



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 5, 2016

Mr. Peter Gruning
City Attorney
City of Lockhart
P.O. Box 314
San Marcos, Texas 78667-0314

OR2016-07593

Dear Mr. Gruning:

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# 604419.

The City of Lockhart (the "city") received two requests from different requestors for the personnel file of a specified individual. You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.117, 552.122, and 552.130 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from public 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 chapter 411 of the Government Code, which makes confidential criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center. *See id.* §411.083(a). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual laws with respect to the CHRI it generates. *See id.*

¹We note the city did not fully comply with section 552.301 of the Government Code in requesting a ruling from this office. *See* Gov't Code § 552.301(e). Nevertheless, as section 552.117 can provide a compelling reason to overcome the presumption of openness, we will consider its applicability to the information that was not timely submitted. *See id.* §§ 552.007, .302, .352. Further, although you claim section 552.1175 of the Government Code for portions of the submitted information, section 552.117 is the proper exception to raise in this instance because the city holds the submitted information in an employment capacity.

Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety (“DPS”) maintains, except DPS may disseminate this information as provided in chapter 411, subchapter F, or subchapter E-1 of the Government Code. *See* Gov’t Code § 411.083(a). 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. *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 chapter 411, subchapter F, of the Government Code. We note section 411.083 does not apply to active warrant information or other information relating to one’s current involvement with the criminal justice system. *See id.* § 411.081(b) (police department allowed to disclose information pertaining to person’s current involvement in the criminal justice system). Furthermore, CHRI does not include driving record information. *See id.* § 411.082(2)(B). However, criminal history information provided by a department officer as part of an application for employment with the department was not compiled by any governmental body. Further, when an officer’s criminal history information is compiled in the course of the officer’s pre-employment screening, there is a legitimate public interest in the information. Upon review, we find a portion of the submitted information, which we have marked, consists of CHRI that is confidential under section 411.083. Thus, the city must withhold the marked information under section 552.101 in conjunction with section 411.083 of the Government Code.

Section 552.101 of the Government Code also encompasses information protected by section 560.003 of the Government Code, which provides, “[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act].” Gov’t Code § 560.003; *see id.* § 560.001(1) (“biometric identifier” means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry). There is no indication either requestor has a right of access to the submitted fingerprints under section 560.002. *See id.* § 560.002(1)(A) (governmental body may not sell, lease, or otherwise disclose individual’s biometric identifier to another person unless the individual consents to disclosure). Accordingly, the city 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.

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 the Texas Commission on Law Enforcement (the “commission”) under subchapter J of chapter 1701 of the Occupations Code.² Section 1701.454 provides as follows:

²The Texas Commission on Law Enforcement Officer Standards and Education was renamed the Texas Commission on Law Enforcement by the 83rd Legislature. *See* Act of May 6, 2013, 83rd Leg., R.S., ch. 93, § 1.01, 2013 Tex. Gen. Laws 174, 174.

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

Occ. Code § 1701.454. The remaining information includes information that was submitted to the commission pursuant to subchapter J of chapter 1701 of the Occupations Code. Furthermore, the submitted F-5 forms do 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. Therefore, the city must withhold the F-5 forms we have marked under section 552.101 in conjunction with section 1701.454 of the Occupations Code. However, we find the city has failed to establish any of the remaining information it has marked was submitted to the commission under subchapter J of chapter 1701 of the Occupations Code. Therefore, we conclude the city has not established any of the remaining information it has marked is confidential under section 1701.454 and thus, the city may not withhold any of it under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses information made confidential under section 1701.306 of the Occupations Code. Section 1701.306 provides the following:

(a) The commission 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 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) and shall maintain a copy of the report on file in a format readily accessible to the commission. A declaration is not public information.

Occ. Code § 1701.306(a)-(b). You seek to withhold a portion of the remaining information, which you have marked, under section 1701.306(b). However, upon review of the information at issue, we find it does not consist of L-2 Declaration of Medical Condition

or L-3 Declaration of Psychological and Emotional Health forms. Accordingly, the city may not withhold the information at issue under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.

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.”³ 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). Accordingly, the city must withhold the employee’s date of birth we marked under section 552.102(a) of the Government Code.

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.⁴ *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 the financial transaction between an individual and a governmental body is excepted from required public disclosure. *See* Open Records Decision Nos. 600 (1992) (employee’s designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history), 455 at 9 (employment applicant’s salary information not private). However, 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 human affairs, but in fact touches on matters of legitimate public concern), 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). Upon review, we

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

⁴Although you do not raise section 552.101 of the Government Code in conjunction with common-law privacy in your brief, we understand you to raise this exception based on your markings.

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.

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. We note section 552.117(a)(2) protects a peace officer's personal cellular telephone number only if the officer pays for the cellular phone or pager service with his or her personal funds. *See* Open Records Decision Nos. 670 at 6 (2001) (Gov't Code § 552.117(a)(2) excepts from disclosure peace officer's cellular telephone number if officer pays for cellular telephone service), 506 at 5–6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by government body and intended for official use). Accordingly, the city must withhold the information we have marked under section 552.117(a)(2) of the Government Code; however, the city may only withhold the marked cellular telephone number if the cellular telephone service is not paid for by a governmental body. Upon review, we find the remaining information you marked does not consist of the home address, telephone number, emergency contact information, social security number, or family member information of a peace officer, and the remaining information you marked may not be withheld under section 552.117(a)(2).

Section 552.122(b) of the Government Code excepts from 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. You seek to withhold portions of the remaining information, which you have marked, under section 552.122 of the Government Code. However, you have not demonstrated the marked information constitutes a test item for purposes of section 552.122. Accordingly, the city may not withhold the information at issue under section 552.122(b) of the Government Code.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release. *See* Gov't Code § 552.130. Upon review, we find portions of the remaining information consist of motor vehicle record information. Accordingly, the city must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

In summary, the city must withhold (1) the information we have marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code; (2) the fingerprints we have marked under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code; (3) the F-5 forms we have marked under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code; (4) the employee's date of birth we have marked under section 552.102(a) of the Government Code; (5) the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy; (6) the information we have marked under section 552.117(a)(2) of the Government Code, but may only withhold the marked cellular telephone number if the cellular telephone service is not paid for by a governmental body; and (7) the motor vehicle record information we have marked under section 552.130 of the Government Code. The remaining information must be released.

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,



Gerald A. Arismendez
Assistant Attorney General
Open Records Division

GAA/dls

Ref: ID# 604419

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)