



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 9, 2009

Ms. Karen Stead
Assistant City Attorney
Legal Department
City of Tyler
P.O. Box 2039
Tyler, Texas 75710

OR2009-17434

Dear Ms. Stead:

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# 363863.

The City of Tyler (the "city") received two requests from the same requestor for the personnel files of two named officers. You state the city will release some of the requested information to the requestor. You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.102, 552.108, 552.114, 552.115, 552.117, 552.119, and 552.130 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹Although you raise section 552.024 of the Government Code, we note that this section is not an exception to public disclosure under the Act. Rather, this section permits a current or former official or employee of a governmental body to choose whether to allow public access to certain information relating to the current or former official or employee that is held by the employing governmental body. See Gov't Code § 552.024. Additionally, although you raise section 552.1175 of the Government Code for some of the submitted information, section 552.117(a)(2) is the applicable exception for this type of information.

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.

Initially, you raise the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-8 for some of the information at issue. 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 city 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 information at issue.

First, we address your argument to withhold the officers' internal affairs files. 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 exception encompasses information that other statutes make confidential. You raise section 552.101 in conjunction with section 143.089 of the Local Government Code for the submitted personnel records. You state that the city is a civil service city under chapter 143 of the Local Government Code. Section 143.089 provides for the existence of two different types of personnel files relating to a police officer: one that must be maintained as part of the officer's civil service file and another the police department may maintain for its own internal use. *See* Local Gov't Code § 143.089(a), (g). The officer's civil service file must

contain certain specified items, including commendations, periodic evaluations by the police officer's supervisor, and documents relating to any misconduct in which the department took disciplinary action against the officer under chapter 143 of the Local Government Code. *Id.* § 143.089(a)(1)-(2). Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *Id.* §§ 143.051-.055; *see* Attorney General Opinion JC-0257 (written reprimand is not disciplinary action for purposes of Local Gov't Code chapter 143).

In cases in which a police department investigates a police officer's misconduct and takes disciplinary action against an officer, it is required by section 143.089(a)(2) to place all investigatory records relating to the investigation and disciplinary action, including background documents such as complaints, witness statements, and documents of like nature from individuals who were not in a supervisory capacity, in the police officer's civil service file maintained under section 143.089(a). *See Abbott v. Corpus Christi*, 109 S.W.3d 113, 122 (Tex. App.—Austin 2003, no pet.). All investigatory materials in a case resulting in disciplinary action are "from the employing department" when they are held by or are in the possession of the department because of its investigation into a police officer's misconduct, and the department must forward them to the civil service commission for placement in the civil service personnel file.³ *Id.* Such records may not be withheld under section 552.101 of the Government Code in conjunction with section 143.089 of the Local Government Code. *See* Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990). However, information maintained in a police department's internal file pursuant to section 143.089(g) is confidential and must not be released. *City of San Antonio v. Tex. Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You state that portions of the submitted information are maintained in the Tyler Police Department's (the "department") internal affairs files of the two named officers as authorized under section 143.089(g) of the Local Government Code. Based on your representations and our review, we agree that the city must withhold the information in the officers' internal affairs files that you have marked under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code.

We next address your arguments to withhold portions of the submitted personnel files of the named officers. 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"

³Section 143.089(g) requires a police or fire department that receives a request for information maintained in a file under section 143.089(g) to refer that person to the civil service director or the director's designee.

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 city must withhold the submitted W-2 and W-4 forms 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.

You indicate that the personnel files contain I-9 forms that are confidential under section 552.101 of the Government Code in conjunction with federal law. Section 1324a of title 8 of the United States Code 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). However, after reviewing the submitted personnel files, we find that they do not contain any I-9 forms. Accordingly, we conclude that the city may not withhold any portion of the personnel files under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code.

Next, section 552.101 also encompasses section 1703.306 of the Occupations Code, which provides that "[a] governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information." Occ. Code § 1703.306(b). Upon review, we find that none of the remaining information consists of polygraph information. Accordingly, the city may not withhold any of this information under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.

You assert that the remaining information includes criminal history record information ("CHRI"). Section 552.101 also encompasses laws that make CHRI confidential. CHRI generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential under federal and state law. 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. Open Records Decision No. 565 at 7 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* You indicate the remaining information includes CHRI excepted under chapter 411 of the Government Code. Upon review, however, we find that none of the remaining information was generated by the NCIC or TCIC. Accordingly, we find you have not demonstrated how any portion of the information at issue constitutes CHRI for purposes of chapter 411, and no portion of this information may be withheld on this basis.

You next claim that some of the remaining information is confidential under section 552.101 of the Government Code in conjunction with the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code. 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.

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). Upon review, we conclude none of the submitted information consists of medical records that are subject to the MPA and none of it may be withheld on that basis.

You also raise section 552.101 of the Government Code in conjunction with the Americans with Disabilities Act (the "ADA"). The ADA 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. Upon review, we find the city has failed to demonstrate the ADA is applicable to any portion of the information at issue. Accordingly, the city may not withhold any of the remaining information under section 552.101 on that basis.

Next, you indicate the remaining information contains psychological evaluations. Section 552.101 also encompasses chapter 611 of the Health and Safety Code, which provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) states that "[c]ommunications 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). However, upon review, we find that the remaining information does not contain communications between a patient and a professional or records of the identity, diagnosis, evaluation, or treatment of a patient. Therefore, no part of the remaining information is confidential under section 611.002, and none of it may be withheld under section 552.101 on that basis.

Next, you assert that the remaining information contains the names of juvenile offenders. Section 552.101 also encompasses section 58.007 of the Family Code, which provides in part:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
- (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

Fam. Code § 58.007(c). Section 58.007(c) is applicable to records of juvenile delinquent conduct or conduct indicating a need for supervision that occurred on or after September 1, 1997. *See* Open Records Decision No. 644 (1996). Section 58.007 is not applicable to information that relates to a juvenile as a complainant, victim, witness, or other involved party and not as a suspect or offender. Upon review, we find that none of the remaining information identifies a juvenile suspect or offender. We therefore conclude that the city may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code.

Section 552.102(a) of the Government Code excepts from public disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" Gov't Code § 552.102(a). Section 552.102 is applicable to information that relates to public officials and employees. *See* Open Records Decision No. 327 at 2 (1982) (anything relating to employee's employment and its terms constitutes information relevant to person's employment relationship and is part of employee's personnel file). In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled the test to be applied to information protected under section 552.102 is the same test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101. Accordingly, we will consider your privacy claims under both sections 552.101 and 552.102 together.

Common-law privacy 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. 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. 540 S.W.2d at 683. This office has also found that personal financial information not relating to the financial transaction between an individual and a governmental body is generally excepted from disclosure under common-law privacy. *See* Open Records Decision No. 600 (1992) (public employee's withholding allowance certificate, designation of beneficiary of employee's retirement benefits, direct deposit authorization, and employee's decisions regarding voluntary benefits programs, among others, protected under common-law privacy). Upon review, we find that the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the city must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. However, we find that no portion of the remaining information at issue is highly intimate or embarrassing or not of legitimate public interest. Therefore, none of the remaining information at issue may be withheld under common-law privacy.

You indicate portions of the remaining information are excepted from disclosure under section 552.108, which provides in pertinent part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

...

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication;

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

...

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or

Gov't Code § 552.108(a)(2), (b)(2). A governmental body claiming subsection 552.108(a)(2) or 552.108(b)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. Upon review, we find that you have failed to demonstrate, nor does the information reflect, that any of the remaining information consists of law enforcement

records relating to investigations that did not result in a conviction or deferred adjudication. Therefore, you have not met your burden under subsection 552.108(a)(2) or 552.108(b)(2). Accordingly, the city may not withhold any of the remaining information under section 552.108 of the Government Code.

You seek to withhold portions of the remaining information under section 552.114 of the Government Code, which excepts from disclosure student records "at an educational institution funded wholly or partly by state revenue." Gov't Code § 552.114(a). The Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(a), governs the availability of student records held by educational institutions or agencies receiving federal funds. These provisions only apply to student records in the custody of educational institutions and to records directly transferred from the educational institution to the third party. 34 C.F.R. § 99.33(a)(2). The city, which maintains the information at issue, is not an educational institution. *See* Open Records Decision No. 309 at 3 (1983) (City of Fort Worth is not an "educational agency" within FERPA). You do not assert, nor does it appear from our review, that the city received any documents directly from an educational institution; therefore, the city has not established that section 552.114 and FERPA are applicable to the information at issue, and the city may not withhold the information on that basis.

We now turn to your argument that section 552.115 of the Government Code excepts from disclosure the submitted birth certificate. Section 552.115 provides that a birth record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official is excepted from required public disclosure except that a "birth record is public information and available to the public on and after the 75th anniversary of the date of birth as shown on the record filed with the bureau of vital statistics or local registration official." Gov't Code § 552.115(a)(1). Since section 552.115 only applies to a birth certificate maintained by the bureau of vital statistics or a local registration official, the city may not withhold the submitted birth certificate pursuant to that section. *See* Open Records Decision No. 338 (1982).

Section 552.117(a)(2) of the Government Code excepts the home addresses and telephone numbers, social security numbers, and family member information of a peace officer as defined by Article 2.12 of the Code of Criminal Procedure, regardless of whether the officer made an election under section 552.024 of the Government Code. Gov't Code § 552.117(a)(2); *see* Open Records Decision No. 622 (1994). We note that an individual's personal post office box number is not a "home address" and therefore may not be withheld under section 552.117. *See* Gov't Code § 552.117; Open Records Decision No. 622 at 4 (1994) (legislative history makes clear that purpose of section 552.117 is to protect public employees from being harassed at home) (citing House Committee on State Affairs, Bill Analysis, H.B. 1979, 69th Leg. (1985)) (emphasis added). The city must withhold the officers' personal information we have marked under section 552.117(a)(2) of the Government Code.

You assert that the officers' photographs should be withheld from disclosure under section 552.119 of the Government Code, which provides as follows:

(a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under Section 51.212, Education Code, the release of which would endanger the life or physical safety of the officer, is excepted from [required public disclosure] unless:

- (1) the officer is under indictment or charged with an offense by information;
- (2) the officer is a party in a fire or police civil service hearing or a case in arbitration; or
- (3) the photograph is introduced as evidence in a judicial proceeding.

(b) A photograph exempt from disclosure under Subsection (a) may be made public only if the peace officer or security officer gives written consent to the disclosure.

Gov't Code § 552.119. Upon review, we find that the city has failed to demonstrate that release of the photographs would endanger the officers' lives or physical safety. Accordingly, the photographs at issue may not be withheld under section 552.119 of the Government Code.

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

Next, you we understand you to assert that some of the information you have marked is excepted from disclosure under 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." Gov't Code § 552.136. 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.* Upon review, we find that you have failed to demonstrate how any of the marked information at issue constitutes access device numbers used to obtain money, goods, services, or another thing of value, or initiate a transfer of funds other than a transfer originated solely by paper

instrument. We therefore conclude the city may not withhold any of the remaining information under section 552.136 of the Government Code.

We note the remaining information contains e-mail addresses that may be subject to section 552.137 of the Government Code.⁴ Section 552.137 states that "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 e-mail addresses we have marked in the submitted information do not appear to be of a type excluded by section 552.137(c). *See id.* § 552.137(c). Accordingly, the city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the city receives consent for their release.

Lastly, we note that the remaining information includes a military discharge record that may be subject to section 552.140 of the Government Code. Section 552.140 provides in part:

(a) This section applies only to a military veteran's Department of Defense Form DD-214 or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003.

Id. § 552.140(a). Section 552.140 provides that a military veteran's DD-214 form or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003 is confidential for a period of seventy-five years and may only be disclosed in accordance with section 552.140 or in accordance with a court order. *See id.* § 552.140(a)-(b). You do not indicate when the city first came into possession of the DD-214 form that we have marked. Nevertheless, to the extent that this form came into the city's possession on or after September 1, 2003, it must be withheld under section 552.140 of the Government Code. To the extent that the DD-214 form came into the city's possession prior to September 1, 2003, it may not be withheld under section 552.140 of the Government Code.

In summary, the city must withhold the information in the officers' internal affairs files under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. In the officers' personnel files, the city must withhold: (1) the W-2 and W-4 forms 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; (2) the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy; (3) the officers' personal information we have marked under

⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

section 552.117(a)(2) of the Government Code; (4) the Texas motor vehicle record information we have marked under section 552.130 of the Government Code; and (5) the e-mail addresses we have marked under section 552.137 of the Government Code, unless the city receives consent for their release. Additionally, to the extent the city came into possession of the marked DD-214 form on or after September 1, 2003, it must be withheld under section 552.140 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,



Adam Leiber
Assistant Attorney General
Open Records Division

ACL/rl

Ref: ID# 363863

Enc. Submitted documents

c: Requestor
(w/o enclosures)