



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 14, 2011

Ms. Janis K. Hampton
City Attorney
City of Bryan
P.O. Box 1000
Bryan, Texas 77805

OR2011-08419

Dear Ms. Hampton:

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# 420558.

The Bryan Police Department (the "department") received a request for the personnel file of a named officer. You claim that the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, you state the information in Exhibit B is confidential pursuant to section 552.101 of the Government Code. Section 552.101 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 section 143.089 of the Local Government Code. You state the City of Bryan is a civil service city under chapter 143 of the Local Government Code. Section 143.089 contemplates two different types of personnel files: a police officer's civil service file that the civil service director is required to maintain, and an internal file that the police department may maintain for its own use. Local Gov't Code § 143.089(a), (g). In *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946 (Tex. App.—Austin 1993, writ denied), the court addressed a request for information contained in a police officer's personnel file maintained by the police department for its use and the applicability of section 143.089(g) to that file. The records included in the departmental personnel file related to complaints against the police officer for which no disciplinary action

was taken. The court determined that section 143.089(g) made the records confidential. *See* Local Gov't Code at 949; Attorney General Opinion JC-0257 at 6-7 (2000) (addressing functions of section 143.089(a) and (g) files). This confidentiality extends to any records maintained in the internal file that reasonably relate to the police officer's employment relationship. *See City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, pet. denied).

You state the information in Exhibit B is held in a personnel file maintained by the department under section 143.089(g). Based on your representation and our review of the information at issue, we conclude that the department must withhold Exhibit B in its entirety under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code.

Section 552.101 also encompasses the federal Family and Medical Leave Act (the "FMLA"). *See* 29 U.S.C. § 2654 *et seq.* Section 825.500 of chapter V of title 29 of the Code of Federal Regulations identifies the record-keeping requirements for employers that are subject to the FMLA. Subsection (g) of section 825.500 provides that

[r]ecords and documents relating to certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if ADA, as amended, is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements[], except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and
- (3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g). Upon review, we find the information we marked Exhibit D is confidential under section 825.500 of title 29 of the Code of Federal Regulations. Further, we find none of the release provisions of the FMLA apply to the information. Thus, the

department must withhold the marked information under section 552.101 of the Government Code in conjunction with the FMLA.¹

We note the remaining documents in Exhibit D, which we have marked, are subject to the Americans with Disabilities Act (the "ADA"), 42 U.S.C. § 12101 *et seq.*, which is also encompassed by section 552.101 of the Government Code. Because the FMLA defers to the confidentiality provisions of the ADA if the ADA is applicable, we will address whether these documents are confidential under the ADA. The ADA provides for the confidentiality of certain medical records of employees and applicants. *See id.* § 12112(d)(3), (4). Specifically, the ADA provides that information about the medical conditions and medical histories of applicants or employees must be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. *Id.*; 29 C.F.R. § 1630.14(b)(1), (c)(1), (d)(1). In addition, an employer's medical examination or inquiry into the ability of an employee to perform job-related functions is to be treated as a confidential medical record. 29 C.F.R. § 1630.14(c); *see also* Open Records Decision No. 641 (1996). The Equal Employment Opportunity Commission determined medical information for the purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as, general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). Federal regulations define "disability" for the purposes of the ADA as "(i) [a] physical or mental impairment that substantially limits one or more of the major life activities of such individual; (ii) [a] record of such an impairment; or (iii) [b]eing regarded as having such an impairment[.]" 29 C.F.R. § 1630.2(g). The regulations further provide that physical or mental impairment means: (1) any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. *See id.* § 1630.2(h). Upon review, we find the ADA is applicable to the information we have marked in Exhibit D. Accordingly, the department must withhold the information we have marked under section 552.101 in conjunction with the ADA.²

Next, you claim that a portion of Exhibit C, which consists of information pertaining to a medal of valor awarded to the named officer, is subject to section 58.007 of the Family Code.

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

²As our ruling is dispositive for this information, we need not address your argument against the disclosure for this information.

Section 552.101 of the Government Code also encompasses section 58.007 of the Family Code. Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential under section 58.007. Section 58.007(c) provides as follows:

Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
- (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapters B, D, and E.

Fam. Code § 58.007(c). You claim a portion of the medal of valor nomination in Exhibit C is confidential under section 58.007. However, although the nomination references juvenile delinquent conduct, it does not consist of a juvenile law enforcement record for purposes of section 58.007. Therefore, none of the information in Exhibit C is confidential under section 58.007(c) of the Family Code, and the department may not withhold it under section 552.101 of the Government Code on that basis.

Section 552.101 also encompasses the common-law right of privacy. Common-law privacy protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *See 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 established. *Id.* at 681-82. This office has determined common-law privacy generally protects the identities of juvenile offenders. *See Open Records Decision No. 394* (1983); *cf.* Fam. Code § 58.007(c). Upon review, we determine the information we have marked is highly intimate or embarrassing and not of legitimate public interest. Therefore, the department must withhold the information we have marked in the remaining submitted information under section 552.101 in conjunction with common-law privacy.

In summary, the department must withhold Exhibit B under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. The department must withhold the information we marked under section 552.101 of the

Government Code in conjunction with the FMLA and the ADA. The department must withhold the information we have marked in the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy. As you raise no further exceptions to its disclosure, the remaining information must be released.

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,



Laura Ream Lemus
Assistant Attorney General
Open Records Division

LRL/em

Ref: ID# 420558

Enc. Submitted documents

c: Requestor
(w/o enclosures)