



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 19, 2013

Ms. Dustanna Hyde Rabe
County Attorney
Hopkins County
110 Main Street
Sulphur Springs, Texas 75482

OR2013-02718

Dear Ms. Rabe:

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# 479107 (County Attorney File No. 12PIR0001).

The Hopkins County Sheriff's Department (the "department") received a request for seven categories of information pertaining to a named individual on a specified date. You state the department has released some of the requested information. We note you have redacted a personal e-mail address under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).¹ You claim the submitted information is excepted from disclosure under sections 552.101 and 552.102 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note the requestor excluded social security numbers and residential addresses and telephone numbers from his request for information. Thus, these types of information within the submitted documents are not responsive to the instant request. We further note the requestor excluded insurance information from his request. Therefore, this type of information, which we have marked, is also not responsive to the instant request. This

¹We note Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including an e-mail address of a member of the public under section 552.137, without the necessity of requesting an attorney general decision.

decision does not address the public availability of the non-responsive information and this information need not be released in response to this request.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. This section encompasses information protected by other statutes. Medical records are confidential under the Medical Practice Act (“MPA”), subtitle B of title 3 of the Occupations Code. *See* Occ. Code §§ 151.001-168.202. Section 159.002 of the MPA provides in part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(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.

Id. § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004. Upon review, we find the responsive information we have marked constitutes medical records for purposes of the MPA. Thus, the department must withhold this information under section 552.101 of the Government Code in conjunction with the MPA.²

Section 552.101 of the Government Code also encompasses laws that make criminal history record information (“CHRI”) confidential. CHRI generated by the National Crime Information Center (the “NCIC”) or the Texas Crime Information Center is confidential under federal and state law. 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.” Gov’t Code § 411.082(2). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI obtained from the NCIC network or other states. *See* 28 C.F.R. § 20.21. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *See* Open Records Decision No. 565 at 7 (1990); *see also*

²As our ruling for this information is dispositive, we need not address your arguments against its release.

generally Gov't Code ch. 411 subch. F. Section 411.083 of the Government Code deems confidential CHRI the Texas Department of Public Safety ("DPS") maintains, except DPS may disseminate this information as provided in subchapter F of chapter 411 of the Government Code. *See id.* § 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. Thus, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 in conjunction with subchapter F of chapter 411 of the Government Code. Upon review, we find the responsive information we have marked constitutes CHRI for purposes of chapter 411. Accordingly, the department must withhold this information under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code and federal law.³

Section 552.101 of the Government Code also encompasses section 560.003 of the Government Code, which provides that "[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act]." *See id.* § 560.003; *see also id.* §§ 560.001(1) (defining "biometric identifier" to include fingerprints), .002(1)(A) (governmental body may not sell, lease, or otherwise disclose individual's biometric identifier to another person unless individual consents to disclosure). Therefore, the department must withhold the fingerprints we have marked under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code.⁴

You raise common-law and constitutional privacy for the remaining responsive information. Section 552.101 of the Government Code also encompasses the doctrines of common-law and constitutional privacy. The doctrine of common-law privacy protects information if it (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. 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 some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See Open Records Decision Nos. 455 (1987) (prescription drugs,*

³As our ruling for this information is dispositive, we need not address your arguments against its release.

⁴As our ruling for this information is dispositive, we need not address your arguments against its disclosure.

illnesses, operations, and physical handicaps). Although common-law privacy protects some medical information, it does not protect all medically related information. *See* Open Records Decision No. 478 (1987). Individual determinations are required. *See* Open Records Decision No. 370 (1983). This office has also found personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate or embarrassing. *See* Open Records Decision No. 545 (1990). However, we note this office has determined in numerous rulings that the public has a legitimate interest in the qualifications, conduct, and performance of public employees and in the details of financial transactions between an employee and a governmental body. *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), 545 at 4 (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities), 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), 373 at 4 (1983) (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis).

Constitutional privacy consists of two inter-related types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4, 455 at 3-7. The first type protects an individual's autonomy within "zones of privacy," which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. ORD 455 at 4. The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* at 7. The scope of information protected by constitutional privacy is narrower than that under common-law privacy; constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985)).

Upon review, we find the information we have marked is highly intimate or embarrassing and of no legitimate public interest. Thus, the department must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy.⁵ However, we find you have not demonstrated that any of the remaining information at issue is highly intimate or embarrassing and not a matter of legitimate public interest. Furthermore, you have failed to demonstrate how any of this information falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the department may not withhold any of the remaining responsive

⁵As our ruling for this information is dispositive, we need not address your remaining arguments against its disclosure.

information under section 552.101 in conjunction with common-law or constitutional privacy.

You generally raise section 552.101 of the Government Code in conjunction with “other laws” for the remaining responsive information. However, you do not refer to any law, nor are we aware of any, that would make this information confidential under section 552.101. Thus, none of the remaining responsive information may be withheld under section 552.101 of the Government Code.

You also raise section 552.102 for the remaining responsive information. Section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwanted invasion of personal privacy.” Gov’t Code § 552.102(a). You 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 Third Court of Appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court expressly 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. *See Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336, 342 (Tex. 2010). The supreme 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. *See id.* at 346. Upon review, we have marked birth dates that may be subject to section 552.102(a). However, we are unable to determine the identities of most of the individuals at issue. Therefore, if the marked birth dates pertain to department employees or officials, they must be withheld under section 552.102(a) of the Government Code. If the marked birth dates do not pertain to department employees or officials, they may not be withheld on this basis.

Section 552.102(b) excepts from disclosure higher education transcripts of professional public school employees, but does not except the employee’s name, the courses taken, and the degree obtained from disclosure. Gov’t Code § 552.102(b); *see also* Open Records Decision No. 526 (1989). Upon review, we find none of the information at issue consists of higher education transcripts of a professional public school employee. Therefore, the department may not withhold any of the remaining responsive information under section 552.102(b) of the Government Code.

We note you have redacted a portion of the remaining responsive information that pertains to a current or former officer employed by the department. We presume you have redacted this information under section 552.117(a)(2) of the Government Code pursuant to Open Records

Decision No. 670 (2001).⁶ We also note the remaining responsive information includes information pertaining to other officers employed by the department. Section 552.117(a)(2) 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 elects confidentiality under sections 552.024 and 552.1175 of the Government Code.⁷ Gov't Code § 552.117(a)(2). In this instance, it is unclear whether all of the individuals at issue are currently licensed peace officers as defined by article 2.12. Thus, if the individuals at issue are currently licensed peace officers as defined by article 2.12, the department must withhold the individuals' personal information you have redacted, and the additional information we have marked under section 552.117, under section 552.117(a)(2) of the Government Code. If, however, the individuals at issue are not currently licensed peace officers, the information at issue may not be withheld under section 552.117(a)(2).

If the individuals whose information is 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 the same information for a current or former employee of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See id.* § 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 the request for the information. Therefore, if the individuals at issue are no longer licensed peace officers as defined by article 2.12, then to the extent they timely elected confidentiality under section 552.024, the department must withhold the information you have redacted, and the additional information we have marked under section 552.117, under section 552.117(a)(1) of the Government Code. If, however, the individuals at issue did not timely elect to keep their personal information confidential, the information at issue may not be withheld under section 552.117(a)(1).

We note some of the remaining responsive information is subject to sections 552.136 and 552.137 of the Government Code.⁸ Section 552.136 of the Government Code provides in part that "[n]otwithstanding any other provision of this chapter, a credit card, debit card,

⁶Open Records Decision No. 670 is a previous determination that authorizes all governmental bodies to withhold the home addresses and telephone numbers, personal cellular telephone and pager numbers, social security numbers, and family member information of peace officers under section 552.117(a)(2) of the Government Code, without the necessity of requesting an attorney general decision.

⁷"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

⁸The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470.

charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b); *see also id.* § 552.136(a) (defining “access device”). Accordingly, the department must withhold the information we have marked under section 552.136 of the Government Code.

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *Id.* § 552.137(a)-(c). The e-mail addresses we have marked are not specifically excluded by section 552.137(c). As such, these e-mail addresses must be withheld under section 552.137 of the Government Code, unless their owners affirmatively consent to their release. *See id.* § 552.137(b).

We note some of the remaining responsive information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *See* Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See id.*; *see also* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the department must withhold the responsive information we have marked under section 552.101 of the Government Code in conjunction with (1) the MPA, (2) chapter 411 of the Government Code and federal law, (3) section 560.003 of the Government Code, and (4) common-law privacy. If the birth dates we have marked pertain to department employees or officials, they must be withheld under section 552.102(a) of the Government Code. Otherwise, they may not be withheld on this basis. If the individuals at issue are currently licensed peace officers as defined by article 2.12 of the Code of Criminal Procedure, the department must withhold the individuals’ information you have redacted, and the additional information we have marked, under section 552.117(a)(2) of the Government Code. Otherwise, the information at issue may not be withheld on this basis. If the individuals at issue are no longer licensed peace officers as defined by article 2.12 of the Code of Criminal Procedure, then to the extent they timely elected confidentiality under section 552.024 of the Government Code, the department must withhold the information you have redacted, and the additional information we have marked, under section 552.117(a)(1) of the Government Code. Otherwise, the information at issue may not be withheld on this basis. The department must withhold the information we have marked under section 552.136 of the Government Code. The department must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless their owners affirmatively consent to their release. The remaining responsive information must be released; however, any information subject to copyright may only be released in accordance with copyright law.

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,



Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/bhf

Ref: ID# 479107

Enc. Submitted documents

c: Requestor
(w/o enclosures)

