



October 16, 2002

Ms. Lillian Guillen Graham
Assistant City Attorney
P.O. Box 850137
Mesquite, Texas 75185-0137

OR2002-5862

Dear Ms. Graham:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 170772.

The City of Mesquite Police Department (the “department”) received a request for “all printed and signed documents pertaining to the pre-employment background investigation of [the requestor], along with a copy of the application and polygraph test.” You claim that the requested information is excepted from disclosure under sections 552.101, 552.111, and 552.122 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that information that is subject to disclosure under the Public Information Act may not be withheld simply because the party submitting it anticipates or requests confidentiality. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 676-78 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Further, it is well-settled that a governmental body’s promise to keep information confidential is not a basis for withholding that information from the public, unless the governmental body has specific authority to keep the information confidential. *See Open Records Decision Nos. 514 at 1 (1988), 476 at 1-2 (1987), 444 at 6 (1986)*. Consequently, the submitted information must fall within an exception to disclosure in order to be withheld from the requestor.

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. Section 1703.306 of the Occupations Code provides as follows:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

Occ. Code § 1703.306. We find that certain information in the submitted records was obtained through a polygraph examination. However, in this case, the requestor is the examinee, a person to whom section 1703.306 grants access to this information. Therefore, the department must release the information related to polygraph examination results to the requestor.

You assert that criminal history record information ("CHRI") contained in the submitted documents is excepted from disclosure under section 411.083 of the Government Code. CHRI generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083.

Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 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. *See* Open Records Decision No. 565 (1990). Furthermore, 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. The information submitted for our review contains CHRI generated by TCIC and NCIC. Accordingly, the information that we have marked is excepted from required public disclosure by section 552.101 of the Government Code. We note, however, that the requestor can obtain her own CHRI from DPS. Gov't Code § 411.083(b)(3).

Section 301.081 of the Labor Code governs the release of employment information held by the Texas Workforce Commission (the "commission"). You explain that the department obtained some of the records at issue from the commission.¹ Section 301.081 provides in pertinent part as follows:

- a) Each employing unit shall keep employment records containing information as prescribed by the commission and as necessary for the proper administration of this title. The records are open to inspection and may be copied by the commission or an authorized representative of the commission at any reasonable time and as often as necessary.
- b) The commission may require from an employing unit sworn or unsworn reports regarding persons employed by the employing unit as necessary for the effective administration of this title.
- c) Employment information thus obtained or otherwise secured may not be published and is not open to public inspection, other than to a public employee in the performance of public duties, except as the commission considers necessary for the proper administration of this title.

Based upon your representations and our review of the submitted documents, we find that the information at issue is confidential under section 301.081 of the Labor Code. We note that, in this case, we do not have sufficient information to determine whether section 301.081 of the Labor Code is intended to protect an individual person's privacy interests. *See*

¹It is the well-settled policy of this state that governmental bodies should cooperate with each other in the interest of the efficient and economical administration of their statutory duties. Attorney General Opinion H-683 (1975). The Texas Public Information Act does not undercut that policy. *Id.* Confidential information may be transferred between state agencies without destroying its confidential character and without constituting a release to the public if the agency to which the information is transferred has authority to obtain the information. Open Records Decision No. 516 (1989), 490 (1988). Consequently, confidential information may be "transferred between state agencies without violating its confidential character on the basis of a recognized need to maintain an unrestricted flow of information between state agencies." Attorney General Opinion H-683 at 4.

generally Rainbow Group, Ltd. v. Texas Employment Comm'n, 897 S.W.2d 946 (Tex. App.—Austin 1995, writ denied) (ambit of confidential information includes interests of governmental body as well as individual's privacy rights). Accordingly, we determine that the requestor does not have a special right of access to the requested records under section 552.023, and, therefore, the records that we have marked must be withheld under section 552.101 of the Government Code in conjunction with section 301.081 of the Labor Code.

We observe that the submitted records contain the requestor's social security number. Social security numbers may be withheld in some circumstances under section 552.101 of the Government Code. A social security number or "related record" may 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). Section 552.023(a) of the Government Code grants a special right of access to a person or a person's authorized representative to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person's privacy interests. *See* Open Records Decision No. 481 (1987) (determining that common-law privacy does not provide basis for withholding information from its subject). Therefore, the requestor has a special right of access to her social security number and the department may not withhold this information in this instance.

Section 552.101 also encompasses the doctrine of 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). 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. 540 S.W.2d at 683.

This office has found that the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). Prior 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. *See* Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983).

We find that the submitted documents contain information that would be protected from disclosure by privacy. In this instance, the department may not withhold any portion of the submitted information under section 552.101 of the Government Code in conjunction with common-law privacy, as the requestor has a special right of access to information that is protected from public disclosure by her own right to privacy. See Gov't Code § 552.023.²

You claim that portions of the requested records constitute interagency or intraagency memoranda that are excepted from public disclosure under section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.--Austin 2001, no pet.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615 at 4-5. The information here at issue pertains only to a specific personnel matter, not to policymaking. Thus, the information at issue may not be withheld from disclosure under section 552.111.

You next contend that a portion of the submitted information is excepted from public 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). After reviewing the submitted information, we conclude that the submitted information does not test an individual's or group's knowledge or ability in a particular area. Therefore, the department may not withhold the information at issue under section 552.122.

²Section 552.023(a) provides that "[a] person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests." See also Open Records Decision No. 481 at 4 (1987) (privacy theories are not implicated when individual asks a governmental body to provide him with information concerning himself).

Although a Texas driver's license number is normally confidential under section 552.130, the requestor has a special right of access to her driver's license number, and the department may not withhold this information in this instance. *See* Gov't Code § 552.023(a).

In summary, the information that we have marked is excepted from required public disclosure by section 552.101 of the Government Code. The remainder of the submitted information must be released to the requestor.³

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).

³We note that some of the unmarked information consists of confidential information that is not subject to release to the general public. *See* Gov't Code § 552.023. However, the requestor in this instance has a special right of access to the information. Gov't Code § 552.023. Because some of the information is confidential with respect to the general public, if the department receives a further request for this information from an individual other than the requestor or her authorized representative, the department should again seek our decision.

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 170772

Enc. Submitted documents

c: Ms. Dana Richard
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(w/o enclosures)