



May 18, 2001

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OR2001-2065

Dear Mr. Hill:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 147425.

The Town of Addison Police Department (the "department"), which you represent, received a request for 1) information relating to a specific arrest and 2) the personnel file of a named police officer. You indicate that there are no responsive 9-1-1 tapes relating to the arrest. The Public Information Act does not require a governmental body to make available information that does not exist. Open Records Decision No. 362 (1983). You contend that the remaining requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108, 552.111, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.108 of the Government Code provides in relevant part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]

(c) This section does not except from the requirements of Section 552.021 information that is basic information about an arrested person, an arrest, or a crime.

Section 552.108(a)(1) excepts information that relates to a pending investigation or prosecution. See *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), writ ref'd n.r.e. per curiam, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases); Open Records Decision No. 216 (1978). You state that the requested information is related to a pending driving while intoxicated ("DWT") case. Based on your representation, we conclude that the records related to this case, which you have submitted as Attachment #1, are excepted from public disclosure by section 552.108(a)(1).

Note, however, that "basic information" is not excepted from disclosure. Gov't Code § 552.108(c). We believe such basic information refers to the "front page" information held to be public in *Houston Chronicle*. See Open Records Decision No. 127 (1976) (summarizing the types of information considered to be basic information). Except for basic information, the department may withhold the information within Attachment #1 from disclosure.<sup>1</sup>

You also claim that some of the information contained in the personnel file, which you have submitted as Attachment #2, is excepted from disclosure under section 552.101 in conjunction with common law privacy and under section 552.102. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information that is protected by the common law right of privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* includes information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

Section 552.102 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). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App--Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information

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<sup>1</sup>Because the records related to the pending DWI case are protected under section 552.108(a)(1), we need not address whether that information is also protected under section 552.103. But note that, generally, basic information may not be withheld from public disclosure under section 552.103. Open Records Decision No. 597 (1991).

claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common law privacy. Accordingly, we will consider your section 552.101 and section 552.102 claims together.

This office has held that personal financial information not related to a financial transaction between an individual and a governmental body is protected by common law privacy. See Open Records Decision Nos. 600 (1992), 545 (1990). On the other hand, a public employee's job performance does not generally constitute his private affairs. Open Records Decision No. 470 (1987). The public has a genuine interest in information concerning a public employee's job performance and the reasons for dismissal, demotion or promotion. Open Records Decision No. 444 at 5-6 (1986). In addition, the public has a legitimate interest in the job qualifications, including college transcripts, of public employees. ORD 470. We have marked the information within the submitted documents that is protected by common law privacy and must therefore be withheld under section 552.102 of the Government Code.

We also find criminal history information within the submitted documents that is protected by common law privacy. Where an individual's criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual's right to privacy. See *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). We have marked the criminal history information that is protected under common law privacy and must also be withheld under section 552.101.

Section 552.101 also excepts information that is made confidential by statute. Criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") must be withheld under section 552.101. 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 law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. See Gov't Code § 411.083.

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 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 generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. See Open Records Decision No. 565 (1990).

Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. We have marked the CHRI that must be withheld section 552.101 of the Government Code.

In addition, we find that some of the information in the personnel file is made confidential by section 1703.306 of the Occupations Code, which provides:

- (a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:
  - (1) the examinee or any other person specifically designated in writing by the examinee;
  - (2) the person that requested the examination;
  - (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
  - (4) another polygraph examiner in private consultation; or
  - (5) any other person required by due process of law.

Occ. Code § 1703.306. We find that certain information in the personnel file was obtained during the application process through polygraph examinations. It does not appear that any of the exceptions in section 1703.306 apply. Accordingly, the information we have marked is confidential pursuant to section 1703.306 of the Occupations Code and is therefore excepted from disclosure under section 552.101 of the Government Code.

The submitted information also contains a declaration of medical condition and a declaration of psychological and emotional health, which are both made confidential by section 1701.306 of the Occupations Code,<sup>2</sup> which provides, in relevant part, as follows:

- (a) The commission may not issue a license to a person as an officer or county jailer unless the person is examined by:

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<sup>2</sup>The Seventy-sixth legislature enacted section 1701.306 of the Occupations Code and repealed section 415.057 of the Government Code without substantive change.

(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 physical examination, blood test, or other medical test.

(b) An agency hiring a person for whom a license as an officer or county jailer 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. We have marked the information that must be withheld pursuant to section 1701.306 of the Occupations Code.

You claim that some of the submitted information is protected by section 552.111 of the Government Code. Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.--Austin 2001, no pet.). An agency’s policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615 at 4-5.

You wish to withhold “internal communication regarding the training performance of the officer [whose personnel file was requested and] the recommendations of training officers.” We believe that this information concerns an internal personnel matter and does not reflect the policymaking process of the department. Therefore, you may not withhold any of the information in the officer’s personnel file under section 552.111.

You also claim that some of the information is protected by section 552.117 of the Government Code. The department must withhold those portions of the records that reveal a peace officer’s home address, home telephone number, and social security number, and

whether the officer has family members, regardless of whether the peace officer complies with section 552.024.<sup>3</sup> The department must also withhold the officer's *former* home address and telephone information from disclosure. See Open Records Decision No. 622 (1994). We have marked the documents accordingly. Please note that the plain language of section 552.117 does not cover an officer's fingerprints. Therefore, the department may not withhold fingerprints under section 552.117.

You claim that the officer's photograph is protected from disclosure by section 552.119, which excepts from public disclosure a photograph of a peace officer that, if released, would endanger the life or physical safety of the officer, unless one of three exceptions applies. The three exceptions are: (1) the officer is under indictment or charged with an offense by information; (2) the officer is a party in a fire or police civil service hearing or a case in arbitration; or (3) the photograph is introduced as evidence in a judicial proceeding. This section also provides that a photograph exempt from disclosure under this section may be made public only if the peace officer gives written consent to the disclosure. Open Records Decision No. 502 (1988). The submitted copies of photographs depict a peace officer, and it does not appear that any of the exceptions apply. You have not informed us that the peace officer in question has executed a written consent to disclosure. Thus, we agree that you must withhold the photographs depicting the peace officer under section 552.119.

Finally, you claim that some of the information is protected by section 552.130, which provides, in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

You must withhold all Texas driver's license numbers that appear in the personnel file under section 552.130.

To summarize: You may withhold the records in Attachment #1 under section 552.108(a)(1), except for "basic information," which must be released. You must withhold the information we have marked in Attachment #2 that is protected by common law privacy and therefore excepted from disclosure under section 552.102. The CHRI, the polygraph results, and the medical and psychological declarations are all made confidential by statute and must be withheld under section 552.101. You may not withhold any of the submitted information

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<sup>3</sup>"Peace officer" is defined by article 2.12 of the Code of Criminal Procedure.

under section 552.111. You must withhold those portions of the records that reveal the officer's home address, home telephone number, and social security number, and whether the officer has family members, under section 552.117(2). You must withhold the photographs depicting the peace officer under section 552.119, and you must withhold all Texas driver's license numbers that appear in the personnel file under section 552.130.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

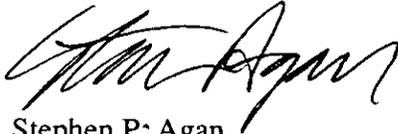
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Stephen P. Agan  
Assistant Attorney General  
Open Records Division

SPA/seg

Ref: ID# 147425

Encl: Submitted documents

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(w/o enclosures)