



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 31, 2011

Sheriff James "Troop" Estes
Cass County Sheriff's Office
P.O. Box 180
Linden, Texas 75563

OR2011-01561

Dear Sheriff Estes:

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# 407509.

The Cass County Sheriff's Office (the "sheriff") received a request for a named sheriff's employee's personnel file, including his employment application, resume, or other documents used or filed to obtain employment. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.115, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We must address the sheriff's obligations under the Act. Section 552.301 of the Government Code prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Gov't Code § 552.301. Section 552.301(b) requires that a governmental body ask for a decision from this office and state which exceptions apply to the requested information by the tenth business day after receiving the request. *Id.* § 552.301(b). You state that the sheriff received the request for information on November 4, 2010. Accordingly, the tenth business day after the receipt of the request was November 19, 2010. Although you timely submitted your initial request for a decision to this office, you did not raise sections 552.101, 552.115, and 552.117 of the Government Code until November 30, 2010. Thus, with respect to sections 552.101, 552.115, and 552.117, the sheriff failed to comply with the procedural requirements mandated by section 552.301(b).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the waiver of its claims under the exception at issue, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *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 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason exists when third party interests are at stake or when information is confidential under other law. Open Records Decision No. 177 (1977). Because sections 552.101, 552.115, and 552.117 of the Government Code can provide compelling reasons to overcome the presumption of openness, we will address your arguments under these exceptions, as well as your timely raised argument.

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 that other statutes make confidential, such as the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code, which governs access to medical records. *See* Occ. Code §§ 151.001-165.160. Section 159.002 of the Occupations Code 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.

Id. § 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 find the information we have marked constitutes confidential medical records that may only be released in accordance with the MPA.¹

Section 552.101 of the Government Code also encompasses section 1701.306 of the Occupations Code, which provides in relevant part:

¹As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

(a) The [Texas Commission on Law Enforcement Officer Standards and Education "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 the commission. A declaration is not public information.

Occ. Code § 1701.306(a), (b). The remaining information contains an L-2 Declaration of Medical Condition form. This form, which we have marked, must be withheld 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 1701.454 of the Occupations Code, which governs the public availability of an F-5 form ("Report of Separation of Licensee") submitted to TCLEOSE under subchapter J of chapter 1701 of the Occupations Code. Section 1701.454 provides as follows:

(a) A report or statement submitted to the [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.

Id. § 1701.454. The remaining information contains an F-5 "Report of Separation of License Holder" report, which does not indicate the deputy whose information is 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 form we have marked

pursuant to section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

You claim some of the remaining information is excepted under chapter 411 of the Government Code, which is also encompassed by section 552.101 of the Government Code. Criminal history records information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center is confidential. Gov't Code § 411.083(a); Open Records Decision No. 565 (1990). Title 28 of part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. ORD 565. 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 as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-.127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. ORD 565. 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. *See id.* § 411.082(2)(B) (term CHRI does not include driving record information). Upon review, we find some of the remaining information consists of confidential CHRI. Accordingly, the sheriff must withhold this information, which we have marked, pursuant to section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code and federal law. However, none of the remaining information is CHRI for purposes of chapter 411, and it may not be withheld under section 552.101 on that basis.

You claim some of the remaining 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.

You raise section 552.115 of the Government Code for the submitted birth certificate. Section 552.115 excepts from disclosure "[a] birth or death record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official[.]" Gov't Code § 552.115(a). Section 552.115 is applicable only to information maintained by the bureau of vital statistics or local registration officials. *See* Open Records Decision No. 338 (1982) (finding that statutory predecessor to section 552.115 excepted only those birth and death records which are maintained by the bureau of vital statistics and local registration officials). Because section 552.115 does not apply to information held by the sheriff, the submitted birth certificate may not be withheld on this basis.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home address, home telephone number, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with section 552.024 of the Government Code.² Gov't Code § 552.117(a)(2). We note section 552.117 is also applicable to personal cellular telephone numbers, provided 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 telephone numbers paid for by governmental body and intended for official use). But 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) (purpose of section 552.117 is to protect public employees from being harassed at home); *see also* Open Records Decision No. 658 at 4 (1998) (statutory confidentiality provision must be express and cannot be implied). In this instance, the information reflects that the individual whose information is at issue may no longer be employed by the sheriff. If the individual whose information is at issue is currently a licensed peace officer as defined by article 2.12, the sheriff must withhold the personal information we have marked under section 552.117(a)(2) of the Government Code; however, the sheriff may only withhold the marked cellular telephone number if the service for the number is not paid for by the sheriff. If the individual is not currently a licensed peace officer, his personal information may not be withheld under section 552.117(a)(2) of the Government Code.

If the individual is no longer a licensed peace officer, then his personal information may be subject to section 552.117(a)(1) of the Government Code, which excepts from disclosure the home addresses and telephone numbers, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024. Gov't Code § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request

²"Peace officer" is defined by article 2.12 of the Texas Code of Criminal Procedure.

for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Therefore, if the individual whose information is at issue is no longer a licensed peace officer, then to the extent he timely elected confidentiality under section 552.024, the sheriff must withhold the personal information we have marked under section 552.117(a)(1) of the Government Code; however, the sheriff may only withhold the marked cellular telephone number if the service for the number is not paid for by the sheriff. The sheriff may not withhold the marked information under section 552.117(a)(1) if the individual did not timely elect to keep his personal information confidential.³

We note some of the remaining information is subject to section 552.130 of the Government Code, which excepts from disclosure information that relates to a motor vehicle operator's license or driver's license issued by a Texas agency.⁴ Gov't Code § 552.130(a)(1). Therefore, the sheriff must withhold the Texas motor vehicle record information we have marked under section 552.130.

In summary, the medical records we have marked may only be released in accordance with the MPA. The sheriff must withhold the information we have marked under section 552.101 of the Government Code in conjunction with: (1) section 1701.306 of the Occupations Code; (2) section 1701.454 of the Occupations Code; and (3) chapter 411 of the Government Code and federal law. The sheriff must also withhold the information we have marked under section 552.102(a) of the Government Code. If the individual whose information is at issue is currently a licensed peace officer, the sheriff must withhold the personal information we have marked, including the cellular telephone number, if the individual paid for the service with his own funds, under section 552.117(a)(2) of the Government Code. If the individual is no longer a licensed peace officer, then to the extent he timely elected confidentiality under section 552.024 of the Government Code, the sheriff must withhold the marked personal information, including the cellular telephone number if the officer paid for the service with his own funds, under section 552.117(a)(1) of the Government Code. The sheriff must also withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code.⁵ The remaining information must be released.

³Regardless 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. Gov't Code § 552.147(b).

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

⁵Open Records Decision No. 684 (2009) is a previous determination authorizing all governmental bodies to withhold ten categories of information, including L-2 declarations under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code and Texas driver's license numbers and copies of Texas driver's licenses under section 552.130 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,



Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/vb

Ref: ID# 407509

Enc. Submitted documents

c: Requestor
(w/o enclosures)