



August 27, 2002

Mr. Sim W. Goodall
Police Legal Advisor
City of Arlington Police Department
P.O. Box 1065
Arlington, Texas 70064-1065

OR2002-4786

Dear Mr. Goodall:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 167040.

The Arlington Police Department and the City of Arlington (collectively, the "city") both received several requests for personnel and training records regarding several named police officers. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.111, 552.117, 552.119, and 552.122 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

We note at the outset that the city requested a decision from this office on May 7, 2002, regarding the public availability of personnel information pertaining to three of the officers at issue here. We ruled on that request in Open Records Letter No. 2002-3774 (2002), issued July 11, 2002. Subsequently, the City of Arlington filed suit challenging our ruling. The City of Arlington filed Cause No. GV202251, styled *City of Arlington v. John Cornyn, Attorney General, State of Texas*, on July 22, 2002 in the 353rd Judicial District Court of Travis County. To the extent that the present request concerns the availability of information, the required public disclosure of which is before the court in *City of Arlington v. Cornyn*, we do not address such information in the present ruling.

Next, we note that some of the requested information is subject to section 552.022 of the Government Code. Section 552.022 provides in part that

¹ In your initial request for a decision from this office, dated June 10, 2002, you raise section 1703.306 of the Occupations Code with regard to the results of polygraph examinations. Upon review of the submitted records, however, we find you have not submitted any polygraph results. Accordingly, we do not further address your claim under section 1703.306 of the Occupations Code.

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[.]

The training and personnel records at issue include completed evaluations and completed internal affairs investigations. The city must release information subject to section 552.022 unless it is excepted from disclosure under section 552.108 of the Government Code, or expressly confidential under other law. You argue that these records are excepted under sections 552.103, 552.107, and 552.111 of the Government Code. Sections 552.103, 552.107, and 552.111 of the Government Code are discretionary exceptions to disclosure that protect the governmental body's interests and are therefore not "other law" that makes information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 630 at 4-5 (1994) (governmental body may waive statutory predecessor to section 552.107), 473 (1987) (governmental body may waive section 552.111); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, the city may not withhold information subject to section 552.022 under sections 552.103, 552.107, and 552.111 of the Government Code.

Although you raise section 552.108, you provide no arguments explaining why section 552.108 applies to the documents at issue here. *See Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977) (governmental body claiming section 552.108 must explain, if information does not supply the explanation on its face, how and why release of information would interfere with law enforcement); *see also Morales v. Ellen*, 840 S.W.2d 519, 526 (Tex. App.—El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable when internal affairs investigation did not result in criminal investigation or prosecution). Accordingly, the city may not withhold the section 552.022 information under section 552.108 of the Government Code.

We next address your claims that the information subject to section 552.022 is confidential under section 552.101 of the Government Code in conjunction with other law. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that other statutes make confidential. You argue that the records at issue are excepted in their entirety under section 552.101 in conjunction with article 39.14 of the Code of Criminal Procedure. Article 39.14 governs the discovery of information and the testimony of witnesses in criminal proceedings. This office has determined that discovery privileges do not make information confidential by law under section 552.101. *See* Open Records

Decision Nos. 575 (1990), 574 (1990) (attorney work-product not protected as information deemed confidential by law under statutory predecessor to section 552.101). We note that the Texas Supreme Court recently held that rules under the Texas Rules of Civil Procedure and Texas Rules of Evidence that expressly make information confidential are "other law" within the meaning of section 552.022. *In Re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Nevertheless, article 39.14 does not make information expressly confidential. Therefore, we find that article 39.14 of the Code of Criminal Procedure does not constitute "other law" for purposes of section 552.022 of the Government Code. Accordingly, the city may not withhold the records at issue under article 39.14 of the Code of Criminal Procedure.

You also raise the attorney work-product privilege under rule 192.5 of the Texas Rules of Civil Procedure. The Texas Rules of Civil Procedure, however, only apply to "actions of a civil nature." Tex. R. Civ. P. 2. Accordingly, the attorney work-product privilege found in rule 192.5 does not apply to information pertaining to the criminal investigations at issue here.

We note that some of the completed internal affairs investigations at issue contain medical records, access to which is governed by the Medical Practice Act ("MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

(b) 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.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). The medical records we have marked may be released only as provided under the MPA. Open Records Decision No. 598 (1991).

The submitted information also contains a dental record. Section 258.102 of the Occupations Code provides in pertinent part as follows:

The following information is privileged and may not be disclosed except as provided by this subchapter:

(1) a communication between a dentist and a patient that relates to a professional service provided by the dentist; and

(2) a dental record.

A "dental record" means dental information about a patient that is created or maintained by a dentist and relates to the history or treatment of the patient. Occ. Code § 285.101(1). We have marked a document created by a dentist which relates to the history or treatment of the patient. The city must withhold the marked document under section 552.101 in conjunction with section 285.102 of the Occupations Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy. You claim that a portion of the completed internal affairs investigations at issue is protected under common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

The records at issue include two allegations of sexual harassment. One completed internal affairs investigation submitted for our review pertains to one of the allegations of sexual harassment. The internal affairs document we have marked contains an adequate summary of the investigation. With the exception of the summary document, the records of this internal affairs investigation must be withheld. *See Ellen*, 840 S.W.2d at 525. In addition, the identities of the victim and witnesses of the alleged harassment must be redacted from the summary. *Id.* The statements and identity of the alleged perpetrator, however, are of legitimate concern to the public. *See Open Records Decision Nos. 438 (1986) (stating that common-law privacy does not protect information about public employee's alleged misconduct on job or complaints made about employee's job performance), 230 (1979), 219 (1978).* Thus, the city may not withhold this individual's statements and identity under section 552.101 and common-law privacy. With respect to the other allegation, we have

marked the information that must be withheld, in this instance, under section 552.101 pursuant to *Ellen* and common-law privacy.

Next, with respect to the submitted information not subject to section 552.022, we address your assertion that the records at issue are excepted in their entirety under section 552.103 of the Government Code. Section 552.103 protects information related to pending or reasonably anticipated litigation to which the state or a political subdivision is a party. A governmental body has the burden of providing relevant facts and documents to show that the section 552.103 exception applies in a particular situation. In this instance, you contend that section 552.103 applies because the officers in question were involved in the arrests of individuals whom the requestor presently represents in pending criminal cases. You state, however, that these cases are pending in Tarrant County courts and that the Tarrant County Criminal District Attorney is the prosecuting entity. Consequently, the city has no section 552.103 interest with respect to criminal prosecutions arising out of arrests made by the officers in question. *See* Open Records Decision No. 392 (1983). Thus, we determine that none of the submitted records may be withheld under section 552.103 of the Government Code.

With respect to the personnel information at issue that is not subject to section 552.022 of the Government Code, we address your attorney work-product claim under section 552.111. In Open Records Decision No. 647 (1996), this office held that a governmental body may withhold information under section 552.111 if the governmental body can show (1) that the information was created for civil trial or in anticipation of civil litigation under the test articulated in *National Tank Company v. Brotherton*, 851 S.W.2d 193 (Tex. 1993), or after a civil lawsuit is filed, and (2) that the work product consists of or tends to reveal an attorney's "mental processes, conclusions, and legal theories." *See* ORD 647 at 5. The work-product doctrine is applicable to litigation files in criminal as well as civil litigation. *See* *Curry v. Walker*, 873 S.W.2d 379, 381 (Tex. 1994) (citing *United States v. Nobles*, 422 U.S. 225, 236 (1975)). A governmental body may withhold attorney work-product from disclosure if it demonstrates that the material was (1) created for trial or in anticipation of civil litigation and (2) consists of or tends to reveal an attorney's mental processes, conclusions, and legal theories. *See* ORD 647 at 4. The attorney work-product privilege generally does not extend to facts obtained by the attorney. *Id.* In this instance, you fail to demonstrate that the police personnel and training information at issue satisfies either element of the work-product test set out in Open Records Decision No. 647 (1996). Therefore, we determine that no portion of the information is excepted from disclosure under section 552.111.

You assert that the personnel records at issue contain some financial information that is also protected by common-law privacy. This office has found that personal financial information is generally excepted from required public disclosure under common-law privacy. Open Records Decision Nos. 600 (1992), 545 (1990). This office has also ruled, however, that the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 (1992)

(information revealing that employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure). Upon review, we find that portions of the personnel records at issue, which we have marked, contain information that reflects personal financial decisions. Accordingly, the city must withhold such information under section 552.101 and common-law privacy.

The submitted documents also contain the officers' I-9 and W-4 forms. Section 1324a of title 8 of the United States Code provides that an Employment Eligibility Verification Form I-9 "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. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). The release of submitted I-9 forms in response to this request for information would be "for purposes other than for enforcement" of the referenced federal statutes. A Form I-9 may be released only for purposes of compliance with the federal laws and regulations governing the employment verification system. A W-4 form is confidential under section 6103 of title 26 of the United States Code. Therefore, the city must withhold the I-9 forms and attachments and W-4 forms under section 552.101 of the Government Code in conjunction with federal law.

We note that the documents at issue include an accident report form that appears to have been completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (Texas Peace Officer's Accident Report form). Section 550.065(b) of the Transportation Code states that except as provided by subsection (c), accident reports are privileged and confidential. Section 550.065(c)(4) provides for the release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. Transp. Code § 550.065(c)(4). Under this provision, the Department of Public Safety or another governmental body is required to release a copy of an accident report to a person who provides the governmental body with two or more pieces of information specified by the statute. *Id.* Here, as the requestor has not provided two or more of the specified pieces of information, the accident report is confidential under section 550.065(b). Thus, the city must withhold this document pursuant to section 552.101 of the Government Code in conjunction with section 550.65 of the Transportation Code.

The records at issue contain social security numbers of members of the public which may be confidential under federal law. A social security number may be withheld in some circumstances 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 number and related records that are obtained or 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 the social security numbers are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 of the Government Code 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 number information, you should ensure that no such information was obtained or is maintained by the city pursuant to any provision of law enacted on or after October 1, 1990.

The records at issue also contain information that is excepted from disclosure under section 552.117 of the Government Code. 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 of the Government Code.

Section 552.117(2) excepts from required public disclosure the home address, home telephone number, social security number, and the family member information of peace officers as defined by article 2.12 of the Code of Criminal Procedure. We note that most of the individuals at issue are commissioned peace officers. Accordingly, the city must withhold the marked personal information pertaining to these individuals under section 552.117(2) of the Government Code. With respect to a police jailer among the individuals at issue, we are unable to determine from the information provided whether this individual is a "peace officer" as defined in article 2.12. You have, however, provided documentation indicating that pursuant to section 552.024, this employee elected to keep personal information confidential. Accordingly, if the police jailer is not a "peace officer," we determine that the city must withhold the marked personal information pertaining to this individual under section 552.117(1) of the Government Code.

The submitted documents contain photographs of some of the officers. A photograph that depicts a peace officer is excepted from public disclosure, unless 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. It does not appear that any of the exceptions to section 552.119 apply. Furthermore, you have not informed us that any of the peace officers depicted in the requested photographs executed a written consent to disclosure of their pictures. Thus, the city must withhold the marked photographs under section 552.119, unless the city obtains written consent from the peace officers for their disclosure.

We also note that the submitted documents contain driver's license and motor vehicle information. Section 552.130 provides for the confidentiality of Texas motor vehicle license and registration information. The city must withhold the information we have marked pursuant to section 552.130.

You argue that several tests contained in the requested training files are excepted from disclosure under section 552.122 of the Government Code. Section 552.122(b) excepts from disclosure test items developed by a licensing agency or governmental body. In Open Records Decision No. 626 (1994), this office determined that the term "test item" in

section 552.122 includes any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated, but does not encompass evaluations of an employee's overall job performance or suitability. Whether information falls within the section 552.122 exception must be determined on a case-by-case basis. Open Records Decision No. 626 at 6 (1994). Traditionally, this office has applied section 552.122 where release of "test items" might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Additionally, when answers to test questions might reveal the questions themselves, the answers may be withheld under section 552.122(b). *See* Open Records Decision No. 626 at 8 (1994). We have marked the information that the city may withhold under section 552.122 of the Government Code.

In summary, medical records may be released only as provided under the MPA. The marked dental record must be withheld under section 552.101 of the Government Code in conjunction with section 258.102 of the Occupations Code. We have marked information relating to the investigations of alleged sexual harassment that must be withheld under section 552.101 and common-law privacy. The city must withhold I-9 and W-4 forms under section 552.101 in conjunction with federal law. The marked accident report form must be withheld under section 552.101 and section 550.065 of the Transportation Code. Social security numbers of members of the public may be confidential under federal law. We have marked the personal information that the city must withhold under section 552.117 of the Government Code. Photographs of peace officers must be withheld under section 552.119 of the Government Code. Motor vehicle information must be withheld under section 552.130 of the Government Code. The marked test items may be withheld under section 552.122 of the Government Code. The remainder of the records 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 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,



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Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 167040

Enc: Submitted documents

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