



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

December 17, 2002

Ms. Dustanna Hyde Rabe
County Attorney
Hopkins County
110 Main Street
Sulphur Springs, Texas 75482

OR2002-7237

Dear Ms. Rabe:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 173804

The Hopkins County Sheriff's Department (the "sheriff") received a request for information relating to a named former deputy. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.114, 552.117, 552.119, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We first note that some of submitted information is made expressly public under section 552.022 of the Government Code. Section 552.022 provides, in relevant part:

(a) 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:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Certain evaluations, daily reports, and investigations, which we have marked, are expressly public under section 552.022(a)(1). Therefore, you may only withhold this information from disclosure if it is excepted from disclosure under section 552.108 or is confidential under other law. You do not argue that any of the submitted information is made confidential under section 552.108. As you argue that this information is excepted from disclosure under

sections 552.101, 552.102, 552.114, 552.117, 552.119, and 552.130, we will address the applicability of these exceptions to the required public disclosure of the entirety of the submitted information.

Section 552.101 of the Government Code 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. Section 552.101 encompasses the doctrines of common-law and constitutional privacy. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). 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. *Id.* 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.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

This office has found that personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990). We have marked the information that you must withhold from disclosure under this exception. However, we find that the remaining submitted information is not the type of information protected by either common-law or constitutional privacy. Thus, you may not withhold the remaining submitted information from required public disclosure on the basis of either common-law or constitutional privacy.

Section 552.101 also encompasses information protected by other statutes. Some of the submitted documents are confidential under section 1701.306 of the Occupations Code, which is applicable to the Texas Commission on Law Enforcement Officer Standards and Education ("TCLEOSE") forms. Section 1701.306 provides in relevant part:

(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.*

Occ. Code § 1701.306(a)-(b) (emphasis added). The sheriff must withhold from disclosure the documents we have marked in accordance with section 1701.306 of the Occupations Code.

We next note that some of the submitted documents are confidential under section 1701.454 of the Occupations Code. Section 1701.454 provides as follows:

(a) A report or statement submitted to TCLEOSE under this subchapter is confidential and is not subject to disclosure under Chapter 552, Government Code, unless the person resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses.

(b) Except as provided by this section, a commission member or other person may not release the contents of a report or statement submitted under this subchapter. The report or statement may be released only by the commission employee having the responsibility to maintain the report or statement and only if:

(1) the head of a law enforcement agency or the agency head's designee makes a written request on the agency's letterhead for the report or statement accompanied by the agency head's or designee's signature; and

(2) the person who is the subject of the report or statement authorizes the release by providing a sworn statement on a form supplied by the commission that includes the person's waiver of liability regarding an agency head who is responsible for or who takes action based on the report or statement.

Occ. Code § 1701.454. The submitted documents include copies of the TCLEOSE Form F-5, Report of Resignation or Separation of License Holder. It does not appear that any of the exceptions specified by section 1701.454(a) apply. Thus, the sheriff must withhold from disclosure the marked TCLEOSE form reports under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

You next assert that the submitted information must be withheld pursuant to section 552.114 of the Government Code. The Family Education Rights and Privacy Act ("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). This office generally applies the same analysis under section 552.114 and FERPA. *See* Open Records Decision No. 539 (1990).

Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 (1982), 206 (1978). 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 directly relates to a former student. Consequently, we believe the information at issue is an education record under FERPA while it is maintained by the educational institution that created it. Thus, we conclude that if the sheriff received the records at issue from the educational institution pursuant to the written consent of the former deputy, such information must be withheld from the requestor under FERPA. *See id.*

§ 1232g(a)(3), (b)(4)(B). We have marked the records at issue for your benefit. We note, however, that if these records were not received from the education institution pursuant to the written consent of the student, information contained in these records may nevertheless be confidential under sections 552.119 and 552.117. We first address the information in the submitted records that is subject to section 552.117.

You claim that some of the submitted information is 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 one of the individuals whose information appears in the responsive material does not appear to be employed by the sheriff. Furthermore, we are uncertain whether either individual is still a peace officer. 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 sheriff pursuant to section 552.117(2) of the Government Code. However, if these individuals are no longer licensed peace officers, then 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 sheriff must withhold from disclosure the information we have marked pursuant to section 552.117(1), if these individuals 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 sheriff, 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 these 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 sheriff, the sheriff must still withhold from disclosure the information that we have marked regarding these individuals pursuant to section 552.1175 of the Government Code, if these individuals otherwise made a proper section 552.1175 election with the sheriff at a time when they were peace officers. Otherwise, we conclude that the sheriff may not withhold from disclosure any portion of the marked information pursuant to section 552.1175 of the Government Code.

If the named individual did not timely elect to withhold from disclosure his social security number as prescribed by section 552.024 or section 552.1175, the social security number may nevertheless be confidential under federal law. A social security number may be withheld from disclosure 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 number in the submitted information is 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 sheriff pursuant to any provision of law enacted on or after October 1, 1990.

We now address the information in the student records that is subject to section 552.119 of the Government Code. This section excepts from public disclosure a photograph of a peace officer as defined by article 2.12 of the Code of Criminal Procedure 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. This office has construed section 552.119 to require withholding of a photograph of a peace officer, absent one of the three above-stated exceptions and absent the written consent of the officer. Open Records Decision No. 502 (1988). Therefore, if the individual depicted in the submitted photograph is a peace officer, you must redact the individual’s image pursuant to section 552.119 of the Government Code. If the former employee is no longer a peace officer or has provided a written consent, then you may not withhold this individual’s image from disclosure under section 552.119 of the Government Code.

Finally, we note that some of the information 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 from disclosure the motor vehicle information we have marked under section 552.130 of the Government Code.

In summary, the sheriff must release to the requestor the submitted evaluations, daily reports, and investigations pursuant to section 552.022(a)(1). We have marked these documents. We have marked the information the sheriff must withhold from disclosure under section 552.101 in conjunction with common-law privacy. The sheriff must withhold

from disclosure the forms we have marked under section 552.101 in conjunction with sections 1701.306 and 1701.454 of the Occupations Code. We have marked student-identifying information that must be withheld pursuant to FERPA, provided that this information was received from the educational agency pursuant to the written consent of the former deputy. If it was not, we have marked information in these student records that must be withheld from disclosure pursuant to section 552.117, as described below, and 552.119 of the Government Code. We have marked information in the submitted documents that must be withheld from disclosure under section 552.117(2), if the named individuals are peace officers as defined by article 2.12 of the Code of Criminal Procedure, or under section 552.117(1), if these individuals made a timely election under section 552.024 of the Government Code. We have marked information the sheriff must withhold from disclosure under section 552.1175 if the individuals elected confidentiality for information about themselves in accordance with subsection 552.1175(b)(1) and (2). We note that a social security number may nevertheless be confidential under federal law if this number was obtained or are maintained pursuant to any law enacted after October 1, 1990. Finally, we have marked motor vehicle information the sheriff 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# 173804

Enc: Submitted documents

c: Ms. Kathleen Gumpert
Route 2, Box 584
Sulphur Springs, Texas 75482
(w/o enclosures)