



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 22, 2012

Chief Gregory L. Grigg
Deer Park Police Department
2911 Center Street
Deer Park, Texas 77536-4942

OR2012-02765

Dear Chief Grigg:

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# 446061.

The Deer Park Police Department (the “department”) received a request for information pertaining to a former department officer. You state the department has released some of the requested documents with information redacted in accordance with Open Records Decision No. 684 (2009).¹ You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.115, 552.1175, and 552.139 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas driver’s license numbers under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision. However, on September 1, 2011, the Texas legislature amended section 552.130 to allow a governmental body to redact the information described in subsections 552.130(a)(1) and (a)(3) without the necessity of seeking a decision from the attorney general. *See* Gov’t Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). Thus, the statutory amendments to section 552.130 of the Government Code supercede Open Records Decision No. 684 on September 1, 2011. Therefore, a governmental body may only redact information subject to subsections 552.130(a)(1) and (a)(3) in accordance with section 552.130, not Open Records Decision No. 684.

²We assume the “representative sample” of records submitted to this office is 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 those records contain substantially different types of information than that submitted to this office.

Initially, we must address the department's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. Gov't Code § 552.130(b). The department received the request for information on November 29, 2011. Thus, the department's ten-business-day deadline to state the exceptions that apply to the requested information was December 12, 2011. You marked some of the responsive information as being excepted from disclosure under section 552.115 of the Government Code. However, the envelope in which you submitted these documents for our review is postmarked December 16, 2011. See Gov't Code § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail). Therefore, the department failed to comply with the procedural requirements mandated by section 552.301(b) in raising section 552.115.³

A governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption the requested information is public and must be released 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). The presumption that information is public under section 552.302 can generally be overcome by demonstrating the information is confidential by law or third-party interests are at stake. See Open Records Decision Nos. 630 at 3, 325 at 2 (1982). Section 552.115 can provide a compelling reason to overcome this presumption. Therefore, we will address your arguments under this exception, as well as the remaining asserted exceptions.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes, including section 550.065 of the Transportation Code, which provides in relevant part the following:

(a) This section applies only to information that is held by the [Texas Department of Transportation ("TxDOT")] or another governmental entity and relates to a motor vehicle accident reported under this chapter or Section 601.004, including accident report information compiled under Section 201.805, as added by Chapter 1407 (S.B. 766), Acts of the 80th Legislature, Regular Session, 2007.

(b) Except as provided by Subsection (c) or (e), the information is privileged and for the confidential use of:

³The department timely raised the remaining exceptions it asserted.

(1) [TxDOT]; and

(2) an agency of the United States, this state, or a local government of this state that has use for the information for accident prevention purposes.

Trans. Code § 550.065(a), (b); *see id.* § 550.064 (officer's accident report). You assert some of the submitted information is confidential under section 550.065 of the Transportation Code because it "satisfied [the] requirements for accident report[s]." However, this information does not consist of an accident report form completed pursuant to chapter 550 or section 601.004 of the Transportation Code. *See id.* § 560.065(a). Furthermore, you have not otherwise shown the information relates to a motor vehicle accident report under chapter 550 or section 601.004. *See id.* Accordingly, we conclude this information is not made confidential by section 550.065, and the department may not withhold it from release under section 552.101 of the Government Code on that basis.

Section 552.101 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 the following:

(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). Medical records must be released upon the patient's signed, written consent, provided the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *Id.* §§ 159.004, 159.005. Section 159.002(c) also requires any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We have marked the portion of the submitted information that constitutes medical records and that the department may only release in accordance with the MPA.⁴ However, upon review, we find you have not established the remaining information at issue consists of records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician. Thus, the remaining information is not confidential under the MPA, and the department may not withhold it from release on that ground.

⁴As our ruling is dispositive, we do not address your other arguments to withhold this information.

Section 552.101 also encompasses section 201.402 of the Occupations Code, which provides in part the following:

(a) Communications between a chiropractor and a patient relating to or in connection with any professional services provided by a chiropractor to the patient are confidential and privileged and may not be disclosed except as provided by this subchapter.

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a chiropractor that are created or maintained by a chiropractor are confidential and privileged and may not be disclosed except as provided by this subchapter.

(c) A person who receives information from the confidential communications or records, excluding a person listed in Section 201.404(a) 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 § 201.402(a)-(c). Chiropractic records must be released on the patient's signed, written consent, provided that the consent specifies: (1) the information records covered by the release; (2) the reason or purpose for the release; and (3) the person to whom the information is to be released. *See id.* §§ 201.404, 201.405. We have marked the portion of the submitted information that constitutes chiropractic records and that the department may only release in accordance with chapter 201 of the Occupations Code.

Section 552.101 also encompasses the Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. §§ 12101-12213. The ADA provides a covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of the applicant and may condition an offer of employment on the results of the examination, provided 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. *See* 42 U.S.C. § 12112(d)(3)(B); *see also* 29 C.F.R. § 1630.14(b); Open Records Decision No. 641 (1996). Thus, the department must withhold the physical examination reports we have marked under section 552.101 of the Government Code in conjunction with the ADA.

Section 552.101 also encompasses section 1703.306(a) of the Occupations Code, which provides "[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[.]" Upon review, we find you have not established the information you assert is confidential under section 1703.306 consists of information acquired from a polygraph examination information. Thus, you conclude you have failed to establish this information is confidential

under section 1703.306, and the department may not withhold it under section 552.101 on that ground.

You also raise section 1701.306 of the Occupations Code, which is also encompassed by section 552.101 of the Government Code. Section 1701.306 makes confidential L-2 Declaration of Medical Condition and L-3 Declaration of Psychological and Emotional Health forms required by the Texas Commission on Law Enforcement Officer Standards and Education (the “commission”). Section 1701.306 provides:

(a) The commission may not issue a license to a person 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 blood test or other medical test.

(b) An agency hiring a person for whom a license 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 submitted information does not contain L-2 or L-3 declaration forms. Accordingly, section 1701.306 is not applicable to the remaining information, and the department may not withhold it under section 552.101 on that basis.

Chapter 560 of the Government Code provides 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), 560.002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), 560.003 (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, section 560.002 permits the disclosure of the submitted fingerprint information. Therefore, the department must withhold this information, which we have marked, under section 552.101 in conjunction with section 560.003 of the Government Code.

Section 552.101 also encompasses the doctrine of common-law privacy, which 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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered 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 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 (1987) (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 (1992), 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). Criminal history information obtained by a law enforcement agency in the process of hiring a peace officer is also a matter of legitimate public interest.

Some of the submitted information is highly intimate or embarrassing and is not of legitimate concern to the public. Therefore, the department must withhold this information, which we have marked, under section 552.101 in conjunction with common-law privacy. Upon review, however, we find the remaining information at issue is either not highly intimate or embarrassing, or it is of legitimate public interest. Therefore, the remaining information is not confidential under common-law privacy, and the department may not withhold it under section 552.101 on that ground.

You claim some of the submitted 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.*, 354 S.W.3d 336 (Tex. 2010). 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.

Section 552.115(a) of the Government Code provides “[a] birth or death record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official is excepted from the requirements of Section 552.021[.]” Gov’t Code § 552.115. Section 552.115 only applies to information maintained by the bureau of vital statistics or local registration official. The department is not the Bureau of Vital Statistics or a local registration official; therefore, the department may not withhold the submitted birth certificate under section 552.115. *See* Open Records Decision No. 338 (1982).

Some of the submitted information may be excepted from release pursuant to section 552.117 of the Government Code.⁵ Section 552.117(a)(1) 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 that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Section 552.117(a)(2) excepts from disclosure this same information regarding a peace officer, as defined by article 2.12 of the Texas Code of Criminal Procedure, regardless of whether the officer elected under section 552.024 or 552.1175 of the Government Code to keep such information confidential. *Id.* § 552.117(a)(2).

We have marked personal information pertaining to the former officer in the submitted information. Thus, if the former department officer at issue is currently a licensed peace officer as defined by article 2.12 of the Texas Code of Criminal Procedure, then the department must withhold this information under section 552.117(a)(2). If this individual is not currently a licensed peace officer as defined by article 2.12, then the department must withhold this information under section 552.117(a)(1) if the individual requested that this information be kept confidential under section 552.024 of the Government Code before the department received the request for information. If, however, this individual neither is currently a licensed peace officer as defined by article 2.12 nor timely requested confidentiality under section 552.024, then the department may not withhold this information under section 552.117(a)(1) or (2).⁶

You assert some of the remaining information is excepted from disclosure under section 552.1175 of the Government Code. Section 552.1175(b) provides in part the following:

Information that relates to the home address, home telephone number, emergency contact information, or social security number of [a peace officer as defined by article 2.12 of the Code of Criminal Procedure], 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

⁵The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987); *see, e.g.*, Open Records Decision No. 470 at 2 (1987) (because release of confidential information could impair rights of third parties and because improper release constitutes a misdemeanor, attorney general will raise predecessor statute of section 552.101 on behalf of governmental bodies).

⁶As our ruling is dispositive, we do not address your other argument to withhold this information. We also note that, regardless 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. *See* Gov't Code § 552.147(b).

(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.

Id. § 552.1175(b). The remaining information you seek to withhold under section 552.1175 is held by the department in an employment context. We also note the remaining information does not consist of a home address or telephone number, emergency contact information, social security number, or family member information. Thus, the department may not withhold any of the remaining information under section 552.1175.

Section 552.139(b)(3) of the Government Code provides that "a photocopy or other copy of an identification badge issued to an official or employee of a governmental body" is confidential. *Id.* § 552.139(b)(3). The submitted information contains photocopies of the former officer's identification badges. Thus, the department must withhold this information, which we have marked, under section 552.139(b)(3). However, you have not established the remaining information you seek to withhold under section 552.139 consists of a photocopy or other copy of an identification badge issued to an official or employee of the department. Therefore, the department may not withhold the remaining information at issue on that ground.

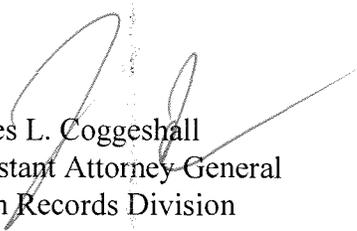
We conclude the following: (1) the medical records we have marked may only be released in accordance with the MPA; (2) the chiropractic records we have marked may only be released in accordance with chapter 201 of the Occupations Code; (3) the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the ADA, section 560.003 of the Government Code, and common-law privacy; (4) the department must withhold the information we have marked under section 552.102 of the Government Code; (5) the department must withhold the information we have marked under section 552.117(a)(2) of the Government Code if the former department is currently a licensed peace officer as defined by article 2.12 of the Texas Code of Criminal Procedure; however, if the former department officer is not currently a licensed peace officer as defined by article 2.12, then the department must withhold this information under section 552.117(a)(1) if he requested that this information be kept confidential under section 552.024 of the Government Code before the department received the request for information; (6) the department must withhold the information we have marked under section 552.139(b)(3) of the Government Code; and (7) the department must release the remaining information.

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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/ag

Ref: ID# 446061

Enc. Submitted documents

c: Requestor
(w/o enclosures)