



November 19, 2001

Mr. Robert R. Ray
Assistant City Attorney
City of Longview
P.O. Box 1952
Longview, Texas 75606-1952

OR2001-5340

Dear Mr. Ray:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 155091.

The City of Longview (the "city") received a request for the personnel file of the city's fire marshal (the "fire marshal"). You do not raise any permissive exceptions to disclosure of the requested information, but rather, you query whether portions of the information are excepted under sections 552.101 and 552.117 of the Government Code. You inform us that the submitted information is a representative sample from the fire marshal's voluminous personnel file.¹ We have considered the exceptions you claim and reviewed the submitted information.

We note initially that when submitting information to this office, it must be marked in a manner that allows us to actually review the material. Failure to submit the information properly is a violation of section 552.301 of the Government Code. In those instances where we can determine the type of information that was redacted, we will rule. However, when we cannot determine the substance of the information submitted, it is deemed public under section 552.302 of the Government Code and must be released. We have marked the information accordingly.

¹ In reaching our conclusion here, 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 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.

You assert that the submitted documents contain information that is protected from disclosure under section 552.117(2). 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. We note that the city must also withhold an officer's *former* address from disclosure. See Open Records Decision No. 622 (1994). The term "peace officer" is used as defined by article 2.12 of the Code of Criminal Procedure. You inform us that the fire marshal is a certified peace officer and that you have highlighted the type of information which you believe is excepted under section 552.117(2). Unless we have marked otherwise, you must withhold the information you marked as excepted from disclosure under section 552.117(2). We point out here that you highlighted the addresses of two city employees, but it is not readily apparent whether those employees are peace officers or whether they elected to keep their home addresses confidential under section 552.024. See Gov't Code § 552.117. If they are not peace officers or did not make an election under section 552.024, then their addresses must be released.

You next claim that portions of the submitted information are excepted from disclosure under section 552.101 and common-law privacy. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section also applies to information made confidential by the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information must be withheld under section 552.101 in conjunction with the common-law right to privacy if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. See *id.*

You contend that some of the submitted information is the fire marshal's personal financial information and is therefore excepted from disclosure under common-law privacy. Previous decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). Thus, a public employee's allocation of his salary to a voluntary investment program offered by his employer is a personal investment decision, and information about that decision is excepted from disclosure by a common-law right of privacy. Open Records Decision Nos. 600 (1992) (TexFlex benefits), 545 (1990) (deferred compensation plan). 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. Open Records Decision No. 600 (1992). Here, we assume that the fire marshal's enrollment in the flexible spending account plan was voluntary and is therefore a personal financial decision protected under section 552.101 and common-law privacy. Hence, you must not release the information at Tab 2.

You have also highlighted and marked portions of the submitted information that you claim are criminal history information excepted from disclosure under 552.101 and common-law privacy. We first point out that some of the alleged criminal history information is illegible and, as such, is deemed public under section 552.302. The remaining alleged criminal history information consists merely of admissions of previous criminal activity, not protected by privacy. See Open Records Decision Nos. 444 (1986) (employee information about qualifications, disciplinary action and background not protected by privacy), 542 (1990) (information about qualifications of a public employee is of legitimate concern to the public), 423 at 2 (1984) (scope of public employee privacy is narrow). Furthermore, please note that driving record information maintained by the Department of Public Safety is not considered criminal history information and must be disclosed. See Gov't Code § 411.082(2)(B). Therefore, you must release the information you have highlighted and marked as "criminal history information."

In addition, you have marked several documents concerning drug abuse testing as excepted from disclosure under common-law privacy. This office has recognized that public employees may have a privacy interest in the drug test results of public employees. See Open Records Decision Nos. 594 (1991) (suggesting identification of individual as having tested positive for use of illegal drug may raise privacy issues), 455 at 5 (1987) (citing *Shoemaker v. Handel*, 619 F. Supp. 1089 (D.N.J. 1985), *aff'd*, 795 F.2d. 1136 (3rd Cir. 1986)). After reviewing the submitted documents, we have marked the information that is protected by privacy.

Section 552.101 also encompasses information protected by other statutes. In that regard, you contend that some of the submitted information is protected from disclosure pursuant to the provisions of Title I of the Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. §§ 12101 *et seq.* Information is confidential by law when it is made confidential by federal statute or administrative regulations enacted pursuant to statutory authority. See Open Records Decision No. 476 at 5 (1987). The ADA provides that information about medical conditions and medical histories of applicants or employees must be 1) collected and maintained on separate forms, 2) kept in separate medical files, and 3) treated as confidential medical records. In this case, the information you have marked is not confidential under the ADA and may not be withheld. We again note that some of the submitted information you claim is protected under the ADA is illegible and therefore deemed public under section 552.302.

You have also marked several documents related to the fire marshal's tax information as being excepted from disclosure under section 552.101. Section 6103(a) of title 26 of the United States Code provides that tax return information, including a W-4 tax form, is confidential. See 26 U.S.C. § 6103(a)(2), (b)(2)(A), (p)(8); Attorney General Op. MW-372 (1981). We have marked the information you may withhold under section 552.101 in conjunction with section 6103(a).

We call your attention to the fact that some of the submitted documents contain driver's license information. Section 552.130 of the Government Code excepts from disclosure information that relates to a driver's license issued by an agency of this state. We have marked the driver's license information you must withhold.

We further note that the submitted information contains photographs of the fire marshal, who you advise is a peace officer. Section 552.119 of the Government Code 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. *See* 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 are applicable. You have not informed us that the fire marshal has executed any written consents to disclosure. Thus, you must withhold the photographs depicting the fire marshal.

In sum, the submitted information that is illegible is deemed public under section 552.302. The fire marshal's home address, former address, home telephone number, social security number, and information indicating whether he has family members must be withheld under section 552.117(2). The same is true for other peace officers and those public employees electing to keep such information private under section 552.024. The fire marshal's financial information at Tab 2 must be withheld pursuant to section 552.101 and common law privacy. The information you allege is criminal history information is merely admissions of prior criminal history and is not protected by privacy; thus, it must be released. We have marked the information concerning drug testing that must be withheld. The information you marked as confidential under the ADA is not protected and must also be released. We have marked the tax information that must be withheld under section 552.101 in conjunction with section 6103(a). Also, we note that driver's license information and photographs of the fire marshal must be withheld under sections 552.130 and 552.119, respectively. The remaining information must be released.

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,



Kevin J. White
Assistant Attorney General
Open Records Division

KJW/seg

Ref: ID# 155091

Enc. Marked documents

c: Mr. John Lynch
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(w/o enclosures)