



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

February 26, 2003

Mr. James J. Savage
Assistant County Attorney
1019 Congress, 5th Floor
Houston, Texas 77002-1700

OR2003-1223

Dear Mr. Savage:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 177024.

The Harris County Sheriff's Office (the "sheriff") received a request for the personnel file of a specified former employee, including information concerning any Internal Affairs Division ("IAD") investigations. You claim that the submitted IAD investigation is excepted from disclosure under section 552.108 of the Government Code and state that you have no objection to release of the remainder of the personnel file. We have considered the exception you claim and reviewed the submitted information.¹

Section 552.108(a) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime." Generally, a governmental body claiming section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. *See Gov't Code* §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). However, section 552.108 is inapplicable to a police department's internal administrative investigations that do not involve the investigation or prosecution of crime. *See Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied).

¹We note that the submitted personnel file includes a single document that solely concerns another employee. Because this document is not responsive to the present request, we do not address it in this ruling.

You have provided a letter from a representative of the sheriff stating that the IAD investigation is ongoing and relates to alleged criminal activity by the former employee. You indicate that on completion of the investigation, the case will likely be presented to the grand jury. Based on these representations and our review of the submitted IAD file, we agree that it is subject to section 552.108(a)(1). See *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), writ ref'd n.r.e. per curiam, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases).

However, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle Publishing Company v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), writ ref'd n.r.e. per curiam, 536 S.W.2d 559 (Tex. 1976). In Open Records Decision No. 127 (1976), this office summarized the types of information made public pursuant to *Houston Chronicle*. See Open Records Decision No. 127 at 4 (1976). You must release this information whether or not it is found on the front page of an offense report. Although section 552.108(a)(1) authorizes you to withhold the remainder of the IAD investigation, you may release any portion of it that is not otherwise confidential. See Gov't Code 552.007.

We turn now to the remainder of the personnel file. Although you do not seek to withhold it, we note that it contains information that must be redacted prior to its release. To start, the file includes a W-4 tax form. Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information made confidential by section 6103(a) of title 26 of the United States Code, which provides that tax return information is confidential. See 26 U.S.C. § 6103(a)(2), (b)(2)(A), (p)(8); see also Open Records Decision No. 600 (1992); Attorney General Op. MW-372 (1981). Accordingly, pursuant to section 552.101 of the Government Code and section 6103(a) of title 26 of the United States Code, the sheriff must withhold the W-4 form that we have marked.

We note that criminal history record information (“CHRI”) is confidential and not subject to disclosure. Section 552.101 excepts from disclosure “information deemed confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes. Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. See 28 C.F.R. § 20.21(c)(1) (“Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given.”), (2) (“No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself.”). Section 411.083 provides that any CHRI maintained by the Department of Public Safety (“DPS”) is confidential. Gov't Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances.

Id. § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Therefore, assuming that you have CHRI about the former employee in your possession and it falls within the ambit of these state and federal regulations, you must withhold it from the requestor.

We next note that the submitted information also includes a Report of Resignation or Separation of License Holder addressed to the Texas Commission on Law Enforcement (“the commission”). This form, commonly referred to as an “F-5,” is made confidential by section 1701.454 of the Occupations Code. Section 1701.452 requires that a law enforcement agency submit a report to the commission regarding an officer licensed under chapter 1701 who resigns from the law enforcement agency. *See Occ. Code* § 1701.452. Section 1701.454 provides in relevant part:

- (a) A report or statement submitted to the commission under this subchapter is confidential and is not subject to disclosure under Chapter 552 of the Government Code.

Occ. Code § 1701.454. Therefore, the sheriff must withhold the F-5 pursuant to section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations

In addition, the personnel file contains polygraph information, the release of which is prohibited by law. Section 1703.306 of the Occupations Code provides that “a person for whom a polygraph examination is conducted . . . may not disclose information acquired from a polygraph examination” except to certain categories of people. Because the requestor does not fall within any of the enumerated categories, pursuant to section 552.101 and section 1703.306, you must withhold the polygraph information that we have marked.

Section 552.101 also encompasses common law privacy, which protects information that is 1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* 2) of no legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). 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). For example, a public employee’s allocation of his salary to a voluntary investment program or to optional insurance coverage that is offered by his employer is a personal investment decision and information about it is excepted from disclosure under the common law right of privacy. *See Open Records Decision* Nos. 600 (1992) (finding personal financial information to include federal tax Form W-4; designation of beneficiary of employee’s retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care). In addition, information related to an

individual's mortgage payments, assets, bills, and credit history is excepted from disclosure under the common law right to privacy. *See* Open Records Decision Nos. 545 (1990), 523 (1989). However, information revealing that an employee participates in a group insurance plan funded partly or wholly by the governmental body is not excepted from disclosure. *See* Open Records Decision No. 600 at 10 (1992). We have reviewed the remainder of the personnel file and marked the information that is protected by common law privacy and must therefore be withheld pursuant to section 552.101.

We next note that the personnel file includes information that is subject to section 552.117. Section 552.117(1) of the Government Code excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of governmental body who request that this information be kept confidential under section 552.024. Section 552.117(2) excepts the same information regarding a peace officer regardless of whether the officer made an election under section 552.024 of the Government Code.

Because the sheriff indicates that the subject of the personnel file remains a peace officer, his present and former home addresses and telephone numbers, social security number, and family member information must be withheld under section 552.117(2). We have marked the information that you must withhold. In addition, we note that the personnel file includes the social security numbers of other individuals. If these individuals were peace officers at the time the sheriff received this request, these social security numbers must be withheld under section 552.117(2). Alternatively, if these individuals are not peace officer but are current or former employees who elected, prior to the receipt of this request, to keep their social security numbers confidential, they must be withheld pursuant to section 552.117(1).

Regardless of whether the other individuals' social security numbers are excepted under section 552.117, they may be confidential under federal law. The 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), make confidential social security numbers 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* Open Records Decision No. 622 (1994). We have no basis for concluding that the social security numbers at issue are confidential under section 405(c)(2)(C)(viii)(I) and therefore excepted from public disclosure under section 552.101 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 sheriff pursuant to any provision of law, enacted on or after October 1, 1990.

Next, we note that the personnel file includes photographs of the former employee. Section 552.119 exempts from public disclosure a photograph of a peace officer² 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. Gov't Code § 552.119 (a)(1)-(3). This section also provides that a photograph made exempt from disclosure by this section may be made public only if the peace officer gives written consent to the disclosure. *Id.* § 552.119(b); *see also* Open Records Decision No. 502 (1988). The submitted photographs depict a peace officer, and it does not appear that any of the exceptions are applicable. You have not informed us that the peace officer has executed a written consent to disclosure. Accordingly, the sheriff must withhold these photographs.

The personnel file also includes information pertaining to motor vehicle records. Section 552.130 of the Government Code provides that “[i]nformation is excepted from [required public disclosure] 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[.]” We have marked the information that the sheriff must withhold under section 552.130.

Finally, we note that the submitted information includes certain account information. Section 552.136 of the Government Code provides:

(a) In this section, “access device” means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. We have marked the account numbers that the sheriff must withhold under section 552.136.

²“Peace officer” is defined by article 2.12 of the Code of Criminal Procedure.

In summary, the sheriff may withhold the IAD investigation, except for basic information, pursuant to section 552.108(a)(1). The former employee's W-4 must be withheld. If the former employee's file includes CHRI, it must also be withheld. The sheriff must withhold the F-5. We have marked information obtained from a polygraph, which you must also withhold, along with the personal financial information we have marked. Because the former employee is a peace officer, his present and former home addresses and telephone numbers, social security number, and family member information must be withheld under section 552.117(2). The other individuals' social security numbers must be withheld under section 552.117 if these persons were peace officers at the time the sheriff received this request or if the individuals were current or former employees who elected prior to the receipt of this request to keep their social security numbers confidential. If section 552.117 does not apply, the sheriff must release these social security numbers unless they were obtained or maintained pursuant to a law enacted on or after October 1, 1990. The submitted photographs depicting a peace officer must be withheld pursuant to section 552.119. We have marked motor vehicle record information and account numbers that must be withheld under sections 552.130 and 552.136 respectively. The unmarked portions of the personnel file 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).

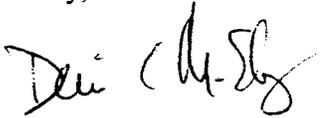
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Dep't of Pub. 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

DCM/lmt

Ref: ID# 177024

Enc. Submitted documents

c: Ms. Carolyn Canville
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(w/o enclosures)