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ATTORNEY GENERAL OF TEXAS

March 23, 2015

Mr. Donald Stout
Counsel for the City of Midlothian
Colvin & Stout
P.O. Box 597
Ennis, Texas 75120

OR2015-05511

Dear Mr. Stout:

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# 557755.

The Midlothian Police Department (the "department"), which you represent, received a request for the personnel and/or civil service file of a named department officer. 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 received and considered comments from the requestor. *See* Gov't Code § 552.304 (permitting interested third party to submit to the attorney general reasons why requested information should or should not be released).

Initially, we note the information we have marked is not responsive to the instant request for information because it consists of the instant request for information. This ruling does not address the public availability of non-responsive information, and the department is not required to release non-responsive information 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. Section 552.101 encompasses information made confidential by statute, such as the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code, which governs release of medical records. 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.

Occ. Code § 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 the information we have marked constitutes records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that were created or are maintained by a physician. Accordingly, the department must withhold information we have marked under section 552.101 of the Government Code in conjunction with the MPA.¹

Section 552.101 of the Government Code also encompasses information protected by 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:

¹As our ruling is dispositive for this information, we do not address your arguments against its disclosure.

(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.²

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 also found personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (public employee's withholding allowance certificate, designation of beneficiary of employee's retirement benefits, direct deposit authorization, and employee's decisions regarding voluntary benefits programs, among others, protected under common-law privacy), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). However, information concerning financial transactions between an employee and a public employer is generally of legitimate public interest. *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). We further note information obtained by a law enforcement agency in the process of hiring a peace officer is a matter of legitimate public interest, and the public has a legitimate interest in information relating to those who are

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

involved in law enforcement. *See* Open Records Decision 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), 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs), 473 at 3 (1987) (fact that public employee received less than perfect or even very bad evaluation not private), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of law enforcement employees), 423 at 2 (1984) (scope of public employee privacy is narrow), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest). Upon review, we find the information we have marked satisfies 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 of the Government Code in conjunction with common-law privacy.³ However, we find you have failed to demonstrate any portion of the remaining information is highly intimate or embarrassing and of no legitimate public interest. Therefore, the department may not withhold any portion of the remaining information under section 552.101 of the Government Code in conjunction with 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[.]" Gov't Code § 552.102(a). We understand you to assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 of the Government Code, 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 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 has expressly disagreed with *Hubert's* interpretation of section 552.102(a), and held the privacy standard under section 552.102(a) 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 (Tex. 2010). The supreme court also considered the applicability of section 552.102(a) and held it excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *See id.* at 348. Upon review, we find the department must withhold the date of birth we have marked under section 552.102(a) of the Government Code. However, we find you have failed to demonstrate any portion of the remaining information consists of dates of birth of department employees. Therefore, the department may not withhold any portion of the remaining information 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

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

and 552.1175 of the Government Code.⁴ 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. We note the remaining responsive information contains information pertaining to peace officers who may be employed by the department. Therefore, to the extent the information we have marked pertains to a peace officer employed by the department, the department must withhold the information we have marked under section 552.117(a)(2) of the Government Code.

In the event any of the individuals whose personal information is at issue are not employed by the department, we note section 552.1175(b) of the Government Code provides in part the following:

Information that relates to the home address, home telephone number, emergency contact information, date of birth, or social security number of [a peace officer as defined by article 2.12 of the Code of Criminal Procedure], or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

- (1) chooses to restrict public access to the information; and
- (2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Id. § 552.1175(b). The remaining responsive information may contain information pertaining to peace officers not employed by the department. Therefore, if any individual whose personal information is at issue is a currently-licensed peace officer not employed by the department who elects to restrict access to the information in accordance with section 552.1175(b), the department must withhold the information we have marked under section 552.1175 of the Government Code. If the individuals at issue are not currently-licensed peace officers or do not elect to restrict access to the information, the department may not withhold the marked information on this basis.

Section 552.130 of the Government Code provides that information relating to a motor vehicle operator's or driver's license or permit issued by an agency of this state or another state or country is excepted from public release. *Id.* § 552.130(a)(1). Upon review, we find the department must withhold the information we have marked under section 552.130.

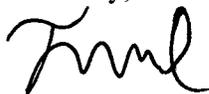
⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

In summary, the department must withhold: (1) the information we marked under section 552.101 of the Government Code in conjunction with the MPA, (2) the information we have marked under section 552.101 of the Government Code in conjunction with the FMLA, (3) the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy, (4) the date of birth we have marked under section 552.102(a) of the Government Code, (5) the information we have marked under section 552.117(a)(2) of the Government Code, provided the individuals whose personal information is at issue are currently-licensed peace officers employed by the department, (6) the information we have marked under section 552.1175 of the Government Code for any individual whose personal information is at issue is a currently-licensed peace officer not employed by the department who elects to restrict access to the information in accordance with section 552.1175(b), and (7) the information we have marked under section 552.130 of the Government Code. The department must release the remaining responsive 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,



Tim Neal
Assistant Attorney General
Open Records Division

TN/bhf

Ref: ID# 557755

Enc. Submitted documents

c: Requestor
(w/o enclosures)