality under sections 552.024 or 552.1175 of the Government Code. Gov't Code § 552.117(a)(2). We are unable to determine from the information provided whether the employee at issue is a licensed peace officer. Thus, we must rule conditionally. If the employee at issue is a licensed peace officer, then the county must withhold the information we have marked under section 552.117(a)(2). If the employee at issue is not currently a licensed peace officer, then the marked information may not be withheld under section 552.117(a)(2).

If the employee at issue is not a licensed peace officer, then section 552.117(a)(1) may apply to her personal information. Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. *Id.* § 552.117(a)(1). The county may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. The submitted information does not reflect whether the employee whose information is at issue elected to keep her information confidential pursuant to section 552.024 of the Government Code prior to the county receiving the request at issue. If the employee at issue made a timely election under section 552.024, the county must withhold the marked information under section 552.117(a)(1).²

Section 552.122(b) of the Government Code excepts from disclosure test items developed by a licensing agency or governmental body. *See id.* § 552.122(b). In Open Records

²As our ruling for this information is dispositive, we need not address your remaining argument against its disclosure. Further, we note that the requestor has a special right of access to otherwise confidential information that pertains to the requestor's client. *See* Gov't Code 552.023 (a person or a person's authorized representative has special right of access, beyond that of the general public, to information that pertains to that person).

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. Whether information falls within the section 552.122 exception must be determined on a case-by-case basis. *See* Open Records Decision No. 626 at 6. 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 inform us that the remaining information includes an examination created by the county and used by the county to determine whether individuals have the ability and knowledge base to effectively satisfy the demands of certain positions. You also state that the county continues to administer the exam, and thus, releasing the exam questions and their answers would compromise its integrity in the future. Based on your representations and our review of the submitted information, we find that the submitted exam questions constitute "test items" under section 552.122(b) and that the release of these questions would compromise the effectiveness of future examinations. We also find that the release of the answers to these questions would tend to reveal the questions themselves. Accordingly, we conclude that the county may withhold the submitted questions, along with their corresponding answers, under section 552.122(b) of the Government Code.

Section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle operator's or driver's license or motor vehicle title or registration issued by an agency of this state. *See* Gov't Code § 552.130(a)(1)-(2). Because this exception protects personal privacy, the requestor has a special right of access to his client's own motor vehicle information under section 552.023 of the Government Code, and that information may not be withheld from this requestor 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 himself). The county must withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code.

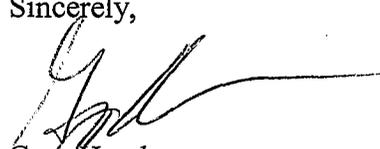
In summary, the marked medical records must be released or withheld on accordance with the MPA. With the exception of the fingerprints belonging to the requestor's client, the county must withhold the remaining fingerprints you have marked under section 560.003 of the Government Code. The county must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 411.083. The county must also withhold the submitted L-2 and L-3 declarations you have marked under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code. The county must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. If the employee at issue is a licensed peace officer, then the county must withhold the information we have marked under section 552.117(a)(2). If the individual at issue is not a licensed peace officer, and if the employee at issue made a timely election under section 552.024, the

county must withhold the marked information under section 552.117(a)(1). The county may withhold the submitted questions, along with their corresponding answers, under section 552.122(b) of the Government Code. The county must withhold the information we have marked under section 552.130 of the Government Code. The remaining information must be released.³

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,



Greg Henderson
Assistant Attorney General
Open Records Division

GH/rl

Ref: ID# 362787

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³The remaining information contains social security numbers. 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* Gov't Code § 552.147(b). However, the requestor has a right to his client's own social security number. *See id.* § 552.023.