



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 6, 2011

Ms. Michelle M. Fraga
Assistant County Attorney
County of Harris
1019 Congress, 15th Floor
Houston, Texas 77002

OR2011-00361

Dear Ms. Fraga:

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# 405154 (C.A. File Nos. 10GEN2408 and 10GEN2592).

The Harris County Constable's Office, Precinct Five (the "constable") received two similar requests for a named deputy's personnel file. You state the constable has released some of the requested information to both requestors, as well as information with redactions made per agreement with the first requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.117, 551.1175, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.108(a)(2) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . 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[.]" Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(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. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). Section 552.108(a)(2) is applicable only if the information at issue relates to a concluded

criminal case that did not result in a conviction or a deferred adjudication. Section 552.108(a)(2) is not applicable to records of an internal affairs investigation that is purely administrative in nature and did not involve the criminal investigation or prosecution of an officer's alleged misconduct. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.) (section 552.108 not applicable to information police department holds as employer); *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution). You state the submitted information includes three internal affairs investigations. You do not provide any arguments explaining how the internal investigations resulted in criminal investigations or prosecutions that concluded in results other than conviction or deferred adjudication. We therefore conclude the constable may not withhold the submitted information pertaining to the three investigations, including the two corresponding videos, under section 552.108(a)(2) of the Government Code.

We note the submitted information includes a W-4 form that is confidential under federal law.¹ 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. This section encompasses information protected by other statutes, such as 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[.]” 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), *dismissed in part, aff'd in part, vacated in part, and remanded*, 993 F.2d 1111 (4th Cir. 1993). Accordingly, the constable must withhold the W-4 form we have marked pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

We note the remaining information contains confidential criminal history record information (“CHRI”). Section 552.101 of the Government Code also encompasses laws that make CHRI confidential. CHRI generated by the National Crime Information Center or by the

¹The 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).

Texas Crime Information Center is confidential under federal and state law. CHRI means "information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions." Gov't Code § 411.082(2). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI obtained from the National Crime Information Center network or other states. *See* 28 C.F.R. § 20.21. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. Open Records Decision No. 565 at 7 (1990); *see generally* Gov't Code ch. 411 subch. F. Section 411.083 of the Government Code deems confidential CHRI the Texas Department of Public Safety ("DPS") maintains, except 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). Thus, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. However, section 411.083 does not apply to active warrant information or other information relating to one's current involvement with the criminal justice system. *See id.* § 411.081(b) (police department allowed to disclose information pertaining to person's current involvement in the criminal justice system). We also note that the term CHRI does not include driving record information. *See id.* § 411.082(2)(B). Accordingly, the constable must withhold the CHRI we have marked under section 552.101 in conjunction with federal law and chapter 411 of the Government Code.

We note the remaining information contains a fingerprint. Section 552.101 also encompasses section 560.003 of the Government Code, which provides, "A biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act]." Gov't Code § 560.003; *see also id.* §§ 560.001 (defining "biometric identifier" to include fingerprints), .002 (governmental body may not sell, lease, or otherwise disclose individual's biometric identifier to another person unless individual consents to disclosure). Therefore, the constable must withhold the fingerprint we have marked under section 552.101 in conjunction with section 560.003 of the Government Code.

Section 552.101 of the Government Code also encompasses section 1703.306 of the Occupations Code, which provides:

- (a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:
 - (1) the examinee or any other person specifically designated in writing by the examinee;

- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

(b) The [Texas Department of Licensing and Regulation] or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Occ. Code § 1703.306. Upon review we agree the remaining information contains information that was acquired from a polygraph examination and is, therefore, within the scope of section 1703.306. It does not appear either requestor falls into any of the categories of individuals who are authorized to receive the polygraph information under section 1703.306(a). Accordingly, the constable must withhold the polygraph information we have marked under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.

You contend some of the remaining information is protected under common-law privacy. Section 552.101 of the Government Code also encompasses the common-law right of privacy, which protects information if it (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). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. Whether information is subject to a legitimate public interest and therefore not protected by common-law privacy must be determined on a case-by-case basis. *See* Open Records Decision No. 373 (1983).

This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate or embarrassing. *See* Open Records Decision Nos. 600 at 9-10 (1992) (employee's designation

of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, 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), 373 (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). However, there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* ORD Nos. 600 at 9 (information revealing that employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure), 545 (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common-law privacy). Upon our review, we agree the remaining information contains personal financial details that are not of legitimate public interest. Therefore, we conclude the constable must withhold this information, which we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy.

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) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). This office has found, however, the public has a legitimate interest in information relating to applicants and employees of governmental bodies and their employment qualifications and job performance, especially where the applicant was seeking a position in law enforcement. *See* Open Records Decision Nos. 562 at 10 (1990), 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 444 (1986), 423 at 2 (1984) (scope of public employee privacy is narrow). Although the remaining information contains criminal history compilations, this information was obtained by the constable in the context of hiring the named deputy. Therefore, this information is of legitimate public interest and may not be withheld under section 552.101 of the Government Code on the basis of common-law privacy.

We note the majority of the remaining information pertains to employment application documents, complaints, and investigations of alleged employee misconduct. Although some of this information may be considered highly intimate or embarrassing, we find there is a legitimate public interest in information related to the job performance of the named deputy. Therefore, none of the remaining information may be withheld under section 552.101 of the Government Code on the basis of common-law privacy.

You also claim the submitted information is excepted from disclosure under section 552.102 of the Government Code. Section 552.102(a) excepts from 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). The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex. & The Dallas Morning News, Ltd.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010) (Dec. 20, 2010, motions for reconsideration and rehearing pending). Having carefully reviewed the information at issue, we have marked the information that must be withheld under section 552.102(a) of the Government Code. The remaining information is not excepted under section 552.102(a) and may not be withheld on that basis.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the current and former home addresses and telephone numbers, social security number, and family member information of a peace officer, regardless of whether the peace officer made an election under section 552.024 of the Government Code. Gov't Code § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Section 552.117(a)(2) protects a peace officer's personal cellular telephone number if the officer pays for the cellular telephone service with his personal funds. Open Records Decision No. 670 at 6 (2001); *cf.* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 of the Government Code not applicable to numbers for cellular mobile phones installed in county officials' and employees' private vehicles and intended for official business). Accordingly, the constable must withhold the information we have marked in the remaining information under section 552.117(a)(2) of the Government Code.² However, the constable must withhold the marked cellular telephone numbers of peace officers only if the officers pay for the cellular telephone service with personal funds.

We note the remaining information contains information subject to section 552.130 of the Government Code. Section 552.130 provides 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). Upon review, we find the video recording labeled "Surveillance Camera Tape" and the remaining information contain Texas motor vehicle record information. Thus, the constable must withhold the discernable Texas license plate numbers from the video recording at issue and the Texas driver's license information, license plate information, and copy of a Texas driver's license

²As our ruling is dispositive of this information, we need not address your remaining arguments under sections 552.1175 and 552.147 of the Government Code against disclosure of portions of this information. We note the previous determination issued in Open Records Decision No. 670 authorizes all governmental bodies to withhold the current and former home addresses and telephone numbers, personal cellular telephone and pager numbers, social security numbers, and family member information of peace officers under section 552.117(a)(2) of the Government Code without the necessity of requesting an attorney general decision.

we have marked in the remaining information under section 552.130 of the Government Code. We note that if the constable lacks the technical capability to redact the information we have indicated in the video, the constable must withhold the video at issue in its entirety. *See* Open Records Decision No. 364 (1983).

We note portions of the remaining information are bank account and bank routing numbers. Section 552.136 of the Government Code states, "Notwithstanding 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(b); *see also id.* § 552.136(a) (defining "access device"). Accordingly, we find the constable must withhold the bank account and bank routing numbers we have marked under section 552.136 of the Government Code.

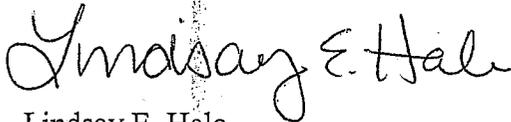
In summary, the constable must withhold the following under section 552.101 of the Government Code: (1) the W-4 form we have marked in conjunction with section 6103(a) of title 26 of the United States Code; (2) the CHRI we have marked in conjunction with federal law and chapter 411 of the Government Code; (3) the fingerprint we have marked in conjunction with section 560.003 of the Government Code; (4) the polygraph information we have marked in conjunction with section 1703.306 of the Occupations Code; and (5) the personal financial information we have marked in conjunction with common-law privacy. The constable must also withhold: (1) the information we have marked under section 552.102(a) of the Government Code; (2) the peace officers' personal information we have marked under section 552.117(a)(2) of the Government Code; however, the peace officers' cellular telephone numbers must be withheld only if the officers pay for the cellular telephone service with personal funds; (3) the discernible Texas license plate numbers within the video recording we have indicated and Texas motor vehicle record information we have marked under section 552.130 of the Government Code; and (4) the bank account and bank routing numbers we have marked under section 552.136 of the Government Code.³ The constable must release the remaining submitted information.

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.

³We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including: direct deposit authorization forms under section 552.101 of the Government Code in conjunction with common-law privacy; 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; a fingerprint under section 552.101 in conjunction with section 560.003 of the Government Code; a Texas driver's license number, a copy of a Texas driver's license, a Texas license plate number, and the portion of any video depicting a discernible Texas license plate number under section 552.130 of the Government Code; and bank account and bank routing numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

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,

A handwritten signature in cursive script that reads "Lindsay E. Hale".

Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/em

Ref: ID# 405154

Enc. Submitted documents

c: Requestors
(w/o enclosures)