



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 18, 2009

Mr. Robert R. Ray
Assistant City Attorney
City of Longview
P.O. Box 1952
Longview, Texas 75606

OR2009-17927

Dear Mr. Ray:

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# 364640.

The Longview Police Department (the "department") received a request for all documents pertaining to a former department police officer, including his personnel file.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.117, 552.1175, 552.119, 552.130, 552.136, 552.137, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request a copy of the specific information requested or representative samples of this information. *See* Gov't Code § 552.301(e)(1)(D). In this instance, your brief to this office states that the information responsive to this request includes call sheets, the marked parts of which you assert are excepted from disclosure under section 552.101 of the Government Code in conjunction with section 771.061 of the Health and Safety Code and fingerprints which you contend are confidential pursuant to section 552.101 in conjunction with chapter 560 of the Government Code. However, you

¹We note the department received clarification of the information requested. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request).

did not submit any call sheets or fingerprints for our review. We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including fingerprints under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code, without the necessity of requesting an attorney general decision. In regards to the call sheets, we note pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301 results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See* Gov't Code § 552.302; *City of Dallas v. Abbott*, 279 S.W.3d 806, 811 (Tex. App.—Amarillo 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). Although section 552.101 can provide a compelling reason for nondisclosure of information under section 552.302, we have no basis for concluding that any portion of the call sheets is confidential because you failed to submit these records for our review. Therefore, we have no choice but to order you to release these records in their entirety. If you believe any portion of the responsive call sheets are confidential and may not lawfully be released, you must challenge this ruling in court pursuant to section 552.324 of the Government Code.

We also note that information has been redacted from the submitted documents. Section 552.301 of the Government Code prescribes procedures that a governmental body must follow in asking this office to determine whether requested information is excepted from public disclosure, unless the information is the subject of a previous determination. *See* Gov't Code §§ 552.006, .301(a), .302; Open Records Decision No. 673 (2001) (previous determinations). Among other things, a governmental body must submit to this office either the specific information that it seeks to withhold or representative samples if the information is voluminous. *See* Gov't Code § 552.301(e)(1)(D). This office has no means of determining whether redacted information falls within the scope of an exception to disclosure. You do not inform us the department has any authorization to withhold information without first requesting a decision under section 552.301. Therefore, the department must release the information that was redacted from the submitted documents. *See id.* §§ 552.006, .301(a), .302.

Next, we understand you claim the information you have marked as "law enforcement sensitive" is excepted under section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. However, you have not directed our attention to any law, nor are we aware of any law, that makes any portion of this information confidential under section 552.101. *See, e.g.*, Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality).

Therefore, the department may not withhold the information at issue under section 552.101 of the Government Code.

Next, you seek to withhold portions of the submitted information as confidential criminal history. Section 552.101 of the Government Code 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 states 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 Texas Department of Public Safety (the "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 the DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-127. We note that an individual's current involvement in the criminal justice system, including active warrant information, does not constitute criminal history record information. *Id.* § 411.081(b). Upon review, we find none of the submitted information is confidential under section 411.083, and the department may not any portion of it under section 552.101 on that ground.

Next, we address your argument under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code for a portion of the submitted information. Section 552.101 also encompasses section 58.007. Juvenile law enforcement records relating to delinquent conduct or conduct in need of supervision that occurred on or after September 1, 1997 are confidential under section 58.007. *See* Fam. Code § 51.03(a), (b) (defining "delinquent conduct" or "conduct indicating a need for supervision"). For purposes of 58.007, a "child" is a person who is ten years of age or older and under seventeen years of age at the time of the conduct. *Id.* § 51.02(2). The relevant language of section 58.007 reads as follows:

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 Subchapters B, D, and E.

Id. § 58.007(c). Upon review, we find a portion of the submitted information, which we have marked, constitutes a law enforcement record involving juvenile delinquent conduct occurring after September 1, 1997. None of the exceptions in section 58.007 appear to apply. Therefore, the department must withhold the information we have marked under section 552.101 in conjunction with section 58.007(c) of the Family Code. However, the information you seek to withhold under this exception is not a law enforcement record relating to juveniles engaging in delinquent conduct or conduct indicating a need for supervision. Therefore, no portion of the remaining information may be withheld on such basis.

Next, we note the submitted information contains W-4 forms. Section 552.101 of the Government Code also encompasses section 6103(a) of title 26 of the United States Code. This office has held that 26 U.S.C. 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 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). Consequently, the department must withhold the submitted W-4 forms, which 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

You assert a portion of the remaining information consists of an L-2 Declaration of Medical Condition form as required by the Texas Commission on Law Enforcement Officer Standards and Education ("TCLEOSE"). This form is 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:

²As our ruling is dispositive for this information, we do not address your arguments against its disclosure. Further, as previously discussed, we note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including W-4 forms under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code, without the necessity of requesting an attorney general decision.

(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). Upon review, we find the department must withhold the L-2 form we have marked under section 552.101 in conjunction with section 1701.306.³

Next, we address your arguments under common-law privacy for portions of the remaining information. Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which 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 medical information or information indicating disabilities or specific illnesses is 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

³As our ruling for this information is dispositive, we do not address your remaining argument against its disclosure. We again note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including L-2 forms under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code, without the necessity of requesting an attorney general decision.

(1987) (prescription drugs, illnesses, operations, and physical handicaps). This office has also found personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (finding personal financial information to include designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). Further, we have also determined common-law privacy generally protects the identities of juvenile offenders. *See* Open Records Decision No. 384 (1983); *cf.* Fam. Code § 58.007(c). In addition, a compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U. S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (finding significant privacy interest in compilation of individual's criminal history by recognizing distinction between public records found in courthouse files and local police stations and compiled summary of criminal history information). Moreover, we find that a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. We note, however, records relating to routine traffic violations are not considered criminal history record information. *Cf.* Gov't Code § 411.082(2)(B) (criminal history record information does not include driving record information). In addition, this office has also found that the public has a legitimate interest in information relating to employees of governmental bodies and their employment qualifications and job performance. *See* Open Records Decision Nos. 562 at 10 (1990), 542 at 5 (1990); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow).

You assert the internal affairs investigation involves a claim of sexual harassment and seek to withhold this information under section 552.101 in conjunction with common-law privacy. *See Morales v. Ellen*, 840 S.W.2d 519, 525 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate and embarrassing information and public did not have a legitimate interest in such information). However, upon review, we find the department did not conduct a sexual harassment investigation. In addition, the department did not receive a sexual harassment complaint against the department. You have failed to demonstrate how any portion of the internal affairs investigation constitutes highly intimate or embarrassing information, the release of which would be highly objectionable to a reasonable person.

Upon review, we agree some of the remaining information is confidential under common-law privacy. We have marked this information and the department must withhold it under

section 552.101.⁴ However, the remaining information you have marked is either not highly intimate or embarrassing, or it is of legitimate public interest. Therefore, none of the remaining information is confidential under common-law privacy, and the department may not withhold it on that ground.

We note a portion of the remaining information concerns sex offenders who are subject to registration under chapter 62 of the Code of Criminal Procedure. Section 552.101 of the Government Code also encompasses article 62.051 of the Code of Criminal Procedure, which requires a sex offender registrant to provide the following information for the Department of Public Safety ("DPS") sex offender registration database: the person's full name; each alias; date of birth; sex; race; height; weight; eye color; hair color; social security number; driver's license number; shoe size; home address; a recent color photograph, or if possible, an electronic image of the person; a complete set of fingerprints; the type of offense the person was convicted of; the age of the victim; the date of conviction; the punishment received; an indication as to whether the person is discharged, paroled, or released on juvenile probation, community supervision, or mandatory supervision; an indication of each license, as defined by article 62.005(g), that is held or sought by the person; an indication as to whether the person is or will be employed, carrying on a vocation, or a student at a particular public or private institution of higher education in this state or another state, and the name and address of that institution; and any other information required by DPS. *See* Crim. Proc. Code art. 62.051(c). This information is public information with the exception of the person's social security number, driver's license number, telephone number, all information required by DPS outside of the enumerated categories of information, and any information that would identify the victim of the offense for which the person is subject to registration. *See id.* art. 62.005(b). To the extent the information we have marked contains sex offender information subject to article 62.005, the department must withhold or release this sex offender information in accordance with article 62.005(b) of the Code of Criminal Procedure.

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.⁵ Gov't Code § 552.117(a)(2). We note 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). We also note a post office box number is not a "home address" for purposes of section 552.117. *See* Gov't Code

⁴As our ruling for this information is dispositive, we do not address your remaining arguments against its disclosure.

⁵"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

§ 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. 1976, 69th Leg. (1985); Senate Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985)) (emphasis added). Accordingly, the department must withhold the information we have marked pursuant to section 552.117(a)(2); however, the department may only withhold the marked cellular telephone number if the officer at issue paid for his cellular telephone with his own funds.⁶

Section 552.1175 of the Government Code 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

(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)(1), (b). Section 552.1175 also encompasses personal cellular telephone numbers if the cellular telephone service is not paid for by a governmental body. *See* ORD 506 at 5-6. We have marked information concerning peace officers the department does not hold in an employment context. The department must withhold the information we have marked under section 552.1175 to the extent the peace officers at issue elected to restrict access to the information in accordance with section 552.1175(b); however, the department may only withhold the marked cellular telephone numbers if the officers at issue paid for the cellular telephone service with personal funds.

You raise section 552.130 of the Government Code for portions of the remaining information. Section 552.130 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]

⁶As our ruling for this information is dispositive, we do not address your remaining arguments against its disclosure.

a motor vehicle title or registration issued by an agency of this state[.]” *Id.* § 552.130. Accordingly, the department must withhold the information you have marked under section 552.130.⁷

Finally, you assert the e-mail address you have marked is confidential under section 552.137 of the Government Code. Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *Id.* § 552.137(a)-(c). The e-mail address you have marked does not appear to be specifically excluded by section 552.137(c). Therefore, the department must withhold the e-mail address you have marked under section 552.137, unless the owner of the e-mail address has affirmatively consented to its release.⁸

In summary, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with (1) section 58.007 of the Family Code, (2) section 6103(a) of title 26 of the United States Code, (3) section 1701.306 of the Occupations Code, and (4) common-law privacy. To the extent the information we have marked contains sex offender information subject to article 62.005 of the Code of Criminal Procedure, the department must withhold or release this information in accordance with article 62.005(b) of the Code of Criminal Procedure. The department must withhold the information we have marked under section 552.117(a)(2) of the Government Code; however, the cellular telephone number we have marked may only be withheld if the officer at issue paid for the cellular telephone with his own funds. The department must withhold the information we have marked under section 552.1175 of the Government Code to the extent the peace officers at issue elected to restrict public access to their personal information; however, the department may only withhold the marked cellular telephone numbers we have marked if the officers paid for the cellular service with their own funds. The department must withhold the Texas motor vehicle record information you have marked under section 552.130 of the Government Code, and the e-mail address you have marked under section 552.137 of the Government Code unless its owner consents to its release. The remaining information must be released.

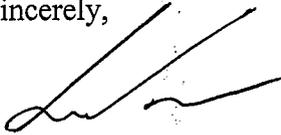
⁷As our ruling for this information is dispositive, we do not address your remaining arguments against its disclosure. As previously noted, this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas driver’s license numbers under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.

⁸We again note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/eeg

Ref: ID# 364640

Enc. Submitted documents

c: Requestor
(w/o enclosures)