



ATTORNEY GENERAL OF TEXAS
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April 22, 2014

Ms. Donna L. Johnson
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OR2014-06502

Dear Ms. Johnson:

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# 520047 (Ref. No. CLS14-001).

The City of Clear Lake Shores (the "city"), which you represent, received a request for information pertaining to a named peace officer and a video recording pertaining to a specified case. You state the city will release some of the requested information. You state the city will redact information pursuant to section 552.130(c) of the Government Code, information pursuant to section 552.136(c) of the Government Code, information pursuant to section 552.147(b) of the Government Code, and information pursuant to Open Records Decision No. 684 (2009).¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.117 of the Government Code.² We have

¹Section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsection 552.130(a) 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). Section 552.136(c) of the Government Code allows a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *See id.* § 552.136(c). 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 id.* § 552.147(b). Open Records Decision No. 684 permits a governmental body to redact certain categories of information, including: L-2 and L-3 declarations under section 552.101 of the Government Code in conjunction with section 1701.306(b) of the Occupations Code; W-4 forms under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code; and an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of seeking a decision from the attorney general. *See* ORD 684.

²Although you raise section 552.1175 of the Government Code, we note section 552.117 is the proper exception to raise for information held in an employment context.

considered the exceptions you claim and reviewed the submitted information. The city also notified the named peace officer of the request for information. *See* Gov't Code § 552.304 (permitting interested third party to submit to attorney general reasons why requested information should or should not be released).

Initially, we note the submitted information contains Texas Commission on Law Enforcement Officer Standards and Education ("TCLEOSE") personal identification numbers. In Open Records Decision No. 581 (1990), this office determined certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. We understand a TCLEOSE personal identification number is a unique computer-generated number assigned to peace officers for identification in TCLEOSE's electronic database, and may be used as an access device number on TCLEOSE's website. Accordingly, TCLEOSE personal identification numbers do not constitute public information under section 552.002 of the Government Code. Thus, the submitted TCLEOSE personal identification numbers are not subject to the Act and need not be released to the requestor.

We will address your arguments under section 552.108 of the Government Code first because that section is potentially the most encompassing. Section 552.108 provides, in pertinent part, the following:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

...

(2) it is information that the deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

...

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

...

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Id. § 552.108(a)(2), (b)(2). A governmental body claiming subsections 552.108(a)(2) and 552.108(b)(2) must demonstrate the requested information relates to a criminal investigation that concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A). We note section 552.108 is generally not applicable to the records of an internal affairs investigation that is purely administrative in nature and does not involve the investigation or prosecution of crime. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.); *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution); *see also* Open Records Decision No. 350 at 3-4 (1982).

You inform us a portion of the submitted information pertains to a criminal investigation by the Clear Lake Shores Police Department that has concluded and did not result in conviction or deferred adjudication. Based on your representation, and our review, we find the city may withhold the information we have indicated section 552.108(a)(2) of the Government Code. However, upon review, we find you have failed to demonstrate any of the remaining information relates to a closed criminal investigation that did not result in conviction or deferred adjudication. Accordingly, the city may not withhold the remaining information under subsection 552.108(a)(2) or subsection 552.108(b)(2).

Section 552.108(b)(1) of the Government Code excepts from disclosure “[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if . . . release of the internal record or notation would interfere with law enforcement or prosecution[.]” Gov’t Code § 552.108(b)(1). Section 552.108(b)(1) protects information that, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.). To prevail on its claim that subsection 552.108(b)(1) excepts information from disclosure, a governmental body must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. Instead, the governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. *See* Open Records Decision No. 562 at 10 (1990) (construing statutory predecessor). In addition, generally known policies and techniques may not be withheld under section 552.108. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common-law rules, and constitutional limitations on use of force not protected), 252 at 3 (1980) (governmental body did not meet burden because it did not indicate why investigative procedures and techniques requested were any different from those commonly known). The determination of whether the release of particular records would interfere with law enforcement is made on a case-by-case basis. *See* Open Records Decision No. 409 at 2 (1984) (construing statutory predecessor). You generally state the remaining information contains information “the release of which could potentially compromise the day to day safety of officers.” Upon review, we find you have failed to demonstrate how release of any of the remaining information would interfere with

law enforcement and crime prevention. Accordingly, the city may not withhold any of the remaining information under section 552.108(b)(1).

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses the Americans with Disabilities Act ("ADA"). *See* 42 U.S.C. §§ 12101 *et seq.* Title I of the ADA requires information about the medical conditions and medical histories of applicants or employees be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. 29 C.F.R. § 1630.14(c). 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. *Id.*; *see also* Open Records Decision No. 641 (1996). The federal Equal Employment Opportunity Commission (the "EEOC") has determined medical information for 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). Upon review, we find you have failed to demonstrate the ADA is applicable to any portion of the remaining information. Accordingly, none of the remaining information may be withheld under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code, which governs release of medical records. *See* Occ. Code §§ 151.001-168.202. Section 159.002 of the MPA provides, in relevant 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. 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 you have failed to demonstrate any of the remaining information constitutes a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that was created or is maintained by a physician or information obtained from a medical record. Accordingly, the city may not withhold the remaining information under section 552.101 of the Government Code in conjunction with the MPA.

Section 552.101 of the Government Code also encompasses section 611.002(a) of the Health and Safety Code, which pertains to mental health records and provides “[c]ommunications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.” Health & Safety Code § 611.002(a). Upon review, we find the information we have marked is confidential under section 611.002 of the Health and Safety Code and must be withheld under section 552.101 of the Government Code on that basis.³ However, we find none of the remaining information consists of communications between a patient and a professional or records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional. Accordingly, the city may not withhold any of the remaining information under section 552.101 of the Government Code on the basis of section 611.002 of the Health and Safety Code.

Section 552.101 of the Government Code also encompasses section 603.4 of title 20 of the Code of Federal Regulations.⁴ Pursuant to section 603.4, state unemployment compensation agencies, such as the Texas Workforce Commission, must protect the confidentiality of information that “reveals the name or any identifying particular about any individual or any past or present employer or employing unit, or [that] could foreseeably be combined with other publicly available information to reveal any such particulars, and must include provision for barring the disclosure of any such information[.]” 20 C.F.R. § 603.4(b). However, the confidentiality provision of section 603.4 applies to “States and State [unemployment compensation] agencies.” *See id.* §§ 603.1, 603.2(f), (g). You do not demonstrate how this provision is applicable to the city. Thus, no part of the submitted information is made confidential by section 603.4 of title 20 of the Code of Federal Regulations, and it may not be withheld under section 552.101 of the Government Code on that basis.

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

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

⁴Although you raise section 603.7 of title 20 of the Code of Federal Regulations in your brief, we note section 603.4 governs the confidentiality of state and federal unemployment compensation information. *See* 20 C.F.R. § 603.4.

TCLEOSE under subchapter J of chapter 1701 of the Occupations Code. Section 1701.454 provides as follows:

(a) All information submitted to the [TCLEOSE] under this subchapter is confidential and is not subject to disclosure under Chapter 552, Government Code, 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.

Occ. Code § 1701.454. The remaining information includes F-5 forms that are submitted to TCLEOSE pursuant to subchapter J of chapter 1701 of the Occupations Code. Furthermore, the information at issue does not indicate the named officer resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses. Upon review, we find the city must withhold the submitted F-5 forms, which we have marked, under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.⁵

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) 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 satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). This office has also found personal financial information not relating to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. *See* Open Records Decision Nos. 600 (1992), 545 (1990). However, there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* ORDs 600 at 9 (information revealing that employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure), 545 (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common-law privacy). Further, we note there is a legitimate public interest in an applicant's background and qualifications for government employment, especially where the applicant was seeking a position in law enforcement. *See* Open Records Decisions Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of

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

human affairs, but in fact touches on matters of legitimate public concern), 542 (1990), 470 at 4 (1986) (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 (scope of public employee privacy is narrow). Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find you have failed to demonstrate any of the remaining information is highly intimate or embarrassing and not of legitimate concern. Accordingly, the city may not withhold any of the remaining information under section 552.101 of the Government Code on the basis of common-law privacy.

Section 552.102(a) of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]"⁶ 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 city must withhold the information we have marked under section 552.102(a) of the Government Code.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home address, home telephone number, 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 sections 552.024 and 552.1175 of the Government Code. *See* 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. In this instance, however, it is unclear whether the individual whose information is at issue is currently a licensed peace officer as defined by article 2.12. If the individual is currently a licensed peace officer as defined by article 2.12, then the city must withhold the information we have marked under section 552.117(a)(2) of the Government Code. However, if the individual is no longer a licensed police officer as defined by article 2.12, the information we have marked may not be withheld under section 552.117(a)(2) of the Government Code.

If the individual at issue is not currently 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 number, and family member information of a current or former employee of

⁶The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision No. 481 (1987), 480 (1987), 470 (1987).

a governmental body who requests this information be kept confidential under section 552.024. *Id.* § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). You state, and provide documentation demonstrating, the individual at issue elected confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the individual at issue is not currently a licensed peace officer, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code.

In summary, the submitted TCLEOSE personal identification numbers are not subject to the Act and need not be released to the requestor. The city may withhold the information we have indicated under section 552.108(a)(2) of the Government Code. The city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code, the information we have marked under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code, the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy, and the date of birth we have marked under section 552.102(a) of the Government Code. If the individual at issue is currently a licensed peace officer as defined by article 2.12, then the city must withhold the information we have marked under section 552.117(a)(2) of the Government Code. If the individual at issue is not currently a licensed peace officer, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The city 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Megan G. Holloway
Assistant Attorney General
Open Records Division

MGH/akg

Ref: ID# 520047

Enc. Submitted documents

c: Requestor
(w/o enclosures)