



March 5, 2002

Mr. John T. Hawkins
Naman, Howell, Smith & Lee
P.O. Box 1470
Waco, Texas 76703

OR2002-1073

Dear Mr. Hawkins:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 159287.

Temple College (the "college"), which you represent, received a request for "the application for employment, test scores, results of oral interview, investigative results, background information (sic) and questions, personal history statements, promotional questionnaires and any other documents" regarding Officer Mark Khun. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.108¹, 552.117, 552.130, and 552.305² of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that section 552.022 of the Government Code makes certain information expressly public unless its is confidential under other law. Section 552.022(a) provides in pertinent part:

¹As you did not submit to this office written comments stating the reasons why section 552.108 would allow the information to be withheld, we find that you have waived this exception. See Gov't Code §§ 552.301, .302.

²Please note that section 552.305 is not an exception to the disclosure of information under the Public Information Act. Rather, section 552.305 permits a governmental body to rely on an interested third party to raise and explain the applicability of exceptions in the Public Information Act in certain circumstances. See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990). This office has not received any communication from an interested third party. Therefore, we need not address section 552.305 any further.

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:*

.....

(17) information that is also contained in a public court record.

Gov't Code § 552.022(a)(17) (emphasis added). The submitted information includes three documents that have been filed with a court. Therefore, you may only withhold the information within these documents if it is confidential under other law.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 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). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included 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. *Id.* at 683. We do not believe that certain portions of the information you have marked in the named officer's Personal History Statement, which pertain to the named officer's prior minor drug use, prior arrests, traffic citations, termination from prior employment, and habits concerning the use of alcohol, are excepted under section 552.101 in conjunction with common-law privacy. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees).

We note, however, that prior decisions of this office have found that personal financial information not relating to a financial transaction between an individual and a governmental body is protected by common-law privacy. 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 the submitted documents that is excepted from disclosure under section 552.101 and common-law privacy.

The submitted information also contains information that must be withheld under section 552.117 of the Government Code. Section 552.117(2) excepts from public disclosure information that reveals a peace officer's home address, home telephone number, social security number, and whether the officer has family members.³ We have read this exception to include a peace officer's personal pager number. Under section 552.117(2), a governmental body must also withhold the officers' *former* home addresses and telephone information from disclosure. See Open Records Decision No. 622 (1994). However, we note that section 552.117(2) only protects a peace officer's 552.117 information in the context of his role as a "peace officer" and not as a "suspect," "complainant," or "victim" in a criminal investigation. Therefore, the college may not withhold the peace officer's home address and telephone number contained in the submitted offense report under section 552.117(2). We have marked the information in the submitted documents that must be withheld pursuant to section 552.117.

We note, however, the peace officer's home address and telephone number contained in the submitted offense report are subject to section 552.1175 of the Government Code. Section 552.1175 states in pertinent part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure;

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

...

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

- (1) chooses to restrict public access to the information; and
- (2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

We have marked the information in the submitted offense report that is subject to section 552.1175. However, you do not inform this office, nor does any of the submitted information indicate, whether the peace officer has elected confidentiality for information about him in accordance with the above-cited subsection 552.1175(b)(1) and (2). If so, the information we have marked in the submitted offense report must be redacted in accordance with section 552.1175. If not, we conclude that the college may not withhold the information we have marked in the submitted offense report.

Section 552.130 of the Government Code excepts from public disclosure information relating to a driver's license or motor vehicle title or registration issued by an agency of this state. We have marked the information in the submitted documents that the college must withhold pursuant to section 552.130.

The submitted materials also include fingerprint information that is subject to sections 559.001, 559.002, and 559.003 of the Government Code. These new statutes were enacted by the Seventy-seventh Legislature and took effect September 1, 2001. See Act of May 24, 2001, 77th Leg., R.S., H.B. 678, § 2 (to be codified as Gov't Code §§ 559.001, .002, and .003). They provide as follows:

Sec. 559.001. DEFINITIONS. In this chapter:

- (1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.
- (2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 559.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

(1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:

(A) the individual consents to the disclosure;

(B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or

(C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and

(2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 559.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

It does not appear to this office that section 559.002 permits the disclosure of the submitted fingerprint information. Therefore, the college must withhold the fingerprints in the submitted documents, which we have marked, under section 552.101 in conjunction with section 559.003 of the Government Code.

The submitted information also contains a declaration of psychological and mental health required by the Texas Commission on Law Enforcement Officer Standards and Education that is confidential pursuant to Section 1701.306 of the Occupations Code. Section 1701.306 provides 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:

(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.*

Therefore, you must withhold the declaration under section 552.101 in conjunction with section 1701.306. We have marked the document accordingly.

The submitted information appears to include 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). Furthermore, if a governmental entity has compiled information that lists an individual as a criminal suspect, arrestee, or defendant, the compiled information takes on a character that implicates the individual's right to privacy in a manner that the same information in an uncompiled state does not. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). Thus, to the extent that the submitted documents contain any information that is confidential under the federal regulations or subchapter F of chapter 411 of the Government Code, or that is private under *Reporters Committee*, the college must withhold such information under section 552.101 of the Government Code. We have marked the criminal history information that the college must withhold under section 552.101.

Section 552.119 excepts from public disclosure a photograph of a peace officer⁴ 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 information includes a photograph depicting 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. Thus, the college must withhold the photograph depicting a peace officer, which we have marked.

To summarize: (1) we have marked the personal financial information in the submitted documents that is excepted from disclosure under section 552.101 and common-law privacy; (2) we have marked the information that must be withheld under section 552.117; (3) we have marked the information in the submitted offense report that must be withheld under section 552.1175 if the peace officer has elected confidentiality for information about him in accordance with subsection 552.1175(b)(1) and (2); (4) we have marked the information that must be withheld under section 552.130; (5) we have marked the fingerprint information that must be withheld under section 552.101 in conjunction with section 559.003 of the Government Code; (6) we have marked the declaration of psychological and mental health that must be withheld under section 552.101 in conjunction with section 1701.306; (7) we have marked the criminal history information that must be withheld under section 552.101; (8) we have marked a photograph depicting a peace officer that must be withheld under 552.119; and (9) 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).

⁴"Peace officer" is defined by article 2.12 of the Code of Criminal Procedure.

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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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# 159287

Enc: Submitted documents

c: Mr. David Fernandez, Jr.
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(w/o enclosures)