



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 21, 2016

Mr. Steven M. Kean
Deputy City Attorney
City of Tyler
P.O. Box 2039
Tyler, Texas 75710

OR2016-14097

Dear Mr. Kean:

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# 615020 (LegalDesk# GNZ-504084).

The Tyler Police Department (the "department") received a request for information pertaining to a named police officer, including specified investigations, e-mails, and computer use logs.¹ The department states it does not have information responsive to a portion of the request.² You claim the submitted information is excepted from disclosure

¹We note the department sought and received clarification of some of the information requested. *See* Gov't Code § 552.222(b) (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); *Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983)*.

under sections 552.101, 552.117, 552.130, and 552.136 of the Government Code.³ Further, you state release of the submitted information may implicate the privacy interests of the named police officer. Accordingly, you state you notified the named police officer of the request for information and of his right to submit arguments to this office as to why the information at issue should not be released.⁴ *See* Gov't Code § 552.304 (providing that 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 representative sample of information.⁵

Initially, you state the department sought clarification of a portion of the request. *See id.* § 552.222(b) (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* Open Records Decision No. 31 (1974) (when presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so request may be properly narrowed). We understand the department has not received clarification of that portion of the request. Thus, we find the department is not required to release information in response to that portion of the request. However, if the requestor does provide clarification, the department must seek a ruling from this office before withholding any responsive information from the requestor. *See City of Dallas*, 304 S.W.3d at 387.

Next, you argue some of the requested information is not subject to the Act. The Act is applicable only to “public information.” *See* Gov't Code §§ 552.002, .021. Section 552.002(a) 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:

³Although you raise section 552.1175 of the Government Code, we note section 552.117 is the proper exception to raise for information held in an employment context. Although the department raises sections 552.137, 552.147, and section 552.101 in conjunction with section 411.087 of the Government Code, sections 159.002 and 1703.306 of the Occupations Code, and section 58.007 of the Family Code, it submits no arguments to support these exceptions. Therefore, we assume the department has withdrawn its claim these sections apply to the submitted information. *See* Gov't Code §§ 552.301, .302.

⁴As of the date of this letter, we have not received comments from the named employee explaining why the submitted information should not be released.

⁵We assume the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(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. Information is “in connection with the transaction of official business” if it is “created by, transmitted to, received by, or maintained by an officer or employee of the governmental body in the officer's or employee's official capacity, or a person or entity performing official business or a government function on behalf of a governmental body, and pertains to official business of the governmental body.” *Id.* § 552.002(a-1). Thus, virtually all the information in a governmental body's physical possession constitutes public information and is subject to the Act. *Id.*; see Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). You explain some of the requested information consists of personal e-mails that have no connection with the department's business and constitute incidental use of the department's resources. You further state the use of the department's resources to create and maintain the submitted information was *de minimis*. See Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). Based on your representations and our review of the information at issue, we agree the information you have marked does not constitute “information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business” by or for the department. See Gov't Code § 552.002. Therefore, we conclude the information you have marked under section 552.002 is not subject to the Act. However, we will address the remaining arguments against disclosure of the information that is subject to the Act.

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.” *Id.* § 552.101. Section 552.101 encompasses information made confidential by other statutes, such as section 143.089 of the Local Government Code. You state the City of Tyler is a civil service city under chapter 143 of the Local Government Code. Section 143.089 provides for the maintenance of two different types of personnel files for each police officer employed by a civil service city: one that must be maintained as part of the officer's civil service file and another the police department may maintain for its own internal use. See Local Gov't Code § 143.089(a), (g). Under section 143.089(a), the officer's civil service file must contain certain specified items, including commendations, periodic evaluations by the police officer's supervisor, and documents relating to any misconduct in any instance in which the department took disciplinary action against the officer under chapter 143 of the

Local Government Code. *Id.* § 143.089(a)(1)-(2). Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *Id.* §§ 143.051-.055. A letter of reprimand does not constitute discipline under chapter 143. *See* Attorney General Opinion JC-0257 (2000). In cases in which a police department investigates a police officer's misconduct and takes disciplinary action against an officer, it is required by section 143.089(a)(2) to place all investigatory records relating to the investigation and disciplinary action, including background documents such as complaints, witness statements, and documents of like nature from individuals who were not in a supervisory capacity, in the police officer's civil service file maintained under section 143.089(a). *See Abbott v. Corpus Christi*, 109 S.W.3d 113,122 (Tex. App.—Austin 2003, no pet.).

All investigatory materials in a case resulting in disciplinary action are “from the employing department” when they are held by or are in the possession of the department because of its investigation into a police officer's misconduct, and the department must forward them to the civil service commission for placement in the civil service personnel file. *Id.* Such records may not be withheld under section 552.101 of the Government Code in conjunction with section 143.089 of the Local Government Code. *See* Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990). Information relating to alleged misconduct or disciplinary action taken must be removed from the police officer's civil service file if the police department determines that there is insufficient evidence to sustain the charge of misconduct or that the disciplinary action was taken without just cause. *See* Local Gov't Code § 143.089(b)-(c).

Section 143.089(g) authorizes a police department to maintain, for its own use, a separate and independent internal personnel file relating to a police officer. *See id.* § 143.089(g). Section 143.089(g) provides as follows:

A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a fire fighter or police officer. The department shall refer to the director or the director's designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file.

Id. § 143.089(g). In *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946 (Tex.App.—Austin 1993, writ denied), the court addressed a request for information contained in a police officer's personnel file maintained by the police department for its use and the applicability of section 143.089(g) to that file. The records included in the departmental personnel file related to complaints against the police officer for which no disciplinary action was taken. The court determined section 143.089(g) made these records confidential. *See* 851 S.W.2d at 949; *see also City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, pet. denied)

(restricting confidentiality under Local Gov't Code § 143.089(g) to “information reasonably related to a police officer’s or fire fighter’s employment relationship”); Attorney General Opinion JC-0257 at 6-7 (addressing functions of Local Gov't Code § 143.089(a) and (g) files).

The department states the information it has marked was gathered during internal investigations that did not result in disciplinary actions and is maintained in the department’s internal files pursuant to section 143.089(g). Based on the department’s representations and our review, we conclude the department must withhold the information it has marked under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code.

The department raises section 552.101 in conjunction with the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) for some of the submitted information. At the direction of Congress, the Secretary of Health and Human Services (“HHS”) promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 (“Privacy Rule”); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, excepted as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

This office addressed the interplay of the Privacy Rule and the Act. Open Records Decision No. 681 (2004). In Open Records Decision No. 681, we noted section 164.512 of title 45 of the Code of Federal Regulations provides a covered entity may use or disclose protected health information to the extent such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *Id.*; *see* 45 C.F.R. § 164.512(a)(1). We further noted the Act “is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public.” ORD 681 at 8; *see also* Gov't Code §§ 552.002, .003, .021. Therefore, we held the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. *See Abbott v. Tex. Dep't of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App.—Austin 2006, no pet.); ORD 681 at 9; *see also* Open Records Decision No. 478 at 2 (1987) (statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the department may not withhold any portion of the information at issue under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses section 6103(a) of title 26 of the United States Code. Prior decisions of this office have held section 6103(a) of title 26 of the

United States Code renders federal tax return information confidential. *See* Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Section 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), *aff’d in part*, 993 F.2d 1111 (4th Cir. 1993). Thus, the submitted W-2 and W-4 forms, which you have marked, constitute tax return information that is confidential under section 6103(a) of title 26 of the United States Code and must be withheld under section 552.101 of the Government Code

Section 552.101 of the Government Code also encompasses information protected by section 1324a of title 8 of the United States Code. Section 1324a governs I-9 forms and their related documents. The submitted information contains Employment Eligibility Verification, Forms I-9, and their attachments. Form I-9 is governed by title 8, section 1324a of the United States Code, which provides that the form “may not be used for purposes other than for enforcement of this chapter” and for enforcement of other federal statutes governing crime and criminal investigations. 8 U.S.C. § 1324a(b)(5); *see* 8 C.F.R. § 274a.2(b)(4). Release of the submitted I-9 forms in this instance would be “for purposes other than enforcement” of the referenced federal statutes. Accordingly, we conclude the department must withhold the submitted I-9 forms and their attachments, which you have marked, under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code.

Section 552.101 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. Additionally, this office has found that 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 No. 600 (1992) (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). Upon review, we find some of the information at issue satisfies the standard articulated by the Texas Supreme Court in

Industrial Foundation. Thus, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.⁶

However, the department has failed to demonstrate the remaining information it has marked is highly intimate or embarrassing and of no legitimate public interest. Thus, the department may not withhold the remaining information it has marked 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[.]”⁷ 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). Upon review, we find the department must withhold the date of birth we have marked 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 section 552.024 and 552.1175 of the Government Code.⁸ See Gov’t Code § 552.117(a)(2). Section 552.117 also protects a peace officer’s personal cellular telephone number if a governmental body does not pay for the cellular telephone service. See Open Records Decision No. 670 at 6 (2001) (section 552.117(a)(2) excepts from disclosure peace officer’s cellular telephone or pager number if officer pays for cellular telephone or pager service). We note a post office box number is not a “home address” for purposes of section 552.117(a). See Open Records Decision No. 622 at 4 (1994) (legislative history makes clear that purpose of Gov’t Code § 552.117 is to protect public employees from being harassed at home). However, we find you have failed to establish section 552.117 is applicable to some of the information you have marked. Accordingly, with the exception of the information we have marked for release, the department must withhold the information you have marked and the information we have marked under section 552.117(a)(2) of the Government Code.⁹ However, the

⁶As our ruling is dispositive, we need not address the department’s remaining arguments against disclosure of this information.

⁷The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. Open Records Decision No. 481 (1987), 480 (1987), 470 (1987).

⁸Section 552.117(a)(2) adopts the definition of peace officer found in article 2.12 of the Code of Criminal Procedure.

⁹As our ruling is dispositive, we need not address the department’s remaining argument against disclosure of this information.

department may not withhold the cellular telephone numbers at issue under section 552.117(a)(2) if a governmental body pays for the cellular telephone service.

Section 552.119 of the Government Code provides the following:

(a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, the release of which would endanger the life or physical safety of the officer, is excepted from [required public disclosure] unless:

(1) the officer is under indictment or charged with an offense by information;

(2) the officer is a party in a civil service hearing or a case in arbitration; or

(3) the photograph is introduced as evidence in a judicial proceeding.

(b) A photograph excepted from disclosure under Subsection (a) may be made public only if the peace officer gives written consent to the disclosure.

Gov't Code § 552.119. Under section 552.119, a governmental body must demonstrate, if the documents do not demonstrate on their face, release of the photograph would endanger the life or physical safety of a peace officer. Upon review, we find you have failed to demonstrate release of the photograph you have marked would endanger an officer's life or physical safety. Accordingly, the photograph you have marked may not be withheld under section 552.119 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. *Id.* § 552.130(a). Upon review, we find the department must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code. However, you have failed to demonstrate any of the remaining information at issue is subject to section 552.130. Thus, the department may not withhold any of the remaining information at issue under section 552.130 of the Government Code.

In summary, the information you have marked is not subject to the Act and need not be released to the requestor in response to this request. The department must withhold the information it has marked under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. The submitted W-2 and W-4 forms, which you have marked, must be withheld under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code. The department must withhold the submitted I-9 forms and their attachments under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code.

The department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The department must withhold the date of birth we have marked under section 552.102(a) of the Government Code. With the exception of the information we have marked for release, the department must withhold the information you have marked and the information we have marked under section 552.117(a)(2) of the Government Code. However, the department may not withhold the cellular telephone numbers at issue under section 552.117(a)(2) if a governmental body pays for the cellular telephone service. The department must withhold 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,



Katelyn Blackburn-Rader
Assistant Attorney General
Open Records Division

KB-R/bw

Ref: ID# 615020

Enc. Submitted documents

c: Requestor
(w/o enclosures)