



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 15, 2014

Mr. W. Ken Johnson
City Attorney
City of Kyle
P.O. Box 40
Kyle, Texas 78640

OR2014-18565

Dear Mr. 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# 538106.

The Kyle Police Department (the "department") received a request for personnel file information and internal affairs investigations pertaining to the requestor's client, who was an officer with the department, and all department policies regarding internal investigations of department personnel. You state the department will release some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.103, 552.117, and 552.136 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

¹Although you raise section 552.024 of the Government Code as an exception to disclosure, we note this section is not an exception to public disclosure under the Act. Rather, this section permits a current or former official or employee of a governmental body to choose whether to allow public access to certain information relating to the current or former official or employee that is held by the employing governmental body. *See* Gov't Code § 552.024. We note section 552.117 of the Government Code is the proper exception to assert. Further, although you also raise section 552.108 of the Government Code, you did not submit to this office written comments supporting this exception, nor have you identified any information you seek to withhold under this exception. Therefore, we presume you no longer assert section 552.108. *See id.* §§ 552.301, .302.

Initially, we note the submitted information contains a peace officer's Texas Commission on Law Enforcement ("TCOLE") identification number. 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 an officer's TCOLE identification number is a unique computer-generated number assigned to peace officers for identification in the commissioner's electronic database and may be used as an access device number on the TCOLE website. Accordingly, we find the officer's TCOLE identification number in the submitted information does not constitute public information under section 552.002 of the Government Code. Therefore, the TCOLE identification number is not subject to the Act and need not be released to the requestor.²

Next, we must address the department's procedural obligations under the Act. This office determined additional information was necessary to render a decision in this case. *See* Gov't Code § 552.303(b), (c). Thus, in accordance with section 552.303(c) of the Government Code, by correspondence sent to you by facsimile on October 1, 2014, this office requested the department provide this office additional information regarding whether the submitted personnel file information was from the department's internal file maintained pursuant to section 143.089(g) of the Local Government Code or the officer's civil service file maintained under section 143.089(a) of the Local Government Code. *See id.* § 552.303(c). The October 1, 2014 correspondence informed you the department had seven calendar days to submit to this office the additional information requested. *See id.* § 552.303(d) (governmental body shall submit necessary additional information to attorney general not later than seventh calendar day after date notice is received). As of the date of this letter, we have not received a response from the department to our October 1, 2014 request for additional information. We have also attempted to contact your office by telephone twice and have not received a response to the two voice mail messages we left with your office. Because the department did not respond to our request for additional information, we find the department failed to comply with section 552.303(d).

Pursuant to section 552.303(e) of the Government Code, a governmental body's failure to comply with the requirements of section 552.303(d) results in the legal presumption that the requested information is subject to required public disclosure and must be released, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.303(e); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 at 2 (1977). You assert the information at issue is excepted from disclosure under section 552.103 of the Government Code. However, this

²As we are able to make this determination, we need not address your argument against the disclosure of this information.

exception is discretionary in nature and may be waived, and, thus, does not provide a compelling reason to withhold information under section 552.302. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, the department has waived its claim under section 552.103 and may not withhold the submitted information that is subject to the Act on that basis. However, you also raise sections 552.117 and 552.136 of the Government Code, and we note portions of the information are subject to sections 552.101, 552.1175, 552.130, and 552.139 of the Government Code.³ These exceptions can provide compelling reasons that overcome the presumption of openness; thus, we will address the applicability of these exceptions to the submitted information that is subject to the Act.

Next, we note the submitted information includes the requestor's client's W-4 form. Prior decisions of this office have held subsection 6103(a) of title 26 of the United States Code renders tax return information confidential for purposes of section 552.101 of the Government Code. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 600 (1992) (W-4 forms). Subsection 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Treasury] with respect to a return or with respect to the determination of the existence, or possible existence, of liability . . . for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense[.]" *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), *dismissed in part, aff'd in part, vacated in part, and remanded*, 993 F.2d 1111 (4th Cir. 1993).

Subsections (c) and (e) of section 6103 are exceptions to the confidentiality provisions of subsection 6103(a) and provide for 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). Accordingly, the department must release the W-4 form we have marked to the requestor pursuant to section 6103 of title 26 of the United States Code.

³The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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. This section encompasses information protected by other statutes such as the Family and Medical Leave Act (the “FMLA”). *See* 29 U.S.C. §§ 2601 *et seq.* Section 825.500 of chapter V of title 29 of the Code of Federal Regulations identifies the record-keeping requirements for employers that are subject to the FMLA. Subsection (g) of section 825.500 states:

[r]ecords and documents relating to medical certifications, recertifications or medical histories of employees or employees’ family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files. . . . If the [Americans with Disabilities Act (the “ADA”), as amended, is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements . . . , except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee’s physical or medical condition might require emergency treatment; and
- (3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g). Upon review, we find the information we have marked is confidential under section 825.500 of title 29 of the Code of Federal Regulations. Further, we find none of the release provisions of the FMLA apply to this information. Accordingly, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the FMLA.⁴

Section 552.101 of the Government Code also encompasses section 58.007 of the Family Code, which provides, in pertinent part, as follows:

- (c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise,

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

concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
- (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapters B, D, and E.

Fam. Code § 58.007(c). Juvenile law enforcement records relating to delinquent conduct or conduct indicating a need for supervision that occurred on or after September 1, 1997, are confidential under section 58.007. *See id.* § 51.03(a), (b) (defining “delinquent conduct” and “conduct indicating a need for supervision”). For purposes of section 58.007(c), “child” means a person who is ten years of age or older and under seventeen years of age at the time of the conduct at issue. *See id.* § 51.02(2). The information we have marked involves a child engaged in delinquent conduct that occurred after September 1, 1997. As such, this information constitutes a juvenile law enforcement record that is confidential pursuant to section 58.007(c). It does not appear that any of the exceptions to confidentiality under section 58.007 apply in this instance. Accordingly, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code.

Section 552.101 of the Government Code also encompasses section 261.201 of the Family Code, which provides, in relevant part:

(a) [T]he following information is confidential, is not subject to public release under [the Act], and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under [chapter 261 of the Family Code] and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under

[chapter 261 of the Family Code] or in providing services as a result of an investigation.

Id. § 261.201(a). Some of the submitted information pertains to a report of alleged or suspected abuse or neglect made under chapter 261 of the Family Code or an investigation by the department of alleged or suspected child abuse or neglect under chapter 261. Thus, this information falls within the scope of section 261.201(a). *See id.* §§ 101.003(a) (defining “child” for purposes of this section as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes), 261.001(1), (4) (defining “abuse” and “neglect” for purposes of chapter 261 of the Family Code). As you do not indicate the department has adopted a rule that governs the release of this type of information, we assume no such regulation exists. Given that assumption, and based on our review, we determine the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code.

Section 552.101 of the Government Code also encompasses section 611.002 of the Health and Safety Code. Section 611.002 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). Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See id.* § 611.001(2). Upon review, we find the information we have marked constitutes a mental health record the department must withhold under section 552.101 in conjunction with section 611.002.⁵

Section 552.101 of the Government Code also encompasses the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. The MPA in pertinent part, the following:

(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.

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

(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(a)-(c). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004. This office has determined that 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). We have also found that when a file is created as the result of a hospital stay, all the documents in the file relating to diagnosis and treatment constitute physician-patient communications or “[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician.” Open Records Decision No. 546 (1990). Upon review, we find the information we have marked constitutes medical records. As such, the department must withhold the marked medical records under section 552.101 in conjunction with the MPA.⁶

Section 552.101 of the Government Code also encompasses section 1701.306 of the Occupations Code. This section 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 (“TCOLE”). Section 1701.306 provides, in part:

(a) [TCOLE] 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 physical examination, 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)

⁶As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

and shall maintain a copy of the report on file in a format readily accessible to [TCOLE]. A declaration is not public information.

Occ. Code § 1701.306(a), (b). The department must withhold the L-2 Declaration of Medical Condition and L-3 Declaration of Psychological and Emotional Health forms we have marked under section 552.101 in conjunction with section 1701.306.⁷

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

(a) All information submitted to the [TCOLE] 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 [TCOLE] member or other person may not release information submitted under this subchapter.

Id. § 1701.454. The remaining information includes an F-5 form submitted to TCOLE pursuant to subchapter J of chapter 1701 of the Occupations Code. This information does not reflect the officer at issue resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses. Therefore, the department must withhold the information we have marked under section 552.101 in conjunction with section 1701.454.⁸

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. This office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987).

⁷As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

⁸As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

Additionally, this office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate or embarrassing. *See generally* Open Records Decision No. 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information). Whether the public's interest in obtaining personal financial information is sufficient to justify its disclosure must be determined on a case-by-case basis. *See* Open Records Decision No. 373 (1983). Upon review, we find portions of the remaining information satisfy the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the department must withhold the information we have marked under section 552.101 in conjunction with common-law privacy.

Section 552.117 of the Government Code applies to records a governmental body holds in an employment capacity and 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 is also applicable to cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 of the Government Code not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). 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). Therefore, a governmental body must withhold information under section 552.117 on behalf of a current or former official or employee only if the individual made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. We note the requestor has a right of access to his client's own personal information and the department may not withhold it from him under section 552.117. *See* Gov't Code § 552.023(a) (person or person's authorized representative has a special right of access to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person's privacy interests). Accordingly, if the individual whose information we have marked timely requested confidentiality pursuant to section 552.024, the department must withhold the cellular telephone number we have marked under section 552.117(a)(1) if the cellular telephone service is not paid for by a governmental body. The department may not withhold this information under section 552.117 if the employee did not make a timely election to keep the information confidential or if the cellular telephone service is paid for by a governmental body. The remaining information either consists of the personal information of the requestor's client, to which he has a right of access, or it does not consist of the home addresses and telephone numbers, emergency contact information, social security numbers, or family member information of current or former officials or employees of the department. As such, the department may not withhold the remaining information under section 552.117(a)(1).

Section 552.1175 of the Government Code protects the home address, home telephone number, emergency contact information, date of birth, social security number, and family member information of certain individuals, when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential. *Id.* § 552.1175. Upon review, we find the information we have marked consists of telephone numbers of individuals who may be among the types of individuals listed in section 552.1175(a) and who are employed by other law enforcement agencies. Thus, if the information we have marked under section 552.1175 consists of the home telephone numbers of individuals to whom section 552.1175 applies and the individuals elect to restrict access to the information in accordance with section 552.1175(b), then the department must withhold the marked information under section 552.1175. If the telephone numbers at issue are not home telephone numbers, the individuals at issue are not individuals to whom section 552.1175 applies, or if no election is made, the department may not withhold the marked information under section 552.1175 of the Government Code.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's or driver's license or permit, a motor vehicle title or registration, or a personal identification document issued by an agency of Texas or another state or country is excepted from public release. *Id.* § 552.130(a). We conclude the department must withhold the information we have marked under section 552.130.

Section 552.136 of the Government Code states, "Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." *Id.* § 552.136(b); *see also id.* § 552.136(a) (defining "access device"). This office has determined an insurance policy number is an access device number for the purposes of section 552.136. *See* Open Records Decision No. 684 (2009). We note, however, section 552.136 protects personal privacy. As such, the requestor has a right of access to his client's information under section 552.023 of the Government Code and the department may not withhold the requestor's information on the basis of section 552.136. *See* Gov't Code § 552.023(a). Upon review, we conclude the department must withhold the insurance policy number we have marked under section 552.136. However, we find you have not explained how any of the remaining information that does not pertain to the requestor's client consists of a credit card, debit card, or charge card number, or is an access device number used to obtain money, goods, services, or any item of value, or used to initiate the transfer of funds. *See id.* §§ 552.136(a), .301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies). Therefore, the department may not withhold the remaining information under section 552.136.

Section 552.139 of the Government code provides, in part, "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). Therefore, the department must withhold the photocopy of the officer's identification card we have marked under section 552.139.

We note some of the remaining information appears to be subject to copyright law. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see 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 TCOLE identification number within the submitted information is not subject to the Act and need not be released to the requestor. The department must release the W-4 form we have marked to the requestor pursuant to section 6103 of title 26 of the United States Code. The department must withhold the following information: (1) the information we have marked under section 552.101 of the Government Code in conjunction with the FMLA; (2) the information we have marked under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code; (3) the information we have marked under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code; (4) the mental health record we have marked under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code; (5) the medical records we have marked under section 552.101 of the Government Code in conjunction with the MPA; (6) the L-2 and L-3 forms we have marked under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code; (7) the F-5 form we have marked under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code; (8) the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy; (9) the cellular telephone number we have marked under section 552.117(a)(1) if the individual whose information is at issue timely requested confidentiality pursuant to section 552.024 of the Government Code and if the cellular telephone service is not paid for by a governmental body; (10) the information we have marked under section 552.1175 of the Government Code if the information consists of the home telephone numbers of individuals to whom section 552.1175 applies and the individuals elect to restrict access to the information in accordance with section 552.1175(b); (11) the information we have marked under section 552.130 of the Government Code; (12) the insurance policy number we have marked under section 552.136 of the Government Code; and (13) the photocopy of the officer's identification card we have marked under section 552.139 of the Government Code. The department must release the remaining information that is subject to the Act; however, any information protected by copyright may only be released in accordance with copyright law.⁹

⁹We note the requestor has a right of access beyond that of the general public to some of the information being released that pertains to his client. See Gov't Code §§ 552.023(a), .137(b) (personal e-mail address of member of public may be disclosed if owner of address affirmatively consents to its disclosure); ORD 481 at 4.

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,

A handwritten signature in black ink that reads "Lindsay E. Hale". The signature is written in a cursive, flowing style.

Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/akg

Ref: ID# 538106

Enc. Submitted documents

c: Requestor
(w/o enclosures)