



September 14, 2001

Mr. David M. Berman
Nichols, Jackson, Dillard, Hager & Smith, L.L.P.
1800 Lincoln Plaza
500 North Akard
Dallas, Texas 75201

OR2001-4117

Dear Mr. Berman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 152004.

The City of Duncanville (the "city"), which you represent, received a request for all files pertaining to former police officer Johnny Black, including personnel files and information concerning an internal investigation. You indicate that the city has released the officer's complete personnel file with certain personal information, including photographs of the peace officer, redacted. You claim that the remaining responsive information, consisting of an internal affairs investigatory file, is excepted from disclosure under sections 552.101, 552.102, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We begin by addressing whether the photographs of the peace officer that you withheld from the requestor are excepted from disclosure. Section 552.119 of the Government Code excepts from public disclosure a photograph of a peace officer¹ 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. You indicate that the named officer is currently appealing a disciplinary action taken by the Duncanville Police Department to the civil service commission. To the extent the named officer is a party in a police civil service hearing or a case in arbitration, section 552.119 does not except his photographs from public disclosure. Furthermore, because you have not indicated that the photographs are excepted under any other exception, the photographs must be released if section 552.119 does not apply.

¹"Peace officer" is defined by article 2.12 of the Code of Criminal Procedure.

With respect to the submitted information, we note that the information contains two newspaper articles. These newspaper articles must be released to the requestor as they already exist in the public domain by virtue of their publication.

We note that the remainder of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108

Gov't Code § 552.022(a)(1). The submitted information consists of completed internal affairs investigations of the named officer. Consequently, the information must be released to the public unless it is confidential under other law or it is excepted from disclosure under section 552.108. You raise section 552.108 as an exception to the disclosure of the submitted information. You also raise sections 552.101 and 552.102, which are considered "other law" for the purpose of section 552.022. However, section 552.103 is a discretionary exception and is not other law for the purpose of section 552.022.² Therefore, we will consider your arguments only under sections 552.101, 552.102, and 552.108.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You indicate that the submitted information is confidential under section 143.089(g) of the Local Government Code. Section 143.089 of the Local Government Code provides in pertinent part:

(a) The director [of the fire fighters' or police officers' civil service] or the director's designee shall maintain a personnel file on each fire fighter and police officer. The personnel file must contain any letter, memorandum, or document relating to:

²Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 665 at 2 n.5 (2000) (governmental body may waive litigation exception, section 552.103), 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding), 549 at 6 (1990) (governmental body may waive informer's privilege), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

(1) a commendation, congratulation, or honor bestowed on the fire fighter or police officer by a member of the public or by the employing department for an action, duty, or activity that relates to the person's official duties;

(2) any misconduct by the fire fighter or the police officer if the letter, memorandum, or document is from the employing department and if the misconduct resulted in disciplinary action by the employing department in accordance with this chapter; and

(3) the periodic evaluation of the fire fighter or police officer by a supervisor. A letter, memorandum, or document relating to alleged misconduct by the fire fighter or police officer may not be placed in the person's personnel file if the employing department determines that there is insufficient evidence to sustain the charge of misconduct

....

(g) 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.

Thus, section 143.089 of the Local Government Code provides for the creation of only two personnel files for police officers and fire fighters: one that must be maintained by the city's civil service director or his designee and another that may be maintained by the city's fire and police departments. Information contained in the personnel file maintained by the civil service director in accordance with chapter 143, including all records relating to misconduct by police officers that resulted in disciplinary action under chapter 143, must be released to the public unless the information comes within one of the Public Information Act's exceptions to required public disclosure. However, information contained in a personnel file held by the police department is confidential pursuant to section 143.089(g) and may not be disclosed under the Act.

Here, the submitted information pertains to misconduct by a peace officer that resulted in the indefinite suspension of the peace officer. Consequently, the submitted information must be included in the peace officer's civil service personnel file and cannot be withheld under section 143.089(g) of the Local Government Code. *See* Local Gov't Code §§ 143.051-.055. Therefore, the city cannot withhold the submitted information under section 143.089(g).

You also contend that the submitted information is excepted from disclosure under section 552.108(b)(2) of the Government Code. Section 552.108(b)(2) provides:

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

....

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in a conviction or deferred adjudication

Section 552.108 is inapplicable to a police department's internal administrative investigations that do not involve an investigation of crime. *See Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied). Although a criminal investigation was conducted into the named peace officer's conduct, it was conducted by the Dallas County Sheriff's Department, not the Duncanville Police Department. The Duncanville Police Department's internal investigation does not appear to have included an investigation of crime. We note that while the submitted information does appear to contain documents obtained from the Dallas County Sheriff's Department concerning the criminal investigation, you have not indicated that the Dallas County Sheriff's Department wishes to withhold this information under section 552.108. Consequently, we find that the submitted information is not excepted from disclosure under section 552.108(b)(2).

Next, you contend that portions of the submitted internal affairs file are excepted from disclosure under section 552.102 of the Government Code. 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 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 as incorporated by section 552.101 of the Act. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

For information to be protected from public disclosure by the common law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation*. In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. Personal financial information generally is excepted from public disclosure under common law privacy, except to the extent the information reflects a transaction between the employee and the

governmental body. Open Records Decision Nos. 600 at 9-12 (1992) (information about public employee's participation in a group insurance program, retirement benefits beneficiaries, tax exempt reimbursement accounts, and direct deposit), 545 (1990) (information about a public employee's participation in a deferred compensation plan). We have marked personal financial information contained in the submitted documents that is confidential under common law privacy and must be withheld under sections 552.101 and 552.102 of the Government Code.

We note that the submitted documents contain other information that is or may be excepted from disclosure under section 552.101. Federal regulations prohibit the release of criminal history record information ("CHRI") maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given."), (2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Section 411.083 provides that any CHRI maintained by the Department of Public Safety ("DPS") is confidential. Gov't Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *Id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Furthermore, 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 information that constitutes confidential CHRI and, therefore, must be withheld under section 552.101.

Furthermore, the submitted documents contain information that is excepted from disclosure under section 552.117(2) of the Government Code. Section 552.117(2) excepts from public 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. Thus, the city must withhold peace officers' home addresses, home telephone numbers, social security numbers, and family member information from the submitted information under section 552.117(2). We note, however, that the named peace officer that is the subject of the instant request has been terminated by the city's police department. If the terminated officer remains a licensed police officer as defined by article 2.12 of the Code of Criminal Procedure or a security officer commissioned under section 51.212 of the Education Code, his home address and telephone number, social security number, and family member information must not be released under section 552.117(2). If he is no longer a licensed officer, his personal information may still be excepted under section 552.117(1). Section 552.117(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental

body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the department must release the terminated officer's personal information if he is no longer a licensed officer and he did not make a request for confidentiality under section 552.024 of the Government Code prior to the date on which the request for this information was received. We have marked the information that is subject to section 552.117.

Social security numbers that are not otherwise excepted from disclosure under section 552.117 might be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security numbers, the city should ensure that it did not obtain or maintain the social security numbers pursuant to any provision of law, enacted on or after October 1, 1990.

Finally, we note that the requested documents contain information that may be 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]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

The requested information contains a driver's license number. To the extent this number is derived from a driver's license issued by an agency of the State of Texas, the city must withhold the driver's license number under section 552.130.

In summary, the city must withhold the photographs of the named peace officer contained in his personnel file under section 552.119 unless the officer is a party in a police civil service hearing or a case in arbitration. The city must release the newspaper articles contained in the submitted information in full. The city must withhold the personal financial information contained in the submitted information under section 552.101 and

section 552.102 of the Government Code. The city must also withhold peace officers' home addresses, home telephone numbers, social security numbers, and family member information that we have marked under section 552.117(2). If the named individual who is the subject of the instant request is no longer a licensed peace officer as defined by article 2.12, then his home address, home telephone number, social security number, and family member information is excepted under section 552.117(1) if he timely elected to keep this information confidential under section 552.024. The city must withhold social security numbers not otherwise protected under section 552.117 if the social security numbers were obtained or maintained pursuant to a provision of law enacted on or after October 1, 1990. Additionally, the city must withhold the marked criminal history record information under section 552.101. Finally, the city must withhold driver's license information to the extent it was issued by the State of Texas. You must release the remainder of the submitted information.

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); *Tex. Dep't of Pub. 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,



Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/sdk

Ref: ID# 152004

Enc: Submitted documents

c: Ms. Kristi Crooks
Managing Editor
Today Newspapers
1701 North Hampton
Desoto, Texas 75115
(w/o enclosures)