



May 31, 2002

Ms. Pamela Smith
Assistant General Counsel
Texas Department of Public Safety
P.O. Box 4078
Austin, Texas 78773-0001

OR2002-2957

Dear Ms. Smith:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 163659.

The Department of Public Safety (the "DPS") received a request for the personnel file of a named trooper. You state that the DPS will be providing the requestor a redacted copy of the requested personnel file and complaint investigation. You state that some of the requested information is excepted from required public disclosure based on a previous determination of this office, Open Records Letter No. 2001-5409 (2001). You claim that the remainder of requested information is excepted from disclosure under sections 552.101, 552.107, 552.108, and 552.115 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We initially address your claim that portions of the investigation information in Exhibit D are subject to a previous determination of this office. You state that some of the requested information pertaining to the completed internal investigation is the subject of Open Records Letter No. 5409 (2001). In that ruling, we determined that the DPS may rely on another ruling, Open Records Letter No. 3490 (2001), to withhold portions of the requested information. In Open Records Letter No. 2001-3490 (2001), this office determined that some of the documents encompassed by the present request for information were excepted under sections 552.108 and 552.101. Assuming the four criteria for a "previous determination" established by this office in Open Records Decision No. 673 (2001) have

been met, the DPS may or must withhold the information in accordance with Open Records Letter No. 2001-3490 (2001).¹

We turn now to your claimed exceptions. You argue that the information you highlighted in Exhibit A is excepted from disclosure under section 552.101. Section 552.101 protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information protected by the common law right of privacy. The doctrine of common law privacy protects information if it is highly intimate or embarrassing such that its release would be highly objectionable to a reasonable person and the public has no legitimate interest in it. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

This office has determined that some personal financial information is highly intimate or embarrassing and thus meets the first part of the *Industrial Foundation* test. 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) (credit reports, financial statements, and other personal financial information), 373 (1983) (assets and income source information). 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 believe that highlighted information in Exhibit A constitutes personal financial information, so therefore is intimate information. Further, we believe there is no legitimate public interest in this information. Accordingly, you must withhold the highlighted information in Exhibit A under section 552.101 in conjunction with common law privacy.

You next assert that the memorandum labeled Exhibit B is excepted under section 552.107. Section 552.107(1) of the Government Code excepts information "that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the

¹The four criteria for this type of "previous determination" are 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code; 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the attorney general's prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and 4) the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling. *See* Open Records Decision No. 673 (2001).

Texas Disciplinary Rules of Professional Conduct[.]” While section 552.107(1) appears to apply to information within rule 1.05 of the Texas Disciplinary Rules of Professional Conduct, this office determined that section 552.107 cannot be applied as broadly as written to information in the possession of an attorney for a governmental body. Open Records Decision No. 574 (1990). Section 552.107(1) was found to protect only the attorney’s communication of legal advice or opinion to the client and communications from a client to an attorney where those communications are made in confidence and in furtherance of the attorney rendering professional legal service to the governmental body. *Id.* at 5. We determine the applicability of section 552.107(1) on a case-by-case basis. You state that a DPS attorney in the Office of General Counsel prepared the memorandum in furtherance of the attorney’s rendition of professional legal services, and that the memorandum contains the attorney’s legal analysis of certain facts and legal advice to the DPS. Accordingly, we agree that the memorandum you have submitted reflects either client confidences or an attorney’s legal advice or opinions. The DPS may therefore withhold the information you have submitted as Exhibit B under 552.107.

You next argue that the birth record submitted as Exhibit C is excepted under section 552.115. Birth or death records maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official are excepted from required public disclosure under section 552.115. However, as the provision applies to birth records held by the bureau of vital statistics or local registration officials, section 552.115 is inapplicable in this case. *See* Open Records Decision No. 338 (1992). You must, however, withhold the marked information in the birth certificate under section 552.117(1) of the Government Code, which excepts from disclosure, among other things, family information of former government employees who request that this information be kept confidential under section 552.024 of the Government Code. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the department may only withhold information under section 552.117(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date on which the present request for this information was received.

Section 552.117(2), which excepts information relating to a peace officer, as that term is defined in article 2.12 of the Code of Criminal Procedure, may also apply to the family member information. We are unable to discern whether the named trooper is presently a peace officer. To the extent that the trooper is a peace officer as defined by article 2.12, you must withhold the marked information on the birth certificate under section 552.117(2). Otherwise, you must withhold this information under section 552.117(1) if the employee has timely complied with section 552.024.

You raise section 552.108 for Exhibit D, records of an internal investigation. Section 552.108(a) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution

of crime.” Generally, a governmental body claiming section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. *See* Gov’t Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(a); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You inform us that as a result of the investigation, criminal charges have been filed. Furthermore, you state that Travis County Assistant District Attorney Greg Cox has asked that no information relating to the investigation be released until the criminal case has been resolved. Additionally, you state that the assistant district attorney believes that release of the records of the investigation would interfere with the prosecution of the pending criminal case. Based upon these representations, we conclude that the release of the information contained in Exhibit D would interfere with the detection, investigation, or prosecution of crime. *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). Thus, the DPS may withhold this information from disclosure based on section 552.108(a)(1), with the following exception.

Information normally found on the front page of an offense report is generally considered public. *See generally* Gov’t Code § 552.108(c); *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); Open Records Decision No. 127 (1976). Thus, you must release the types of information that are considered to be front page offense report information, even if this information is not actually located on the front page of the offense report with the following exception.

However, in this case, certain front page offense report information is excepted from disclosure under section 552.101 of the Government Code in conjunction with common law privacy. *Industrial Found.*, 540 S.W.2d 668. *See Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, *writ denied*). Accordingly, the DPS must withhold all victim-identifying information pursuant to section 552.101 and common law privacy. You must release all other front page offense report information.

In summary, the DPS must withhold from disclosure the information in Exhibit A under section 552.101 in conjunction with common-law privacy. The DPS may withhold the memorandum in Exhibit B under section 552.107(1). You must withhold the information we have marked un Exhibit C under section 552.117(1), if the employee has timely complied with section 552.024, or under section 552.117(2) if the employee is a peace officer as defined by article 2.12 of the Code of Criminal Procedure. Assuming the four criteria for a previous determination have been met, the DPS may or must withhold information in Exhibit D in accordance with Open Records Letter No. 2001-3490 (2001). You may withhold the information submitted in Exhibit D under section 552.108, except for basic information. You must withhold victim-identifying information located within the basic information under section 552.101 in conjunction with common-law privacy.

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 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,



V.G. Schimmel
Assistant Attorney General
Open Records Division

VGS/sdk

Ref: ID# 163659

Enc: Submitted documents

c: Mr. Jason Spencer
Austin-American Statesman
P.O. Box 670
Austin, Texas 78767
(w/o enclosures)