



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

July 18, 2022

Mr. Joseph Sanders  
Senior Assistant City Attorney  
City of Port Arthur  
P.O. Box 1089  
Port Arthur, Texas 77641-1089

OR2022-20736

Dear Mr. Sanders:

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# 959793 (City ID No.: 22-106).

The City of Port Arthur (the "city") received a request for personnel records pertaining to two named police officers. You state you have released some information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.114, 552.117, and 552.140 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the city has redacted portions of the submitted information. The city does not assert, nor does our review of our records indicate, it has been authorized to withhold any such information without seeking a ruling from this office. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 (2000). Because we can discern the nature of the information that has been redacted, being deprived of it does not inhibit our ability to make a ruling in this instance. Nevertheless, be advised a failure to provide this office with requested information generally deprives us of the ability to determine whether information may be withheld and leaves this office with no alternative other than ordering that the redacted information be released. *See* Gov't Code §§ 552.301(e)(1)(D) (governmental body must provide this office with copy of "specific information requested"), .302.

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 protected by section 143.089 of the

Local Government Code. The city states it 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 that 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 use[.] . . . [T]he 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 city asserts some of the submitted information is confidential under section 143.089(g) of the Local Government Code. Some of the information at issue relates to a disciplinary action taken against the officer at issue that was overturned by arbitration. The city asserts it maintains this information in its internal files as authorized by section 143.089(g). However, the information at issue contains the decision of the arbitration hearing examiner. Pursuant to section 143.1016 of the Local Government Code, a police officer or firefighter may elect to appeal disciplinary actions to an independent third-party hearing examiner instead of to the commission. *See* Local Gov't Code § 143.1016(a); *see also id.* § 143.010 (commission appeal procedure). The hearing examiner has the same duties and powers as the commission in conducting the appeal. *Id.* § 143.1016(f). Section 143.011 of the Local Government Code provides “[e]ach rule, opinion, directive, decision, or order issued by the commission must be written and constitutes a public record the commission shall retain on file.” *Id.* § 143.011(c). As the hearing examiner has the same duties and powers as the commission, we find the written decision issued by a hearing examiner also constitutes a public record. *Id.*; *see id.* §143.057(f); *see also City of Garland v. Byrd*, 97 S.W.3d 601 (Tex. App.—Dallas 2002, pet. denied) (private hearing examiner stands in shoes of civil service commission when rendering decision on discipline); Attorney General Letter Opinion No. 96-018 (1996) (hearing examiner appeals must be held in public like commission proceedings because hearing examiner has same duties and powers as commission pursuant to section 143.057). Thus, the submitted hearing examiner’s decision is subject to section 143.011(c) and is a public record. Although the city claims the information at issue is confidential under section 143.089(g) of the Local Government Code, we find section 143.011 expressly makes appeal decisions issued by the commission public, and section 143.1016 assigns the same commission duties to a hearing examiner. Thus, section 143.011 specifically controls the hearing examiner’s appeal decision at issue in this ruling, not section 143.089(g). Therefore, the city must release the submitted decision of the hearing examiner under section 143.011 of the Local Government Code.

Further, we note the information at issue includes documents relating to misconduct that resulted in disciplinary action. While this information may be kept in the internal file maintained under section 143.089(g), it must also be kept in the civil service personnel file maintained under section 143.089(a). *See* Local Gov't Code § 143.089(a)(1). In this instance, the request was received by the city, which has access to the files maintained under both sections 143.089(a) and 143.089(g); therefore, the request encompasses both of these files. Accordingly, the city may not withhold the documents relating to misconduct that resulted in disciplinary action under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. Upon review, we find the city has demonstrated section 143.089(g) is applicable to some of the remaining

information at issue. Accordingly, the city must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. However, we find the city has failed to demonstrate the remaining information at issue is subject to section 143.089(g) of the Local Government Code. Accordingly, the city may not withhold the remaining information 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). [As noted above, section 6103(a), as a federal law, preempts any conflicting state provisions, including section 22.082 of the Education Code. *See Equal Employment Opportunity Comm’n v. City of Orange, Texas*, 905 F. Supp. at 382 (E.D. Tex. 1995).] Thus, the submitted W-4 forms 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 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 a portion of the remaining information, which we 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 and information obtained from a patient's medical records. Accordingly, the city must withhold the marked information 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."<sup>1</sup> 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). Thus, under *Texas Comptroller*, section 552.102(a) is applicable to the birth date of an employee of a governmental body in a record maintained by his or her employer in an employment context. Accordingly, the city must withhold the dates of birth of the employees at issue 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. *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 a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. *See Open Records Decision Nos. 523 (1989)* (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). However, we note this office has 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* (public has legitimate interest in job qualifications and performance of public employees), 455 at 9 (applicant salary information is of legitimate public interest because it "bears on the applicants' past

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<sup>1</sup> The 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).*

employment record and their suitability for the employment position in question”), 444 (1986), 423 at 2 (1984) (scope of public employee privacy is narrow). This office has also found common-law privacy generally protects the identifying information of child victims of abuse or neglect. *See* ORD 394; *cf.* Fam. Code § 261.201.

Upon review, we find some of the remaining information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the city must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.114(a) of the Government Code excepts from disclosure student records “at an educational institution funded wholly or partly by state revenue.” Gov’t Code § 552.114(a). This office has determined the same analysis under section 552.114 and the Family Educational Rights and Privacy Act of 1974 (“FERPA”), section 1232g of title 20 of the United States Code. FERPA governs the availability of student records held by educational institutions or agencies receiving federal funds. We note section 552.114 and FERPA apply only to student records in the custody of an educational institution and records directly transferred from an educational institution to a third party. *See* 34 C.F.R. § 99.22(a)(2). The city contends some of the remaining information is confidential under section 552.114. However, the city is not an educational institution. *See generally* Open Records Decision No. 309 at 3 (1983) (City of Fort Worth not an “educational agency” for purposes of FERPA). Further, we have no indication the city received the information at issue directly from an educational institution. Therefore, we conclude the city may not withhold any of the remaining information on the basis of section 552.114 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 current or honorably retired peace officer, as well as information that reveals whether the current or honorably retired peace officer has family members, regardless of whether the current or honorably retired peace officer complies with sections 552.024 and 552.1175 of the Government Code. *See* Gov’t Code § 552.117(a)(2); *id.* § 552.003(1-b) (defining “honorably retired” for purposes of the Act). We note, for purposes of section 552.117, “family member” means a spouse, minor child, or adult child who resides in the person’s home. *See id.* § 552.117(c) (providing that “family member” has meaning assigned by Fin. Code § 31.006(d)). Section 552.117 also encompasses a personal cellular telephone number, unless the cellular service is paid for by a governmental body. *See* ORD 506 at 5-7. In this instance we are unable to determine whether the individuals whose information is at issue are currently-licensed or honorably retired peace officers; therefore, we must rule conditionally. If the individuals at issue are currently-licensed or honorably retired peace officers and the cellular telephone service is not paid for by a governmental body, the city must withhold the information we marked under section 552.117(a)(2) of the Government Code. Conversely, if the individuals at issue are not currently-licensed or honorably retired peace officers, the city may not withhold the information at issue under section 552.117(a)(2) of the Government Code. Further, we find you failed to demonstrate the remaining information at issue is subject to section 552.117(a)(2). Thus, no portion of the remaining information may be withheld under section 552.117(a)(2).

If the individuals at issue are not currently-licensed or honorably retired peace officers, the information at issue may be subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See Gov't Code § 552.117(a)(1)*. We note, for purposes of section 552.117, "family member" means a spouse, minor child, or adult child who resides in the person's home. *See id.* § 552.117(c). Section 552.117(a)(1) also applies to the personal cellular telephone number of a current or former official or employee of a governmental body, provided the cellular telephone service is not paid by a governmental body. *See ORD 506 at 5-6*. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989)*. Therefore, a governmental body must withhold information under section 552.117(a)(1) on behalf of a current or former employee only if the individual made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Therefore, if the employees whose information is at issue timely requested confidentiality under section 552.024 of the Government Code and the cellular telephone service is not paid for by a governmental body, the city must withhold the information we marked under section 552.117(a)(1) of the Government Code. Conversely, if the employees at issue did not timely request confidentiality under section 552.024 or the cellular telephone service is paid for by a governmental body, the city may not withhold the information at issue under section 552.117(a)(1). Further, we find you failed to demonstrate the remaining information at issue is subject to section 552.117(a)(1). Thus, no portion of the remaining information may be withheld under section 552.117(a)(1).

Section 552.136 of the Government Code provides, "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. *See Open Records Decision No. 684 at 9 (2009)*. Accordingly, the city must withhold the insurance policy numbers we marked under section 552.136 of the Government Code.

Section 552.140 of the Government Code provides a military veteran's DD-214 form or other military discharge record that is first recorded with, or that otherwise first comes into the possession of, a governmental body on or after September 1, 2003, is confidential for a period of seventy-five years and may only be disclosed in accordance with section 552.140 or in accordance with a court order. *See Gov't Code § 552.140(a)-(b)*. We understand the city came into possession of the submitted military discharge record after September 1, 2003. Accordingly, we conclude the city must withhold the military discharge record we marked under section 552.140 of the Government Code.

In summary, the city must release the submitted decision of the hearing examiner under section 143.011 of the Local Government Code. The city must withhold the information we marked under section 552.101 of the Government Code in conjunction with section

143.089(g) of the Local Government Code. The city must withhold the submitted W-4 forms under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code. The city must withhold the marked information under section 552.101 of the Government Code in conjunction with the MPA. The city must withhold the dates of birth of the employees at issue under section 552.102(a) of the Government Code. The city must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. If the individuals at issue are currently-licensed or honorably retired peace officer and the cellular telephone service is not paid for by a governmental body, the city must withhold the information we marked under section 552.117(a)(2) of the Government Code. If the employees whose information is at issue timely requested confidentiality under section 552.024 of the Government Code and the cellular telephone service is not paid for by a governmental body, the city must withhold the information we marked under section 552.117(a)(1) of the Government Code. The city must withhold the insurance policy numbers we marked under section 552.136 of the Government Code. The city must withhold the military discharge record we marked under section 552.140 of the Government Code. The city 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

D. Michelle Case  
Assistant Attorney General  
Open Records Division

DMH/jxd

Ref: ID# 959793

Enc. Submitted documents

c: Requestor  
(w/o enclosures)