



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 15, 2011

Ms. Amy L. Sims  
Assistant City Attorney  
City of Lubbock  
P.O. Box 2000  
Lubbock, Texas 79457-2000

OR2011-18465

Dear Ms. Sims:

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# 439057.

The Lubbock Police Department (the "department") received a request for the personnel file of a named officer and all e-mails sent to or received from the named officer's e-mail account over a specified time period. You claim the requested information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.117, 552.130, 552.137, and 552.147 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed 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. You raise section 552.101 in conjunction with the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-9. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal

---

<sup>1</sup>Although you also raise section 552.108 of the Government Code in conjunction with section 143.089 of the Local Government Code, we note section 552.108 does not encompass other statutory provisions. Additionally, although you also raise section 552.1175 of the Government Code, the proper exception in this instance is section 552.117 of the Government Code because the department holds the information at issue in an employment context.

Standards for Privacy of Individually Identifiable Health Information. *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. pts. 160, 164 (“Privacy Rule”); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, except as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

This office addressed the interplay of the Privacy Rule and the Act in Open Records Decision No. 681 (2004). In that decision, we noted section 164.512 of title 45 of the Code of Federal Regulations provides that a covered entity may use or disclose protected health information to the extent such use or disclosure is required by law and the use or disclosure complies with, and is limited to, the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted the Act “is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public.” *See* ORD 681 at 8; *see also* Gov’t Code §§ 552.002, .003, .021. We, therefore, held that the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. *See Abbott v. Tex. Dep’t of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App.—Austin 2006, no pet.); ORD 681 at 9; *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make information that is subject to disclosure under the Act confidential, the department may not withhold any portion of the submitted information on this basis.

Section 552.101 of the Government Code encompasses section 6103(a) of title 26 of the United States Code, which makes 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[.]” *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). Subsections (c) and (e) of section 6103 are exceptions to the confidentiality provisions of section 6103(a) and provide for the disclosure of tax information to the taxpayer or the taxpayer’s designee. *See* 26 U.S.C. § 6103(c), (e)(1)(A)(I) (tax return information may be disclosed to taxpayer), (e)(7) (information may be disclosed to any person authorized by subsection(e) to obtain such information if Secretary of Treasury determines such disclosure would not seriously impair tax administration); *see also Lake v. Rubin*, 162 F.3d 113 (D.C. Cir. 1998) (26 U.S.C. § 6103 represents exclusive statutory route for taxpayer to gain access to own return information and overrides individual’s right of access under the federal Freedom of Information Act). The submitted information contains

the named officer's W-4 form, which we have marked. This information is confidential under section 6103(a) of title 26 of the United States Code, and the department must withhold it under section 552.101 of the Government Code.

You also claim portions of the remaining information are excepted from public disclosure under section 552.101 in conjunction with section 181.101 of the Health and Safety Code. Section 181.101 provided "[a] covered entity shall comply with the [HIPAA] and Privacy Standards relating to . . . (3) uses and disclosures of protected health information, including requirements relating to consent[.]" Act of June 17, 2001, 77th Leg., R.S., ch. 1511, § 1, sec. 181.101, 2001 Tex. Gen. Laws 5384, 5386. However, that section was repealed effective September 1, 2003. Act of June 17, 2001, 77th Leg., R.S., ch. 1511, § 1, sec. 181.101, 2001 Tex. Gen. Laws 5384, 5386, repealed by Act of April 10, 2003, 78th Leg., R.S., ch. 3, § 1, 2003 Tex. Gen. Laws 5. Therefore, the department may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with former section 181.101 of the Health and Safety Code.

Section 552.101 also encompasses section 143.089 of the Local Government Code. We understand the City of Lubbock is a civil service city under chapter 143 of the Local Government Code. Section 143.089 provides for the existence of two different types of personnel files relating to a police officer: one that must be maintained as part of the officer's civil service file and another the police department may maintain for its own internal use. *See* Local Gov't Code § 143.089(a), (g). The officer's civil service file must contain certain specified items, including commendations, periodic evaluations by the police officer's supervisor, and documents relating to any misconduct in which the department took disciplinary action against the officer under chapter 143 of the Local Government Code. *Id.* § 143.089(a)(1)-(2). Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *Id.* §§ 143.051-.055. In cases in which a police department investigates a police officer's misconduct and takes disciplinary action against an officer, it is required by section 143.089(a)(2) to place all investigatory records relating to the investigation and disciplinary action, including background documents such as complaints, witness statements, and documents of like nature from individuals who were not in a supervisory capacity, in the police officer's civil service file maintained under section 143.089(a). *See Abbott v. Corpus Christi*, 109 S.W.3d 113, 122 (Tex. App.—Austin 2003, no pet.). All investigatory materials in a case resulting in disciplinary action are "from the employing department" when they are held by or are in the possession of the department because of its investigation into a police officer's misconduct, and the department must forward them to the civil service commission for placement in the civil service personnel file. *Id.* Such records may not be withheld under section 552.101 of the Government Code in conjunction with section 143.089 of the Local Government Code. *See* Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990). However, information maintained in a police department's internal file pursuant to section 143.089(g)

is confidential and must not be released.<sup>2</sup> *City of San Antonio v. Tex. Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You explain the information in Exhibit D is maintained in the department's own internal file for the named officer under section 143.089(g) of the Local Government Code. We note Exhibit D includes evaluations and commendations for the named officer, which are subject to section 143.089(a)(1). Accordingly, the evaluations and commendations, which we have marked, must be maintained in the officer's civil service file under section 143.089(a). Upon review, we agree Exhibit D is confidential under section 143.089(g) of the Local Government Code and must be withheld from disclosure under section 552.101 of the Government Code.<sup>3</sup>

Section 552.101 of the Government Code also encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides, in 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.

Occ. Code § 159.002(b)–(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 find none of the remaining information consists of records created by either a physician or someone under the supervision of a physician. Accordingly, the MPA is not applicable, and the department may not withhold any of the remaining information on that basis.

Section 552.101 encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which

---

<sup>2</sup>Section 143.089(g) of the Local Government Code requires a police department that receives a request for information maintained in a personnel file under section 143.089(g) to refer that requestor to the civil service director or the director's designee. Local Gov't Code § 143.089(g).

<sup>3</sup>As our ruling on Exhibit D is dispositive, we need not address your remaining arguments against its disclosure.

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 established. *Id.* at 681–82. This office has found the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), and personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600, 545 (1990). However, this office has also found the public has a legitimate interest in information relating to employees of governmental bodies and their employment qualifications and job performance. *See* Open Records Decision Nos. 470 at 4 (public has legitimate interest in job qualifications and performance of public employees), 405 at 2-3 (1983) (public has interest in manner in which public employee performs job).

Upon review, we find the information we have marked is highly intimate or embarrassing and of no legitimate concern 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. However, none of the remaining information is highly intimate or embarrassing. Therefore, the department may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

You raise section 552.102 of the Government Code and assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101, which is discussed above. *See Indus. Found.*, 540 S.W.2d at 685. In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549–51 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court recently disagreed with *Hubert's* interpretation of section 552.102(a) and held its privacy standard differs from the *Industrial Foundation* test under section 552.101. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163, at \*5 (Tex. Dec. 3, 2010). The court then considered the applicability of section 552.102 and 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. *Id.* at \*10. We have marked the information that must be withheld under section 552.102(a). None of the remaining information is excepted under section 552.102(a) and may not be withheld on that basis.

You raise section 552.108 of the Government Code for Exhibit C. Section 552.108(a)(1) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime. . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]”

Gov't Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state the information submitted as Exhibit C pertains to ongoing criminal cases. Based upon this representation and our review, we conclude release of the information at issue would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Accordingly, the department may withhold Exhibit C under section 552.108(a)(1).<sup>4</sup>

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home addresses, home telephone numbers, emergency contact information, 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 or section 552.1175 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. You state the named officer is currently a licensed peace officer as defined by article 2.12. Accordingly, the department must withhold the personal information pertaining to the named officer, which we have marked, under section 552.117(a)(2).<sup>5</sup> However, it is unclear whether the other department employee at issue is currently a licensed peace officer as defined by article 2.12. Thus, if this employee is currently a licensed peace officer as defined by article 2.12, the department must withhold the information we have marked under section 552.117(a)(2). If, however, this employee is not currently a licensed peace officer, his personal information may not be withheld under section 552.117(a)(2).

However, if the other employee is not current 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, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. 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 for confidentiality under section 552.024 prior to the date of the governmental body's receipt of

---

<sup>4</sup>As our ruling on Exhibit C is dispositive, we need not address your remaining argument against its disclosure.

<sup>5</sup>As our ruling on this information is dispositive, we need not address your remaining argument against its disclosure.

the request for the information. Therefore, if the other employee is not currently a licensed peace officer as defined by article 2.12, and he timely elected confidentiality under section 552.024, the department must withhold the information we have marked under section 552.117(a)(1). If, however, the other employee is not currently a licensed peace officer and did not timely elect to keep his personal information confidential, then his marked personal information may not be withheld under section 552.117(a)(1).

Section 552.130 of the Government Code excepts from disclosure information related to a motor vehicle operator's or driver's license or permit issued by an agency of this state or another state or country and information related to a motor vehicle title or registration issued by an agency of this state or another state or country. Gov't Code § 552.130(a)(1), (2). Therefore, the department must withhold the information we have marked under section 552.130 of the Government Code.

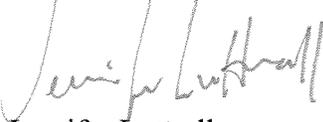
Section 552.137 of the Government Code provides, "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). *Id.* § 552.137(a)–(c). We note section 552.137 is not applicable to an e-mail address maintained by a governmental entity for one of its officials or employees. Upon review, we find the department must withhold the e-mail addresses we have marked under section 552.137, unless the owners have consented to their release.

In summary, the department must withhold (1) the W-4 form we have marked under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code; (2) Exhibit D under section 552.101 in conjunction with section 143.089(g) of the Local Government Code; (3) the information we have marked under section 552.101 in conjunction with common-law privacy; and (4) the information we have marked under section 552.102(a) of the Government Code. The department may withhold Exhibit C under section 552.108(a)(1) of the Government Code. The department must withhold the information pertaining to the named officer, which we have marked, under section 552.117(a)(2) of the Government Code. If the other employee at issue is currently a licensed peace officer as defined by article 2.12 of the Code of Criminal Procedure, the department must withhold the information pertaining to him, which we have marked, under section 552.117(a)(2) of the Government Code. If the other employee is not a licensed peace officer as defined by article 2.12, and he timely elected confidentiality under section 552.024, the department must withhold the information pertaining to him, which we have marked, under section 552.117(a)(1) of the Government Code. The department must withhold the information we have marked under section 552.130 of the Government Code. The department must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners have consented to their release. 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](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 Luttrall  
Assistant Attorney General  
Open Records Division

JL/dls

Ref: ID# 439057

Enc. Submitted documents

c: Requestor  
(w/o enclosures)