



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 7, 2011

Mr. David Daugherty
County Attorney
Harris County
1019 Congress, 15th Floor
Houston, Texas 77002

OR2011-00435

Dear Mr. Daugherty:

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# 405284 (C. A. File No. 10GEN2456).

The Harris County Sheriff's Office (the "sheriff") received a request for a named former employee's personnel records. You state the sheriff has released some responsive records to the requestor. You state the sheriff is withholding portions of the responsive information pursuant to Open Records Decision No. 684 (2009).¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.117, 552.1175, 552.130, 552.136, and 552.147 of the Government Code. We have considered the exceptions you

¹Open Records Decision No. 684 is 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; a Form I-9 and attachments under section 552.101 in conjunction with section 1324a of title 8 of the United States Code; W-4 forms under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code; copies of a Texas driver's license under section 552.130 of the Government Code; and bank account and routing numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision. We note this decision does not authorize the withholding of other information on a check or social security cards.

claim and reviewed the submitted information, portions of which consist of representative samples.²

We must first address the sheriff's procedural obligations under the Act. Pursuant to section 552.301(e) of the Government Code, the governmental body is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See* Gov't Code § 552.301(e). You state the sheriff received the request for information at issue on October 18, 2010. Therefore, the sheriff's fifteen-business-day deadline was November 8, 2010. However, your arguments explaining why the stated exceptions apply and the information you seek to withhold were sent to this office in an envelope postmarked November 17, 2010. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Thus, the sheriff failed to comply with the requirements mandated by section 552.301(e).

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(e) results in the legal presumption the requested 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 id.* § 552.302; *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, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). Normally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third-party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). In this instance, sections 552.101, 552.102, 552.117, 552.1175, 552.130, and 552.136 can provide compelling reasons to withhold information for purposes of section 552.302. Thus, we consider these claimed exceptions to disclosure.

Section 552.102(a) of the Government Code 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

²We assume the representative samples of records submitted to this office are 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.

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, however, is not excepted under section 552.102(a) and may not be withheld on that basis.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses information made confidential by other statutes, such as section 1701.454 of the Occupations Code, which governs the release of reports or statements submitted to the Texas Commission on Law Enforcement Officers Standards and Education (“TCLEOSE”). Section 1701.454 provides as follows:

(a) A report or statement submitted to [TCLEOSE] under this subchapter is confidential and is not subject to disclosure under Chapter 552, Government Code, unless the person resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses.

(b) Except as provided by this subchapter, a [TCLEOSE] member or other person may not release the contents of a report or statement submitted under this subchapter.

Occ. Code § 1701.454. The submitted information contains an F-5 (“Report of Separation of Licensee”) report, which does not indicate the deputy at issue resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses. Therefore, the sheriff must withhold the F-5 report we marked pursuant to section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

The submitted information also contains L-2 Declaration of Medical Condition and L-3 Declaration of Psychological and Emotional Health forms required by TCLEOSE. These forms are confidential under section 1701.306 of the Occupations Code, which is also encompassed by section 552.101 of the Government Code. Section 1701.306 provides:

(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.

Id. § 1701.306(a), (b). Thus, we agree the sheriff must withhold the L-2 and L-3 declarations we marked under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations 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.

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

The Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code, is also encompassed by section 552.101 of the Government Code. Section 159.002 of the MPA provides in part the following:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(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.

Id. § 159.002(a)-(c). This office has concluded 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 have marked the submitted medical records. These marked records may only be released in accordance with the MPA.

Section 552.101 of the Government Code also 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 state agencies 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 Department of Public Safety ("DPS") maintains,

except that DPS may disseminate this information in accordance with 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 only release CHRI 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. Furthermore, 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. Upon review, we have marked the portions of the submitted information that constitute confidential CHRI. The sheriff must withhold this marked information under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. *See id.* § 411.083(b)(3).

You raise chapter 560 of the Government Code, which is also encompassed by section 552.101 of the Government Code. Chapter 560 provides that a governmental body may not release fingerprint information except in certain limited circumstances. *See id.* §§ 560.001 (defining "biometric identifier" to include fingerprints), .002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), .003 (biometric identifiers in possession of governmental body exempt from disclosure under the Act). Upon review of the remaining information, we find it does not contain fingerprints. Consequently, the sheriff may not withhold any of the remaining information under section 552.101 in conjunction with section 560.003 of the Government Code.

Section 552.101 of the Government Code also encompasses the common-law right of privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *See 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. In Open Records Decision No. 393 (1983), this office concluded information that either identifies or tends to identify a victim of sexual assault or other sex-related offense must be withheld under common-law privacy. Open Records Decision No. 393 at 2 (1983); *see* Open Records Decision No. 339 (1982); *see also Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information). This office has found some kinds of 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 (1987) (prescription drugs, illnesses, operations, and physical handicaps). This office has also 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), 523 at 3-4 (1989). 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).

However, information relating to routine traffic violations is not private and may not be withheld under section 552.101 on that basis. *Cf. Gov't Code § 411.082(2)(B)* (criminal history record information does not include driving record information). Additionally, there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* ORD 600 at 9 (information revealing that employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure); *see also* Open Decision Nos. 545 (1990) (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common law privacy), 523 (1989). The work behavior of a public employee and the conditions for his or her continued employment are also generally matters of legitimate public interest not protected by the common-law right of privacy. *See* Open Records Decision Nos. 438 (1986). Similarly, information about a public employee's qualifications, disciplinary action and background is not protected by common-law privacy. *See* Open Records Decision Nos. 444 at 5-6 (1986) (public has interest in public employee's qualifications and performance and the circumstances of his resignation or termination), 405 at 2-3 (1983) (public has interest in manner in which public employee performs his job), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former section 552.101), 208 at 2 (1978) (information relating to complaint against public employee and disposition of the complaint is not protected under either the constitutional or common-law right of privacy).

Upon review, we have marked the portions of the remaining information that reveal information that is are highly intimate or embarrassing and of no legitimate public interest in this instance. The sheriff must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, the remaining information at issue involves routine traffic violations or pertains directly to the named former employee's background, qualifications, work conduct, and the reasons for his termination. Additionally, although you claim portions of the submitted information are excepted from disclosure under section 552.101 in conjunction with

common-law privacy and the ruling in *Morales v. Ellen*, none of the remaining information concerns an investigation of sexual harassment. Therefore, we find that *Ellen* is not applicable in this instance. Accordingly, because the remaining information is of legitimate public interest, it may not be withheld under section 552.101 on the basis of common-law privacy.

Some of the remaining information may be subject to section 552.117 of the Government Code. Section 552.117(a)(2) excepts from disclosure the current and former home addresses and telephone numbers, social security number, 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.³ *Id.* § 552.117(a)(2). We note that an individual's personal post office box number is not a "home address" for purposes of section 552.117, and therefore may not be withheld under section 552.117. *See* 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)). Section 552.117 does encompass personal cellular telephone numbers, provided the cellular telephone service is paid for by the employee with his or her own funds. *See* Open Records Decision No. 670 at 6 (2001) (extending section 552.117 exception to personal cellular telephone number and personal pager number of employee who elects to withhold home telephone number in accordance with section 552.024). Accordingly, if the named former employee is a peace officer as defined by article 2.12 of the Code of Criminal Procedure, the sheriff must withhold the information we have marked under section 552.117(a)(2), but may only withhold the cellular telephone and pager numbers if service for those numbers is paid for with the employee's own funds. However, if the individual is no longer a peace officer, then section 552.117(a)(2) is not applicable, but this information may be subject to section 552.117(a)(1).

Section 552.117(a)(1) makes confidential the same types of information covered by section 552.117(a)(2) but for current and former employees of governmental bodies who timely request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the sheriff may withhold information under section 552.117(a)(1) on behalf of the former employee only if the employee made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Thus, if the named former employee timely elected to keep his personal information confidential, the sheriff must withhold the information we have marked under section 552.117(a)(1) of the Government Code, but may only withhold the cellular telephone and pager numbers to the extent service for those numbers is paid for with the employee's own funds. The sheriff may

³"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

not withhold this information under section 552.117(a)(1) if the former employee did not make a timely election to keep the information confidential.⁴

The remaining records contain information concerning peace officers who are not employed by the sheriff. 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). The sheriff must withhold the information we have marked under section 552.1175 of the Government Code to the extent this information relates to peace officers who elect to restrict access to the information in accordance with section 552.1175(b).

Some of the remaining information is excepted under section 552.130 of the Government Code. 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] a motor vehicle title or registration issued by an agency of this state." *Id.* § 552.130(a)(1), (2). The sheriff must withhold the information we have marked under section 552.130 of the Government Code.

Finally, section 552.136 of the Government Code 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." *Id.* § 552.136; *see id.* § 552.136(a) (defining "access device"). The submitted information

⁴Regardless of the applicability of section 552.117, 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).

contains insurance policy numbers that are subject to section 552.136. The sheriff must withhold these numbers, which we have marked, under section 552.136.

In summary, the sheriff must withhold the information we marked under section 552.102(a) of the Government Code. The sheriff must also withhold the F-5 report we marked pursuant to section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code. The sheriff must withhold the L-2 and L-3 declarations we marked under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code. The sheriff must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. The sheriff may only release the marked medical records in accordance with the MPA. The sheriff must withhold the information we marked under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. The sheriff must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. If the named former employee is a peace officer as defined by article 2.12 of the Code of Criminal Procedure, the sheriff must withhold the information we have marked under section 552.117(a)(2) of the Government Code. If the named former employee is not a peace officer, the sheriff must withhold this information under section 552.117(a)(1) of the Government Code if he timely elected to keep this personal information confidential. In either case, the sheriff may only withhold the marked cellular telephone and pager numbers if the service for those numbers is paid for with the employee's own funds. The sheriff must withhold the information we have marked under section 552.1175 of the Government Code to the extent this information relates to peace officers who elect to restrict access to the information in accordance with section 552.1175(b). The sheriff must withhold the information we have marked under sections 552.130 and 552.136 of the Government Code.⁵ The remaining submitted information must be released.⁶

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.

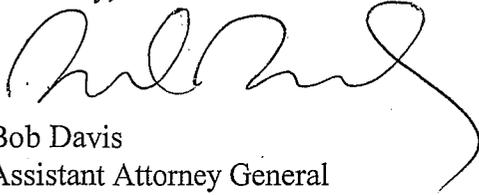
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php,

⁵As previously noted, Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including L-2 and L-3 declarations under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code, Texas driver's license and license plate numbers under section 552.130 of the Government Code, and insurance policy numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

⁶As our ruling is dispositive, we need not address your remaining arguments against disclosure.

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 black ink, appearing to read 'Bob Davis', written in a cursive style.

Bob Davis
Assistant Attorney General
Open Records Division

RSD/tf

Ref: ID# 405284

Enc. Submitted documents

c: Requestor
(w/o enclosures)