



ATTORNEY GENERAL OF TEXAS
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October 21, 2014

Mr. Byron L. Brown
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OR2014-18939

Dear Mr. Brown:

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# 540252.

The Fulshear Police Department (the "department"), which you represent, received a request for the complete personnel file for a police officer. You state you will provide some information to the requestor with redactions of information subject to section 552.117 of the Government Code pursuant to section 552.024 of the Government Code, motor vehicle record information pursuant to section 552.130 of the Government Code, and access device numbers pursuant to section 552.136 of the Government Code.¹ You further state you will

¹Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See* Gov't Code § 552.024(c)(2). If a governmental body redacts such information, it must notify the requestor in accordance with subsections 552.024(c-1) and (c-2). *See id.* § 552.024(c-1)-(c-2). Section 552.130(c) of the Government Code allows a governmental body to redact the information described in section 552.130(a) without the necessity of seeking a decision from the attorney general. *Id.* § 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). Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold specified categories of information, including an access device number under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision. However, on September 1, 2011, the Texas legislature amended section 552.136 to allow 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* Gov't Code § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e). Thus, the statutory amendments to section 552.136 of the Government Code superceded Open Records Decision No. 684 on September 1, 2011. Therefore, a governmental body may only redact information subject to section 552.136(b) in accordance with section 552.136, not Open Records Decision No. 684.

withhold the officer's personal cellular telephone number pursuant to Open Records Decision No. 670 (2001) and certain information pursuant to Open Records Decision No. 684.² You claim the remaining requested information is excepted from disclosure under sections 552.101, 552.102, 552.110, and 552.122 of the Government Code. You also state release of the remaining requested information implicates the proprietary interests of a third party. Accordingly, we understand you notified Stanard & Associates ("Stanard") of the request for information and of its right to submit arguments stating why its information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received and considered comments from Stanard. We have considered the exceptions claimed and reviewed the remaining requested information.

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 TCOLE'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.

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. Section 552.101 encompasses section 1701.454 of the Occupations Code, which 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

²Open Records Decision No. 670 authorizes all governmental bodies to withhold the current and former 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. ORD 670 at 6. 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, 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.

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.

Occ. Code § 1701.454. You seek to withhold an F-5 History Report under section 1701.454. Upon review, we find the information contained in Exhibit B was not submitted to TCOLE under subchapter J of chapter 1701 of the Occupations Code. Accordingly, we conclude the department may not withhold the F-5 History Report in Exhibit B under section 552.101 in conjunction with section 1701.454 of the Occupations Code.

Section 552.101 also encompasses information protected by other statutes, including section 1703.306 of the Occupations Code, which provides the following:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

(b) The [Texas Department of Licensing and Regulation] or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Id. § 1703.306. Upon review, we find the information we marked in Exhibit C, and the entirety of Exhibit D, constitutes information acquired from a polygraph that is confidential under section 1703.306. It does not appear the requestor falls into any of the categories of

individuals who are authorized to receive the polygraph information under section 1703.306(a). Accordingly, the department must withhold the polygraph information we marked in Exhibit C, and the entirety of Exhibit D, under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. However, we find none of the remaining information consists of polygraph information for the purposes of section 1703.306. Accordingly, the department may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code and it must be released.

Section 552.101 of the Government Code also encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code, which governs release of medical records. Section 159.002 of the MPA provides, in part, as follows:

(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 agree Exhibit F 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. Accordingly, the department must withhold the medical record in Exhibit F under section 552.101 in conjunction with the MPA.

Section 552.122 of the Government Code excepts from public disclosure "a test item developed by a . . . governmental body[.]" Gov't Code § 552.122(b). In Open Records Decision No. 626 (1994), this office determined the term "test item" in section 552.122 includes "any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated." ORD 626 at 6. The question of whether specific information falls within the scope of section 552.122(b) must be determined on a case-by-case basis.

Id. at 7. Traditionally, this office has applied section 552.122 where release of “test items” might compromise the effectiveness of future examinations. *See* Open Records Decision No. 118 (1976); *see generally* ORD 626 at 4-5. Section 552.122 also protects the answers to test questions when the answers might reveal the questions themselves. *See* Attorney General Opinion JM-640 at 3 (1987).

You seek to withhold the submitted test exercises and responses in Exhibit E under section 552.122. You explain the department uses the questions at issue on a continuing basis during the department’s selection process. You assert the release of the information at issue would compromise the effectiveness of the department’s future examinations. Having considered your arguments and reviewed the submitted information, we find the test exercises evaluate an applicant’s specific knowledge or ability in a particular area and, thus, qualify as “test items” under section 552.122(b). Furthermore, we find release of the answers to these questions would reveal the questions themselves. Accordingly, the department may withhold the information within Exhibit E under section 552.122(b) of the Government Code.³

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). Additionally, this office has 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 No. 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 600 (1992) (personal financial information includes choice of a particular insurance carrier). Upon review, we find the information within Exhibit G, and the information we marked in Exhibit I, satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, the department must withhold Exhibit G, and the information we marked in Exhibit I, under section 552.101 of the Government Code in conjunction with common-law privacy.⁴

³As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

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

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). Having carefully reviewed the information at issue, the department must withhold the information you marked in Exhibit I under section 552.102(a) of the Government Code.

In summary, the TCOLE identification number is not subject to the Act and need not be released to the requestor. The department must withhold the polygraph information we marked in Exhibit C, and the entirety of Exhibit D, under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. The department must withhold the medical record in Exhibit F under section 552.101 in conjunction with the MPA. The department may withhold Exhibit E under section 552.122(b) of the Government Code. The department must withhold Exhibit G, and the information we marked in Exhibit I, under section 552.101 of the Government Code in conjunction with common-law privacy. The department must withhold the information you marked in Exhibit I under section 552.102(a) 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.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,



Rustom Abedinzadeh
Assistant Attorney General
Open Records Division

RA/dls

Ref: ID# 540252

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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