



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 28, 2012

Ms. Julie V. Pandya
Nichols, Jackson, Dillard, Hager & Smith, L.L.P.
1800 Lincoln Plaza
500 North Akard Street
Dallas, Texas 75201

OR2012-04548

Dear Ms. Pandya:

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# 449035 (Ref. No. 53518).

The Hutchins Police Department (the "department"), which you represent, received a request for information pertaining to a named former employee, and information regarding a specified incident involving the named former employee and a named individual. You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.114, 552.115, 552.117, 552.130, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes, such as chapter 411 of the Government Code, which makes confidential criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC"). *See id.* § 411.083(a). CHRI means "information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions." *Id.* § 411.082(2). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states 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. *Id.* at 10-12. Section 411.083 of the Government Code deems confidential CHRI that the Texas 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. *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 subchapter F of chapter 411. We note section 411.083 does not apply to active warrant information or other information relating to one’s current involvement with the criminal justice system. *See id.* § 411.081(b) (police department allowed to disclose information pertaining to person’s current involvement in the criminal justice system). Upon review, we find the department must withhold the information we have marked under section 552.101 in conjunction with chapter 411 and federal law. However, we find none of the remaining information at issue consists of CHRI generated by the NCIC or TCIC. Consequently, you have failed to demonstrate how the remaining information at issue constitutes CHRI for purposes of chapter 411 or federal law. Therefore, the department may not withhold any of the remaining information at issue under section 552.101 of the Government Code on this basis.

We note the submitted information contains an L-3 Declaration of Psychological and Emotional Health form required by the Texas Commission on Law Enforcement Officers Standards and Education (“TCLEOSE”). This form is confidential under section 1701.306 of the Occupations Code, which is also encompassed by section 552.101 of the Government Code. Section 1701.306 provides the following:

(a) [TCLEOSE] 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 [TCLEOSE]. A declaration is not public information.

Occ. Code § 1701.306(a), (b). Therefore, the department must withhold the submitted L-3 declaration form, which we have marked, under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.¹

Section 552.101 of the Government Code also encompasses section 1701.454 of the Occupations Code, which governs the public availability of information submitted to TCLEOSE under subchapter J of chapter 1701 of the Occupations Code. Section 1701.454 provides as follows:

(a) All information submitted to [TCLEOSE] under this subchapter is confidential and is not subject to disclosure under [the Act], 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 information submitted under this subchapter.

Id. § 1701.454. The remaining information contains two F-5 Report of Separation of Licensee reports. The F-5 reports state the officer at issue resigned or was terminated for reasons other than substantiated incidents of excessive force or violations of the law other than traffic offenses. Therefore, the department must withhold the submitted F-5 reports, which we have marked, under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

Section 552.101 of the Government Code 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). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. A compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (finding significant privacy interest in compilation of individual's criminal history by recognizing distinction between public

¹We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including L-3 declarations under section 552.101 of the Government Code in conjunction with section 1701.306(b) of the Occupations Code, without the necessity of requesting an attorney general decision.

records found in courthouse files and local police stations and compiled summary of criminal history information). Moreover, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. Upon review, we find no portion of the information at issue constitutes a compilation of an individual's criminal history. Accordingly, we find the information at issue does not constitute a criminal history compilation, and may not be withheld under section 552.101 on that basis.

We note common-law privacy also protects other types of information. The type of information considered intimate and 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. 540 S.W.2d at 683. Additionally, this office has found some kinds of medical information or information indicating disabilities or specific illnesses are generally highly intimate or embarrassing. See Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). This office has also found that personal financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. See Open Records Decision No. 600 (1992) (finding personal financial information to include choice of particular insurance carrier). Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the department must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.114(a) of the Government Code excepts from disclosure student records "at an educational institution funded wholly or partly by state revenue." Gov't Code § 552.114(a). This office has determined the same analysis applies under section 552.114 and the Family Educational Rights and Privacy Act of 1974 ("FERPA"), section 1232g of title 20 of the United States Code. FERPA governs the availability of student records held by educational institutions or agencies receiving federal funds. We note section 552.114 and FERPA apply only to student records in the custody of an educational institution and records directly transferred from an educational institution to a third party. See 34 C.F.R. § 99.33(a)(2). You contend some of the remaining information is confidential under section 552.114. However, the department is not an educational institution. See Open Records Decision No. 309 at 3 (1983) (City of Fort Worth not an "educational agency" for purposes of FERPA). You do not inform us, and it does not otherwise appear from our review, that the department received any of the submitted information directly from an educational institution. We therefore conclude the department may not withhold any of the information at issue on the basis of section 552.114 of the Government Code or FERPA.

Section 552.115 of the Government Code 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 official. *See* Open Records Decision No. 338 (1982). In this instance, the department maintains the birth certificate contained in the submitted information. We therefore conclude the department may not withhold the submitted birth certificate under section 552.115 of the Government Code.

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 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). Upon review, we find the date of birth you have marked, in addition to the birth dates we have marked, must be withheld under section 552.102(a) of the Government Code.

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.² Gov’t Code § 552.117(a). Additionally, section 552.117 encompasses an employee’s personal cellular telephone number, provided the cellular telephone service is paid for by the employee with his or her own funds. *See* Open Records Decision No. 670 at 6 (2001) (extending section 552.117 exception to personal cellular telephone number and personal pager number of employee who elects to withhold home telephone number in accordance with section 552.024).

We have marked personal information, including a cellular telephone number, pertaining to the officer named in the request and other officers. It is unclear, however, whether or not the officers are currently licensed peace officers as defined by article 2.12. Thus, if the officers are currently licensed peace officers as defined by article 2.12, with the exception of the information we have marked for release, the department must withhold the information it has marked, as well as the information we have marked under section 552.117(a)(2) of the Government Code. Likewise, if the named officer paid for his cellular service, the department must withhold that officer’s cellular telephone number under section 552.117(a)(2) of the Government Code. If, however, the officers at issue are not currently licensed peace officers, their personal information may not be withheld under section 552.117(a)(2) of the Government Code.

²“Peace officer” is defined by Article 2.12 of the Texas Code of Criminal Procedure.

If the officers at issue are no longer licensed peace officers, then their 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). 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 the request for the information. You inform us the officer named in the request timely elected confidentiality under section 552.024. Therefore, with the exception of the information we have marked for release, the department must withhold the information it has marked regarding the named officer, as well as the additional information we have marked, under section 552.117(a)(1) of the Government Code. Similarly, if the named officer paid for his cellular telephone service, the department must withhold the officer's marked cellular telephone number under section 552.117(a)(1) of the Government Code. If the other individuals are no longer licensed peace officers and made timely elections under section 552.024, the department must withhold their personal information under section 552.117(a)(1). If these individuals are no longer licensed peace officers and did not make timely elections under section 552.024, their personal information may not be withheld under section 552.117(a)(1).³

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's or driver's license, title, or registration issued by a Texas agency, or an agency of another state or country, is excepted from public release. Gov't Code § 552.130(a)(1), (2). The department must withhold the driver's license information you have marked, as well as the additional information we have marked, under section 552.130 of the Government Code.

In summary, in conjunction with section 552.101 of the Government Code, the department must withhold: (1) the information we have marked under chapter 411 of the Government Code and federal law; (2) the L-3 declaration form we have marked under section 1701.306 of the Occupations Code; (3) the F-5 reports we have marked under section 1701.454 of the Occupations Code; and (4) the information we have marked under common-law privacy. The department must withhold the information it has marked, and the additional information we have marked, under section 552.102(a) of the Government Code. If the officers whose information is at issue are currently licensed peace officers as defined by article 2.12, with the exception of the information we have marked for release, the department must withhold

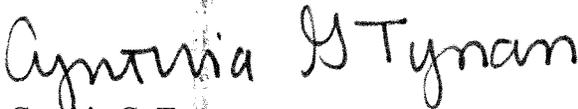
³Regardless of the applicability of section 552.117, section 552.147(b) of the Government Code authorizes a governmental body to redact the social security number of a living person without the necessity of requesting a decision from this office under the Act. *See* Gov't Code § 552.147(b).

their marked personal information, including the named officer's cellular telephone number, if he paid for the cellular service, under section 552.117(a)(2) of the Government Code. If the officers are no longer licensed peace officers as defined by article 2.12, then to the extent they timely elected confidentiality under section 552.024 of the Government Code, with the exception of the information we have marked for release, the department must withhold their marked personal information, including the named officer's cellular telephone number, if he paid for the cellular service, under section 552.117(a)(1) of the Government Code. The department must withhold the information it has marked, as well as the information we have marked, under section 552.130 of the Government Code. 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,



Cynthia G. Tynan
Assistant Attorney General
Open Records Division

CGT/ag

Ref: ID# 449035

Enc. Submitted documents

c: Requestor
(w/o enclosures)