



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 11, 2016

Ms. Akilah Mance
Counsel for the City of Waller
Olson & Olson
Wortham Tower, Suite 600
2727 Allen Parkway
Houston, Texas 77019-2133

OR2016-10756

Dear Ms. Mance:

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# 609512 (Ref. No. COW16-002).

The City of Waller (the "city"), which you represent, received a request from the attorney for a named individual for (1) all documents relating to the reasons for the termination of the named individual's employment, (2) the named individual's personnel file, (3) another named individual's personnel file, and (4) a copy of the city's police department's (the "department") policies and procedures manual. You state the city has released some of the requested information to the requestor. You also state the city will redact certain information under section 552.136(c) of the Government Code and section 552.147(b) of the Government Code, and Open Records Decision No. 684 (2009).¹ You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.102, 552.108, 552.117, 552.130, and 552.137 of the Government Code. Additionally, you state the city has

¹Section 552.136 of the Government Code permits a governmental body to withhold the information described in section 552.136(b) without the necessity of seeking a decision from this office. *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). Section 552.147(b) of the Government Code authorizes a governmental body to redact the social security number of a living person without the necessity of requesting a decision from this office under the Act. *See id.* § 552.147(b). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information without the necessity of requesting an attorney general decision.

notified the named individuals pursuant to section 552.304 of the Government Code. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the submitted information contains peace officers' Texas Commission on Law Enforcement ("TCOLE") identification numbers. Section 552.002(a) of the Government Code defines "public information" as information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body;
- (2) for a governmental body and the governmental body:
 - (A) owns the information;
 - (B) has a right of access to the information; or
 - (C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or
- (3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

Id. § 552.002(a). 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 officers' TCOLE identification numbers in the submitted information do not constitute public information under section 552.002 of the Government Code. Therefore, the TCOLE identification numbers are not subject to the Act and need not be released to the requestor.

Next, we note the city has redacted portions of the submitted information, including information subject to sections 552.117 and 552.130 of the Government Code, which the city may redact pursuant to sections 552.024 and 552.130(c) of the Government Code,

respectively.² However, you do not assert, nor does our review of the records indicate, you have been authorized to withhold any of the remaining redacted information without seeking a ruling from this office. *See id.* § 552.301(a); ORD 673. Therefore, information must be submitted in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. In this instance, we can discern the nature of the redacted information; thus, being deprived of this information does not inhibit our ability to make a ruling. In the future, however, the city should refrain from redacting any information that it is not authorized to withhold in seeking an open records ruling. Failure to do so may result in the presumption the redacted information is public. *See Gov't Code* § 552.302.

Section 552.101 of the Government Code exempts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. Section 552.101 encompasses laws that make criminal history record information (“CHRI”) confidential. CHRI generated by the National Crime Information Center or by the Texas Crime Information Center is confidential under federal and state law. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI states obtain from the federal government or other states. Open Records Decision No. 565 at 7 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* at 10-12. Section 411.083 of the Government Code deems confidential CHRI 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) of the Government Code authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for criminal justice purposes. *See id.* § 411.089(b)(1). Upon review, we find the information we have marked constitutes confidential CHRI. Therefore, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code.³ However, the remaining information at issue does not constitute confidential CHRI; thus, the city may not withhold any portion of the remaining information at issue under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code.

²Section 552.024 authorizes a governmental body to redact from public release a current or former employee’s home address and telephone number, emergency contact information, social security number, and family member information excepted from disclosure under section 552.117(a)(1) without the necessity of requesting a decision from this office under the Act, if the employee timely elected to withhold such information. *See Gov't Code* §§ 552.024(a)-(c), .117(a)(1). 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. *See 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).

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

Section 552.101 of the Government Code also encompasses information made confidential by 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 city must withhold the marked medical records under section 552.101 of the Government Code in conjunction with the MPA. However, we find the city has failed to demonstrate any portion of the remaining information at issue consists of a physician-patient communication or a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that was created or is maintained by a physician. Therefore, the city may not withhold any of the remaining information at issue under section 552.101 of the Government Code in conjunction with the MPA.

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 the sheriff’s office 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. Section 552.101 encompasses common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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. We note the requestor has a right of access to his client's date of birth pursuant to section 552.023 of the Government Code. *See Gov't Code* § 552.023(a) (governmental body may not deny access to person to whom information relates or person's agent on ground that information is considered confidential by privacy principles); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). Thus, the city may not withhold the requestor's client's date of birth under section 552.102(a). However, upon review, we find the city must withhold the date of birth you have marked that does not belong to the requestor's client under section 552.102(a) of the Government Code.⁴ However, as none of the remaining information at issue consists of an employee's date of birth subject to section 552.102(a), the city may not withhold any portion of it under section 552.102(a).

As noted above, section 552.101 of the Government Code encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *See Indus. Found.*, 540 S.W.2d at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681–82. Under the common-law right of privacy, an individual has a right to be free from the publicizing of private affairs in which the public has no legitimate concern. *Id.* at 682. In considering whether a public citizen's date of birth is private, the Third Court of Appeals looked to the supreme court's rationale in *Texas Comptroller of Public Accounts v. Attorney General of Texas*, 354 S.W.3d 336 (Tex. 2010). *Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at *3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.). The supreme court concluded public employees' dates of birth are private under section 552.102 of the Government Code because the employees' privacy interest substantially outweighed the negligible public interest in disclosure.⁵ *Texas Comptroller*, 354 S.W.3d at 347-48. Based on *Texas Comptroller*, the court of appeals concluded the privacy rights of public employees apply equally to public citizens, and thus, public citizens' dates of birth are also protected by common-law privacy pursuant to section 552.101. *City of Dallas*, 2015 WL 3394061, at *3. 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

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

⁵Section 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).

personal financial information not relating to the financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. *See* Open Records Decision Nos. 600 (1992), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). However, this office has also found the public has a legitimate interest in information relating to applicants and employees of governmental bodies and their employment qualifications and job performance, especially where the applicant was seeking a position in law enforcement. *See* Open Records Decision Nos. 562 at 10 (1990), 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 444 (1986), 423 at 2 (1984) (scope of public employee privacy is narrow).

We note the requestor has a right of access to his client's private information and it may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. *See* Gov't Code § 552.023(a); ORD 481 at 4. Further, upon review, we find the city has failed to demonstrate the remaining information at issue is highly intimate or embarrassing and of no legitimate public concern. Thus, the city may not withhold any portion of the remaining information at issue under section 552.101 in conjunction with common-law privacy.

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) is intended to protect "information which, 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 the laws of this State." *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.). To prevail on its claim that section 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* ORD 562 at 10 (construing statutory predecessor). This office has concluded that section 552.108(b) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (section 552.108 of the Government Code is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). Section 552.108(b)(1) is not applicable, however, to generally known policies and procedures. *See, e.g.*, ORDs 531 at 2-3 (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

The information at issue consists of the department's policies and procedures manual. You state this information includes highly specific guidelines for police officers confronted by violence or threatened violence when effecting an arrest or protecting the public safety and this information is not duplicated in the Penal Code. You also state the included information demonstrates the department's case-specific interpretation and application of the procedures based on analysis of the circumstances. Thus, you assert the release of this information "has the potential for interfering with law enforcement objectives in that it may equip the public, and particularly criminals, with guidance as to the type of conduct that an officer must tolerate before he may exercise the use of force, and have the effect of encouraging these individuals to tailor their behavior accordingly." Based on your arguments and our review of the information at issue, we agree release of the information we have marked would interfere with law enforcement. Accordingly, the city may withhold the information we have marked under section 552.108(b)(1) of the Government Code. However, we find you have failed to demonstrate the remaining information at issue would interfere with law enforcement or crime prevention. Thus, the city may not withhold the remaining information at issue under section 552.108(b)(1) of the Government Code.

Section 552.117(a)(2) of the Government Code excepts from disclosure the home address, home telephone number, emergency contact information, social security number, and family member information of a peace officer, regardless of whether the peace officer complies with section 552.024 or 552.1175 of the Government Code.⁶ Gov't Code § 552.117(a)(2). We note section 552.117 is also applicable to personal 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) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). The requestor has a right of access to his client's private information and it may not be withheld from him under section 552.117(a)(2). *See* Gov't Code § 552.023(a); ORD 481 at 4. Accordingly, with the exception of the requestor's client's information, the city must generally withhold the information we have marked, in addition to the information you have marked, under section 552.117(a)(2) of the Government Code; however, the city may not withhold the marked cellular telephone numbers to the extent the cellular telephone service is paid for by a governmental body.

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 generally assert section 552.122 of the Government Code for the remaining information at issue. However, we find you have not demonstrated any portion of the remaining

⁶Section 552.117(a)(2) adopts the definition of peace officer found in article 2.12 of the Code of Criminal Procedure.

information at issue constitutes a test item for purposes of section 552.122. Accordingly, the city may not withhold the remaining 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 or 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. Gov't Code § 552.130(a). The requestor has a right of access to the requestor's client's own motor vehicle record information pursuant to section 552.023 of the Government Code. *See id.* § 552.023(a); ORD 481 at 4. Thus, with the exception of the requestor's client's motor vehicle record information, we find the city must withhold the motor vehicle record information you have marked under section 552.130 of the Government Code.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). We note the information at issue includes the requestor's client's e-mail address, to which the requestor has a right of access pursuant to section 552.137(b). *See id.* § 552.137(b). The remaining e-mail addresses at issue are not subject to subsection (c), and you do not indicate the owners of the e-mail addresses have consented to release of their e-mail addresses. Thus, with the exception of the requestor's client's e-mail address, we find the city must withhold the e-mail addresses you have marked under section 552.137 of the Government Code.

We note some of the remaining information at issue may be protected by copyright. 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 numbers are not subject to the Act and need not be released to the requestor. The city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code. The city must withhold the marked medical records under section 552.101 of the Government Code in conjunction with the MPA. The city must withhold the date of birth you have marked that does not belong to the requestor's client under section 552.102(a) of the Government Code. The city may withhold the information we have marked under section 552.108(b)(1) of the Government Code. With the exception of the requestor's client's information, the city must generally withhold the information we have marked, in addition to the information you have marked, under section 552.117(a)(2)

of the Government Code; however, the city may not withhold the marked cellular telephone numbers to the extent the cellular telephone service is paid for by a governmental body. With the exception of the requestor's client's motor vehicle record information, the city must withhold the motor vehicle record information you have marked under section 552.130 of the Government Code. With the exception of the requestor's client's e-mail address, we find the city must withhold the e-mail addresses you have marked under section 552.137 of the Government Code. The city must generally release the remaining information; however, the city may release information subject to copyright only in accordance with copyright law.

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,



Lee Seidlits
Assistant Attorney General
Open Records Division

CLS/bw

Ref: ID# 609512

Enc. Submitted documents

c: Requestor
(w/o enclosures)