



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 31, 2011

Mr. O. Charles Buenger
Buenger & Associates
For City of Bruceville-Eddy
3203 Robinson Drive
Waco, Texas 76706

OR2011-01577

Dear Mr. Buenger:

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# 407905.

The Bruceville-Eddy Police Department (the "department"), which you represent, received a request for "sex offender records" pertaining to three named individuals, department policies or memorandums pertaining to sex offender registration, and the personnel file of a named officer. You claim that "dates of birth, residence addresses, driver's license numbers and social security numbers" contained in the requested personnel records "should be redacted," but you raise no exception to disclosure under the Government Code.¹ We have considered your claim and reviewed the submitted information.

Initially, we note you have not submitted the requested sex offender records or policies. To the extent this information existed on the date the department received this request, we assume it has been released. If the department has not released any such information, it must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

We next must address the department's obligations under the Act. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for

¹We note 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).

information it wishes to withhold. Pursuant to section 552.301(b) of the Government Code, the governmental body must request a ruling from this office and state the exceptions to disclosure that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(b). 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 id.* § 552.301(e). The department states it received the request for information on November 8, 2010. Thus, the ten-business-day deadline for requesting a ruling from this office was November 23, 2010, and the fifteen-business-day deadline was December 2, 2010. However, you did not state any claimed exceptions within the ten-business-day deadline, and you failed to submit written comments stating the reasons that would allow the information to be withheld. *See id.* § 552.301(b), (e)(1)(A). Consequently, we find the department failed to comply with the requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *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, 381-2 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness); Open Records Decision No. 319 (1982). 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. Open Records Decision No. 150 at 2 (1977). We note some of the submitted information is subject to sections 552.101, 552.102, 552.117, 552.1175, and 552.130 of the Government Code.² Because these exceptions can provide compelling reasons to withhold information, we will address their applicability to the submitted information.

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 protected by other statutes, such as section 1324a of title 8 of the United States Code. Section 1324a governs I-9 forms and their related documents. This section provides an I-9 form and "any information contained in or appended to such form, may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). Accordingly, we conclude the submitted I-9 forms are confidential for purposes of section 552.101 of the Government Code and may only be released in compliance with the federal laws and regulations governing the employment verification system. *See* 8 U.S.C. § 1324a(b)(1)(B)-(D); 8 C.F.R. § 274a.2(b)(1)(v)(A)-(C).

Prior decisions of this office have held section 6103(a) of title 26 of the United States Code 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 income, payments, 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 the determination of the existence, or possible existence, of liability . . . for any tax, . . . penalty, . . . , or offense[.]" *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). Accordingly, the department must withhold the submitted W-4 form under section 552.101 of the Government Code in conjunction with federal law.

Section 552.101 of the Government Code also encompasses section 1701.454 of the Occupations Code, which governs the release of reports or statements submitted to the Texas Commission on Law Enforcement Officer 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 section, a [TCLEOSE] member or other person may not release the contents of a report or statement submitted under this subchapter. The report or statement may be released only by the [TCLEOSE] employee having the responsibility to maintain the report or statement and only if:

(1) the head of a law enforcement agency or the agency head's designee makes a written request on the agency's letterhead for the report or statement accompanied by the agency head's or designee's signature; and

(2) the person who is the subject of the report or statement authorizes the release by providing a sworn statement on a form supplied by [TCLEOSE] that includes the person's waiver of liability regarding an agency head who is responsible for or who takes action based on the report or statement.

Id. § 1701.454. The submitted information includes F-5 Report of Separation of License Holder forms. In this instance, the named officer did not resign due to substantiated incidents of excessive force or violations of the law other than traffic offenses. Therefore, the department must withhold the submitted F-5 forms pursuant to section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

Section 552.101 also encompasses section 1701.306 of the Occupations Code, which provides the following:

(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 submitted L-2 Declaration of Medical Condition and L-3 Declaration of Psychological and Emotional Health forms under section 552.101 in conjunction with section 1701.306 of the Occupations Code.

Section 552.101 also encompasses chapter 560 of the Government Code, which provides that a governmental body may not release fingerprint information except in certain limited circumstances. *See* Gov't Code §§ 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). You do not inform us, and the submitted information does not indicate, that section 560.002 permits the disclosure of the submitted fingerprint information in this instance. Therefore, the department must withhold the fingerprints we have marked under section 552.101 in conjunction with section 560.003 of the Government Code.

Section 411.083 of the Government Code pertains to 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. *See* Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *See 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. *See 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 conclude the department must withhold the CHRI we have marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code.

Section 552.101 also encompasses the doctrine of common-law privacy. Common-law privacy protects information about an individual if the information (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 highly intimate or 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 that personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from required public disclosure. *See* Open Records Decision Nos. 600 (1992) (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms

allowing employee to allocate pre-tax 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).

We also note the public generally has a legitimate interest in information that relates to public employment and public employees. *See* Open Records Decisions Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 542 (1990), 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow).

Upon review, we find that portions of the remaining information are highly intimate or embarrassing and of no legitimate interest to the public. Accordingly, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

We note the submitted records include information that is excepted from disclosure under section 552.102(a) 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." *Id.* § 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.

Portions of the remaining information may be excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(2) of the Government Code 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 Gov't Code § 552.117(a)(2). Accordingly, if the former employee is a peace officer as defined by article 2.12 of the Code of Criminal Procedure, the department must withhold the types of information we have marked under section 552.117(a)(2).

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

However, if the individual is no longer a peace officer, then section 552.117(a)(2) is not applicable.

If the individual concerned is no longer a peace officer, section 552.117(a)(1) of the Government Code may be applicable to the marked information. We note that 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 department 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. Provided that the former employee timely elected to keep his personal information confidential, the department must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The department may 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.

Section 552.1175 of the Government Code also may be applicable to some of the remaining information. This section provides in part:

(a) This section applies only to:

- (1) peace officers as defined by Article 2.12, Code of Criminal Procedure;
- (2) county jailers as defined by Section 1701.001, Occupations Code;
- (3) current or former employees of the Texas Department of Criminal Justice or of the predecessor in function of the department or any division of the department; and
- (4) commissioned security officers as defined by Section 1702.002, Occupations Code.

(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)-(b). Section 552.1175 encompasses personal cellular telephone or pager numbers, provided that the cellular telephone or pager service is paid for by the employee with his or her own funds. *See* Open Records Decision Nos. 670 at 6 (2001) (statutory predecessor to section 552.117(a)(2) encompassed personal cellular phone numbers and personal pager numbers of peace officers who purchased cellular or pager service with their personal funds), 506 at 5-6 (1988) (section 552.117 not applicable to cellular mobile numbers paid for by governmental body and intended for official use). We also note section 552.1175 does not protect a governmental employee's work telephone number. To the extent the marked information relates to a county jailer under section 1701.001 of the Occupations Code or a peace officer of another governmental entity, the department must withhold this information under section 552.1175 if the individual to whom it pertains elects to restrict access to the information in accordance with section 552.1175(b) and provided the county jailer or licensed peace officer pays for the cellular telephone service with his own funds.

Section 552.130 of the Government Code excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit or a motor vehicle title or registration issued by an agency of this state. *See* Gov't Code § 552.130(a)(1)-(2). The department must withhold the information we have marked under section 552.130 of the Government Code.

In summary, the department must withhold the following under section 552.101 of the Government Code: (1) the I-9 and W-4 forms in conjunction with federal law; (2) the F-5 forms in conjunction with section 1701.454 of the Occupations Code; (3) the L-2 Declaration of Medical Condition and L-3 Declaration of Psychological and Emotional Health forms in conjunction with section 1701.306 of the Occupations Code; (4) the fingerprints we have marked in conjunction with section 560.003 of the Government Code; (5) the CHRI we have marked in conjunction with section 411.083 of the Government Code; and (6) the information we have marked in conjunction with common-law privacy. We have marked the information that must be withheld under section 552.102(a) of the Government Code. Provided that the former employee is currently a peace officer as defined by article 2.12 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. If the former employee is not currently a licensed peace officer as defined by article 2.12, but timely elected to keep his personal information confidential, the department must withhold the information we have marked under section 552.117(a)(1) of the Government Code. To the extent the marked information relates to a county jailer under section 1701.001 of the Occupations Code or a peace officer of another governmental entity, the department must withhold this information under section 552.1175 if the individual to whom it pertains elects to restrict access to the

information in accordance with section 552.1175(b) and provided the county jailer or licensed peace officer pays for the cellular telephone service with his own funds. The department must withhold the information we have marked under section 552.130 of the Government Code. The department must release the remaining information.⁴

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 407905

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴We note Open Records Decision No. 684 (2009) is a previous determination issued to all governmental bodies authorizing them to withhold ten categories of information, including a Form I-9 under section 552.101 in conjunction with section 1324a of title 8 of the United States Code; a W-4 form under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code; L-2 and L-3 declarations under section 552.101 in conjunction with section 1701.306 of the Occupations Code; fingerprints under section 552.101 in conjunction with section 560.003 of the Government Code; and a Texas driver's license number under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.