



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

January 22, 2003

Ms. Linda L. Sjogren
Assistant City Attorney
City of San Angelo
P.O. Box 1751
San Angelo, Texas 76902

OR2003-0443

Dear Ms. Sjogren:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 175328.

The San Angelo Police Department (the "department") received a request for all personnel and training records for a named police officer. You advise that you have released some of the requested information. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.102, 552.115, 552.117, 552.119, and 552.130 of the Government Code.¹ We have considered the exceptions you claim and have reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure information deemed confidential by statute, such as section 143.089 of the Local Government Code. You indicate that the City of San Angelo is a civil service city pursuant to Chapter 143 of the Local Government Code. Section 143.089 contemplates two different types of personnel files, a police officer's civil service file that the police department is required to maintain, and an internal file that the police department may maintain for its own use. Local Gov't Code § 143.089(a), (g).

In addition to providing for the maintenance of a police civil service file, section 143.089 specifies what may be kept in that file:

¹ In your initial letter to this office, you also claim section 552.108. In your subsequent brief, you do not submit arguments in support of a claim under section 552.108. Therefore, you have waived any claim of exception from disclosure under this section of the Government Code. See Open Records Decision Nos. 586 (1991) (governmental body may waive section 552.108); Gov't Code §§ 552.301, .302.

(a) The director or the director's designee shall maintain a personnel file on each fire fighter and police officer. The personnel file must contain any letter, memorandum, or document relating to:

(1) a commendation, congratulation, or honor bestowed on the fire fighter or police officer by a member of the public or by the employing department for an action, duty, or activity that relates to the person's official duties;

(2) any misconduct by the fire fighter or police officer if the letter, memorandum, or document is from the employing department and if the misconduct resulted in disciplinary action by the employing department in accordance with this chapter; and

(3) the periodic evaluation of the fire fighter or police officer by a supervisor.

(b) A letter, memorandum or document relating to alleged misconduct by the fire fighter or police officer may not be placed in the person's personnel file if the employing department determines that there is insufficient evidence to substantiate the charge of misconduct.

(c) A letter, memorandum, or document relating to disciplinary action taken against the fire fighter or police officer or to alleged misconduct by the fire fighter or police officer that is placed in the person's personnel file as provided by subsection (a)(2) shall be removed from the employee's file if the commission finds that:

(1) the disciplinary action was taken without just cause; or

(2) the charge of misconduct was not supported by sufficient evidence.

Information that section 143.089(b) and (c) prohibit from being placed in the civil service file may be maintained in a police department's internal file, as provided in section 143.089(g):

A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a fire fighter or police officer. The department shall refer to the director or the director's

designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file.

A review of the information in Exhibit C reveals that, with one exception as noted below, none of it is the type of information that must be placed in the civil service file under section 143.089(a). You state that this information is maintained in the department's internal file pursuant to section 143.089(g). We therefore conclude that this information is confidential pursuant to section 143.089(g) of the Local Government Code and must be withheld under section 552.101 to the extent the information is maintained solely in the department's personnel files. As we are able to make this determination, we need not address your other claimed exceptions for portions of the information in Exhibit C. However, the submitted information that you state is maintained in the department's internal file includes a commendation of the named officer, which must be contained in the civil service file under section 143.089(a)(1). Thus, while this information, which we have marked, may be kept in the department's internal file, it must also be kept in the civil service personnel file. Local Gov't Code § 143.089(a)(1), (3). Therefore, although the commendation maintained in the department's internal personnel file is confidential under section 143.089(g), the commendation in the civil service personnel file is not confidential under that provision and may not be withheld under section 552.101 of the Government Code.

We now address your arguments under sections 552.101, 552.117, 552.115, 552.119, and 552.130 for the information in Exhibits B and D. First, you claim that information pertaining to the officer's participation in the Texas Municipal Retirement System is made confidential under section 855.115(a) of the Government Code. Section 855.115(a) protects certain information contained in records that are in the custody of the retirement system concerning an individual member, retiree, annuitant, or beneficiary. The documents at issue are in the custody of the department, not the retirement system. Thus, we conclude that the department may not withhold any records pursuant to section 552.101 of the Government Code in conjunction with section 855.115(a) of the Government Code.

We note that a portion of one of the submitted records constitutes a medical record, the release of which is governed by the Medical Practice Act (the "MPA"). Occ. Code §§ 151.001-165.160. Section 159.002 of the Occupations Code provides in pertinent part:

(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. *See* 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). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We have marked the information that is subject to the MPA.

Further, employee W-4 forms are excepted from disclosure under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code. Open Records Decision No. 600 (1992). The department must therefore withhold the submitted W-4 form, which we have marked, under section 552.101.

The documents at issue also include an Employment Eligibility Verification, Form I-9. Form I-9 is governed by title 8, section 1324a of the United States Code, which provides that the form "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. 8 U.S.C. § 1324a(b)(5); *see* 8 C.F.R. § 274a.2(b)(4). Release of this document under the Public Information Act would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we conclude that the Form I-9, which we have marked, must be withheld under section 552.101 and may only be released in compliance with the federal laws and regulations governing the employment verification system.

You claim that some of the information contained in Exhibit B is excepted from disclosure under section 552.101 in conjunction with 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 Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* includes 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. *Id.* at 683.

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. *See* 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). 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 relating to an employee's choice of insurance carrier and his election of optional coverages is confidential under the right of privacy. *Id.* at 10-11. Similarly, this office has determined that information revealing the personal financial decision to voluntarily have certain deductions made from an employee's paycheck meets the *Industrial Foundation* test. Open Records Decision No. 545 (1990). We have marked the personal financial information that is excepted from disclosure under section 552.101 and common-law privacy.

You also claim that the submitted documents contain criminal history information that is protected by common-law privacy. Where an individual's criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual's right to privacy. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). However, because responding to the present request does not require the department to compile any individual's criminal history, we conclude that the common-law privacy concerns expressed in *Reporters Committee* do not make any information confidential in this instance.

You also assert that a birth certificate in the submitted information is excepted under section 552.115 of the Government Code. Birth or death records maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official are excepted from required public disclosure under section 552.115 of the Government Code. However, because the department is not the bureau of vital statistics or a local registration official, section 552.115 is inapplicable.

You claim that section 552.117 excepts some information in Exhibits B and D. Section 552.117(2) of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of peace officers, regardless of whether the officer elected confidentiality under section 552.024 of the Government Code. *See Gov't Code § 552.117(2)*. Thus, the department must withhold the named officer's home address, home telephone number, social security number, and information that reveals whether the officer has family members. The department must also withhold the officer's *former* home address and telephone number from disclosure. *See Open Records Decision No. 622 (1994)*. We have marked the information in the submitted documents that is subject to section 552.117(2) and must be withheld.

Section 552.119 excepts from public disclosure a photograph of a peace officer 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. Open Records Decision No. 502 (1988). The documents at issue include a copy of a photograph depicting a peace officer, and we have no basis for finding that any of the exceptions are applicable to the photograph. Additionally, it does not appear that the peace officer has executed any written consent to disclosure. Thus, you must withhold under section 552.119 the photograph depicting the officer that we have marked.

Finally, section 552.130 excepts from public disclosure information relating to a driver's license or motor vehicle title or registration issued by an agency of this state. Gov't Code § 552.130. Therefore, the department must withhold the driver's license information that we have marked within the documents at issue under section 552.130.

In summary, the department must withhold the information that is maintained solely in its internal personnel file pursuant to section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. We have marked information that may only be released in accordance with the MPA. You must withhold the submitted W-4 form and Form I-9 under section 552.101 in conjunction with federal law. We have marked personal financial information that is excepted from disclosure under section 552.101 and common-law privacy. You must withhold the personal information pertaining to the officer that we have marked under section 552.117. The photograph of the officer that we have marked must be withheld under section 552.119. You must withhold the driver's license information we have marked under section 552.130. The remaining requested information must be released.

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

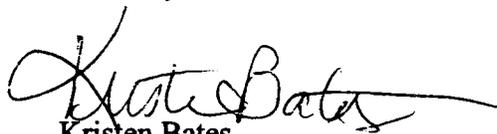
governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge 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,



Kristen Bates
Assistant Attorney General
Open Records Division

KAB/seg

Ref: ID# 175328

Enc. Submitted documents

c: Ms. Alice Bell
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(w/o enclosures)