



June 29, 2001

Ms. Sarajane Milligan
Assistant County Attorney
County of Harris
1019 Congress, 15th Floor
Houston, Texas 77002-1700

OR2001-2807

Dear Ms. Milligan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 148941.

The Harris County Constable Precinct Eight (the "constable") received three requests for several categories of information regarding a named deputy. You indicate that the constable does not have information responsive to some of these categories.¹ You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108, 552.114, 552.117, 552.119, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.²

First, you argue that the requested information is excepted from disclosure under section 552.103 of the Government Code. Section 552.103(a) provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

¹ We note that the Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

² You indicate that you have submitted a representative sample of the information responsive to two of the categories of requested information. We assume that 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.

The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) applies. The litigation exception enables a governmental body to protect its position in litigation by requiring information related to the litigation to be obtained through discovery. Open Records Decision No. 551 at 3 (1990). Further, section 552.103 only applies where the litigation involves or is expected to involve the governmental body that is claiming the exception. See Open Records Decision No. 392 (1983)(finding predecessor to section 552.103 only applicable to governmental body who has the litigation interest).

You state that the requested information relates to criminal litigation brought by the State of Texas against the requestor's client. However, the constable is not a party to the criminal case and, therefore, has no section 552.103 interest in the requested information. In addition, you do not demonstrate that the prosecutor has expressed a section 552.103 interest in the information. See, e.g., Open Records Decision No. 469 (1987). Consequently, the requested information is not excepted by section 552.103 in this instance.

Second, you assert that the requested information is excepted from disclosure under section 552.108(a)(1) of the Government Code. Section 552.108 of the Government Code states that information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from required public disclosure "if release of the information would interfere with the detection, investigation, or prosecution of crime." Gov't Code § 552.108(a)(1). You inform us that the requested information pertains to a pending criminal case, and that release of the requested information would hinder its prosecution. We therefore believe that the release of the information in Exhibit D-2, which deals with the investigation of a crime, "would interfere with the detection, investigation, or prosecution of crime." *Id.* However, you have not demonstrated how release of the Department Manual submitted as Exhibit D-3 and the dispatch radio log submitted as Exhibit D-5 would interfere with the pending prosecution. Furthermore, the personnel file submitted as Exhibit D-1 and the training records submitted as Exhibit D-4 do not deal with the detection, investigation, or prosecution of crime. Thus, Exhibits D-1, D-3, D-4, and D-5 may not be withheld from disclosure under section 552.108(a)(1).

We note that section 552.108 is inapplicable to basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle Publishing Company 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). Thus, with the exception of the basic front page offense and arrest information, the constable may withhold the information in Exhibit D-2 from disclosure based on section 552.108(a)(1).

Third, you contend that portions of the submitted information are confidential under common law and/or constitutional privacy. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and incorporates the doctrine of common law privacy. You also raise section 552.102, which protects "information in a personnel file,

the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” The protection of section 552.102 is the same as the protection provided by the common law right to privacy under section 552.101. *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Consequently, we will consider these two exceptions together.

For information to be protected from public disclosure under common law privacy, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992).

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within “zones of privacy” which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the “most intimate aspects of human affairs.” *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

This office has determined that some personal financial information is highly intimate or embarrassing and thus it meets the first part of the *Industrial Foundation* test. See Open Records Decision Nos. 600 (1992) (Employee's Withholding Allowance Certificate; designation of beneficiary of employee's retirement benefits; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history), 523 (1989). However, where a transaction is funded in part by the state, it involves the employee in a transaction with the state and is not protected by privacy. Thus, information about the essential features of an employee's participation in a group insurance program funded in part by the state involves him in a transaction with the state and, therefore, is not excepted from disclosure by a right of privacy. On the other hand, information is excepted from disclosure if it relates to a voluntary investment that the employee made in an option benefits plan offered by the city. Open Records Decision No. 600 (1992). We have marked the personal financial information in Exhibit D-1 that is excepted from disclosure under section 552.101 and common law privacy.

Furthermore, this office has concluded that common law privacy protects some kinds of medical information or information indicating disabilities or specific illnesses. See Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Accordingly, we have marked additional information in Exhibit D-1 that the constable must withhold under section 552.101 of the Government Code in conjunction with common law privacy.

Fourth, you claim that some of the submitted documents are medical records that are protected from disclosure under section 552.101 in conjunction with the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. The MPA provides that "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." Occupations Code § 159.002(b). It does not appear, nor do you demonstrate, that any of the submitted information was created or maintained by a physician. Therefore, the constable may not withhold any of the submitted information from disclosure under section 552.101 in conjunction with the MPA.

Fifth, you argue that portions of the submitted information are excepted from disclosure under section 552.117 of the Government Code. Section 552.117(2) excepts from disclosure a peace officer's home address, home telephone number, social security number, and information indicating whether the peace officer has family members regardless of whether the peace officer made an election under section 552.024 of the Government Code. Section 552.117(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Accordingly, the constable must withhold the information we have marked in Exhibits D-1, D-3, and D-4 under section 552.117.

Sixth, you contend that certain photographs in the submitted information must be withheld from disclosure under section 552.119 of the Government Code. Section 552.119 excepts from public disclosure a photograph of a peace officer³ 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 photographs in D-1 depict a peace officer and it does not appear that any of the exceptions are applicable. You have not informed us that the peace officer has executed any written consent to disclosure. We therefore agree that the constable must withhold the photographs of the peace officer in Exhibit D-1 pursuant to section 552.119 of the Government Code.

Seventh, you assert that portions of the submitted information are excepted from disclosure under section 552.130 of the Government Code. Section 552.130 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]

³"Peace officer" is defined by article 2.12 of the Code of Criminal Procedure.

(2) a motor vehicle title or registration issued by an agency of this state[.]

Accordingly, we have marked the information in Exhibit D-1 that the constable must withhold under section 552.130. Further, our review of Exhibit D-5 indicates that it may contain motor vehicle information that relates to a license, permit, title, or registration issued by an agency of the state of Texas. If any of the information in Exhibit D-5 relates to a license, permit, title, or registration issued by an agency of the state of Texas, the constable must withhold it pursuant to section 552.130.

Finally, you contend that some of the submitted information is excepted from disclosure under section 552.114 of the Government Code. The federal Family Educational Rights and Privacy Act of 1974 ("FERPA") provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). This office generally applies the same analysis under section 552.114 and FERPA. Open Records Decision No. 539 (1990).

Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. Section 552.026 provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

Thus, FERPA and the accompanying Government Code provisions govern the availability of student or education records held by educational agencies or institutions. *See* 20 U.S.C. § 1232g(b)(1); Gov't Code §§ 552.026, 552.114. FERPA generally does not govern access to records in the custody of governmental bodies that are not educational agencies or institutions. *See* Open Records Decision No. 390 at 3 (1983). An exception to this rule applies if the governmental body received the records from an educational agency under written consent of the student. 20 U.S.C. 1232g(b)(4)(B). Thus, if the constable received the records at issue from an educational agency or institution pursuant to the written consent of the student, such information is confidential under FERPA and must be withheld from the requestor. *See* 20 U.S.C. § 1232g(a)(3), (b)(4)(B).

We note that Exhibit D-1 contains an employee W-4 form that must be withheld under section 552.101. Employee W-4 forms are excepted from disclosure under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code. Open Records Decision No. 600 (1992). The constable must therefore withhold the W-4 form in Exhibit D-1, which we have marked, under section 552.101.

We also note that Exhibit D-1 contains an Employment Eligibility Verification, Form I-9. 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 this document under the Public Information Act would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we conclude that Form I-9, which we have marked, is confidential under section 552.101 and may only be released in compliance with the federal laws and regulations governing the employment verification system.

We further note that among the documents in Exhibit D-1 is a print-out that appears to contain criminal history record information ("CHRI") generated by the Texas Crime Information Center ("TCIC") or the National Crime Information Center ("NCIC"). The dissemination of CHRI obtained from the NCIC network is limited by federal law. *See* 28 C.F.R. § 20.1; Open Records Decision No. 565 at 10-12 (1990). Federal regulations allow each state to follow its individual law with respect to CHRI it generates. Open Records Decision No. 565 at 10-12 (1990). 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 the information except to another criminal justice agency for a criminal justice purpose. Gov't. Code § 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, and 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. *See* Open Records Decision No. 565 (1990). We have marked the criminal history information in Exhibit D-1 that the constable must withhold under section 552.101.

To summarize, we conclude that: (1) the constable may not withhold the requested information under section 552.103; (2) with the exception of the basic front page offense and arrest information, the constable may withhold the information in Exhibit D-2 from disclosure based on section 552.108(a)(1); (3) we have marked the information in Exhibit D-1 that the constable must withhold under section 552.101 and common law privacy; (4) the constable may not withhold any of the submitted information from disclosure under section 552.101 in conjunction with the MPA; (5) the constable must withhold the information we have marked in Exhibits D-1, D-3, and D-4 under section 552.117; (6) the constable must withhold the photographs in D-1 pursuant to section 552.119; (7) the constable must withhold the information we have marked in Exhibit D-1 under section 552.130; (8) the constable must withhold any information in Exhibit D-5 that relates to a license, permit, title, or registration issued by an agency of the state of Texas, pursuant to section 552.130. (9) if the constable received the educational records at issue from an educational agency or institution pursuant to the written consent of the student, such information is confidential under FERPA and must be withheld from the requestor; (10) the constable must withhold the W-4 form in Exhibit D-1 under section 552.101; (11) Form I-9,

which we have marked, is confidential under section 552.101 and may only be released in compliance with the federal laws and regulations governing the employment verification system; and (12) the constable must withhold the criminal history information we have marked in Exhibit D-1 under section 552.101. The remaining submitted information must be released to the requestor.

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,



Karen A. Eckerle
Assistant Attorney General
Open Records Division

KAE/sdk

Ref: ID# 148941

Enc: Submitted documents

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