



November 12, 2002

Mr. Charles Zech
City Attorney
City of New Braunfels
P.O. Box 311747
New Braunfels, Texas 78131-1747

OR2002-6417

Dear Mr. Zech:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 171449.

The City of New Braunfels (the "city") received a request for personnel information relating to two named officers. You state that you have released some of the requested information to the requestor. You claim, however, that the remainder of the requested information is excepted from disclosure under sections 552.101, 552.102, 552.108, and 552.114 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides that

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[.]

Gov't Code § 552.022(a)(1). In this instance, the submitted documents include a completed report. Thus, this information must be released under section 552.022(a)(1) unless it is expressly confidential under other law or excepted from disclosure under section 552.108. As you argue that this information is excepted under section 552.101, which is considered other law for purposes of section 552.022, and under section 552.108, we will address your arguments with respect to the entirety of the submitted information.

Before we address your arguments under section 552.101, we first briefly address your assertion that the submitted information is excepted under section 552.108 of the Government Code. This section provides in pertinent part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

(1) release of the information would interfere with the detection, investigation or prosecution of crime; [or]

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution; [or]

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Code § 552.108(a)(1), (a)(2), (b)(1), (b)(2). In this case, you have not explained, nor can we discern, how section 552.108 applies to the submitted material. Accordingly, you may not withhold any of the submitted information under section 552.108.

We turn now to the remainder of your claimed exceptions. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” 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 by the common law right of privacy under section 552.101, 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). In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be

highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685.

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 some of the submitted information constitutes highly intimate and embarrassing financial information. Further, we believe there is no legitimate public interest in this information. Accordingly, you must withhold the personal financial information we have marked based on section 552.101 in conjunction with common-law privacy. *See also* Gov't Code § 552.136.

Section 552.101 of the Government Code also protects information that another statute makes confidential. The submitted information includes annual statements from the Texas Municipal Retirement System. Information pertaining to participation in the Texas Municipal Retirement System is made confidential under section 855.115 of the Government Code. Section 855.115(a) provides in part that "information contained in records that are in the custody of the retirement system concerning an individual member, retiree, annuitant, or beneficiary is confidential under section 552.101," subject to certain exceptions that are not applicable here. We have marked the information that the city must withhold under section 552.101 in conjunction with section 855.115 of the Government Code.

You next argue that polygraph information is made confidential under section 552.101 in conjunction with chapter 1703 of the Occupations Code. Chapter 1703 of the Occupations Code codifies the Polygraph Examiners Act. *See* Occ. Code § 1703.001. 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.

(b) The [Polygraph Examiners B]oard or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Id. § 1703.306. *See also* Open Records Decision No. 430 (1985) (results of examination, questions asked, and those marked as control questions confidential under predecessor statute). We find that certain information in the submitted files was obtained through a polygraph examination. It appears that none of the exceptions in section 1703.306 applies. *See* Open Records Decision 565 (1990) (construing predecessor statute). Accordingly, the information we have marked is confidential pursuant to section 1703.306 of the Occupations Code, and is therefore excepted from disclosure under section 552.101 of the Government Code.

You contend that some of the submitted information is excepted from disclosure under section 552.114 of the Government Code. Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. This office generally applies the same analysis under section 552.114 and the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), section 1232g of title 20 of the United States Code. Open Records Decision No. 539 (1990). FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A).

A "student" is defined to include "any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution. *Id.* § 1232g(a)(6); *see also* 34 C.F.R. § 99.3. Section 99.3(a) of title 34 of the Code of Federal Regulations states that "[a]ttendance includes, but is not limited to, attendance in person or by correspondence." 34 C. F. R. § 99.3(a). Section 552.026 of the Government Code provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

Thus, FERPA and the accompanying Government Code provisions govern the availability of student or education records held by educational agencies or institutions. *See* 20 U.S.C. § 1232g(b)(1); Gov't Code §§ 552.026, 552.114. FERPA generally does not govern access to records in the custody of governmental bodies that are not educational agencies or institutions. *See* Open Records Decision No. 390 at 3 (1983). An exception to this rule applies if the governmental body received the records from an educational agency under written consent of the student. 20 U.S.C. 1232g(b)(4)(B).

The information at issue appears to be a registration form for a continuing education course at San Antonio College (the "College"). We assume that the College is an educational agency for purposes of FERPA. *See* 20 U.S.C. § 1232g(a)(3). We also assume that the continuing education course was sponsored by the College. After consultation with the United States Department of Education, we understand that an individual taking a continuing education course at an educational institution that is sponsoring the course is a student at that educational institution. *See id.* § 1232g(a)(6); 24 C.F.R. § 99.3(a). Consequently, we believe the information at issue is an education record under FERPA while it is maintained by the College. Thus, we conclude that if the city received the record at issue from the College pursuant to the written consent of the student, such information must be withheld from the requestor under FERPA. *See id.* § 1232g(a)(3), (b)(4)(B).

We note that some of the information may be excepted from disclosure pursuant to section 552.117(2) of the Government Code. Section 552.117(2) excepts from disclosure a peace officer's home address, home telephone number, social security number, and information indicating whether the peace officer has family members, regardless of whether the peace officer made an election under section 552.024 of the Government Code. Section 552.117(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. We note, however, that it is unclear whether the individuals who are the subject of the present request are employed by the city. Furthermore, we are uncertain whether these individual are still peace officers. If these individuals remain licensed peace officers as defined by article 2.12 of the Code of Criminal Procedure, then the information

that we have marked must not be released by the city pursuant to section 552.117(2) of the Government Code. However, if the individuals are no longer licensed peace officers, then such information relating to them may still be excepted from disclosure under section 552.117(1). Furthermore, if these individuals are no longer peace officers, information relating to them may still be excepted from disclosure under section 552.1175. Accordingly, we address whether section 552.117(1) of the Government Code excepts any of this type of information regarding these individuals from disclosure. We will also address whether section 552.1175 of the Government Code excepts any of the information regarding these individuals from disclosure.

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. *See* Gov't Code § 552.117(1). However, information that is responsive to a request may not be withheld from disclosure under section 552.117(1) if the employee did not request confidentiality in accordance with section 552.024 or if the request for confidentiality under section 552.024 was not made until after the request for information at issue was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Accordingly, we conclude that the city must withhold from disclosure the marked information regarding the individuals pursuant to section 552.117(1), if they made a request for confidentiality under section 552.024 of the Government Code for this information prior to the date on which the present request was received by the city, regardless of the fact that they may not currently be peace officers. Otherwise, such information regarding these individuals may still be excepted from disclosure under section 552.1175 of the Government Code.

Section 552.1175 provides in pertinent part:

(a) This section applies only to:

...

(2) peace officers as defined by Article 2.12, 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.

Gov't Code § 552.1175(a), (b). We note that to the extent that the individuals are not currently peace officers and did not make a request for confidentiality under section 552.024 of the Government Code for this information prior to the date on which the present request was received by the city, the city must still withhold from disclosure the information that we have marked regarding these individuals pursuant to section 552.1175 of the Government Code, if they otherwise made a proper section 552.1175 election with the city at a time when they were peace officers. Otherwise, we conclude that the city may not withhold any portion of the marked information pursuant to section 552.1175 of the Government Code.

If the individuals at issue did not timely elect to withhold their social security numbers as prescribed by section 552.024 or section 552.1175, the social security numbers may nevertheless 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 numbers and related records that are obtained and 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 in the submitted information are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 of the Public Information Act (the "Act") on the basis of that federal provision. We caution, however, that section 552.352 of the 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.

Finally, we note that some of the information in the internal investigation is subject to section 552.130. Section 552.130 provides in relevant part:

- (a) Information is excepted from the requirement of Section 552.021 if the information relates to:
 - (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
 - (2) a motor vehicle title or registration issued by an agency of this state[.]

You must withhold the motor vehicle information we have marked under section 552.130 of the Government Code.

In summary, the city must withhold the personal financial information we have marked under section 552.101 in conjunction with common-law privacy. Information pertaining to participation in the Texas Municipal Retirement System is confidential under section 552.101 in conjunction with section 855.115 of the Government Code. Information obtained through a polygraph examination is confidential under section 552.101 in conjunction with section 1703.306 of the Occupations Code. If the city received the education record at issue from an educational agency or institution pursuant to the written consent of the student, the record must be withheld from the requestor under FERPA. We have marked the information that must be withheld under section 552.117(2), if the individuals at issue are peace officers as defined by article 2.12 of the Code of Criminal Procedure, or under section 552.117(1), if the individual made timely elections under section 552.024 of the Government Code. We have marked information the city must withhold from disclosure under section 552.1175 if the individuals have elected confidentiality for information about them in accordance with subsection 552.1175(b)(1) and (2). We note that social security numbers may nevertheless be confidential under federal law if these number were obtained or are maintained pursuant to any law enacted after October 1, 1990. Finally, we have marked motor vehicle information the city must withhold from disclosure under section 552.130. The remaining information 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,



V.G. Schimmel
Assistant Attorney General
Open Records Division

VGS/sdk

Ref: ID# 171449

Enc: Submitted documents

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