



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

May 7, 2003

Mr. Matthew C. G. Boyle
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OR2003-3081

Dear Mr. Boyle:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 180649.

The City of Farmers Branch (the "city") received a request for information relating to two named individuals. You state that the city is providing some of the requested information to the requestor. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.108, and 552.130 of the Government Code. We have considered the exception you claim and have reviewed the representative sample of submitted information.¹

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. CHRI generated by the National Crime Information Center or by the Texas Crime Information Center 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.

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

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 definition of criminal history record information does not include driving record information. *See* Gov't Code § 411.082(2)(B). Assuming that the city has CHRI about either of the referenced individuals in its possession and it falls within the ambit of these state and federal regulations, the city must withhold it from the requestor.

You argue that Exhibit A is excepted from disclosure under section 552.101 in conjunction with common-law privacy.² 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. *Id.* at 685. The types 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. *Id.* at 683. This office has also 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), and personal financial information pertaining to voluntary financial decisions and financial transactions that do not involve public funds, *see* Open Records Decision Nos. 600 (1992), 545 (1990).

Furthermore, in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the

²Section 552.101 also encompasses the doctrine of common-law privacy.

person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

Exhibit A contains information pertaining to two investigations. We agree that one of these investigations pertains to an allegation of sexual harassment. Because there is no adequate summary of this investigation in Exhibit A, you must release a portion of this investigation, which we have marked. However, based on *Ellen*, the city must withhold the identities of the victim and the witnesses. We have marked the information that must be withheld.

We disagree, however, that the remaining highlighted information in Exhibit A must be withheld from disclosure. The remaining information in this exhibit relates to an investigation of a retracted allegation of official misconduct and assault perpetrated against a detainee, not an employee. Under these circumstances we find that a sexual harassment analysis would be inappropriate. *See Soto v. El Paso Nat. Gas*, 942 S.W.2d 671, 677-78 (Tex. App.—El Paso 1997, writ denied) (necessary element of both quid-pro-quo and hostile-work-environment sexual harassment claim is that victim is employee). Furthermore, having reviewed the information at issue, we conclude that the highlighted information is not otherwise protected by common-law privacy. *Cf.* Open Records Decision No. 393 at 2-3 (1982) (in cases of serious sexual assault identity of victim is protected). Consequently, the remaining information in Exhibit A may not be withheld from disclosure under section 552.101 of the Government Code.

We next note that some of the information in Exhibit C 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 individual whose information is at issue is still a peace officer. If this individual remains a licensed peace officer as defined by article 2.12 of the Code of Criminal Procedure, then the information that we have marked must be withheld by the city pursuant to section 552.117(2) of the Government Code. However, if the individual is no longer a licensed peace officer, then information relating to him may still be excepted from disclosure under section 552.117(1). Accordingly, we address whether section 552.117(1) of the Government Code excepts any of this type of information regarding this individual 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 information we have marked regarding the individual pursuant to section 552.117(1), if he 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 he may not currently be a peace officer.

If this individual is not currently a licensed peace officer and did not timely elect to withhold his social security number as prescribed by section 552.024, the social security number 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 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 city pursuant to any provision of law enacted on or after October 1, 1990.

We next note that the remaining submitted information includes a photograph of one of the individuals named in the request, as well as other individuals who appear to be peace officers. Section 552.119 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). It does not appear that any of the stated exceptions to section 552.119 apply in this instance. Furthermore, you have not informed us that any of the individuals depicted in the photographs consented to disclosure of their photographs.

Therefore, if the individuals or the former employee depicted in the submitted photographs are currently licensed peace officers, you must redact these individuals' images pursuant to section 552.119 of the Government Code. If the individuals or the former employee are no longer peace officers, then you may not withhold these individuals' images from disclosure under section 552.119 of the Government Code.

Finally, you argue that some of the submitted information is excepted under section 552.130. Section 552.130 provides in relevant part as follows:

(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[.]

Therefore, the city must withhold the motor vehicle information we have marked pursuant to section 552.130.

In summary, the city must withhold CHRI, to the extent that it exists, under section 552.101 in conjunction with chapter 411 of the Government Code. You must withhold information we have marked under section 552.101 in conjunction with common-law privacy. Other information, which we have marked, must be withheld under section 552.117(2) if the individual at issue is a licensed peace officer, or under section 552.117(1) if the individual made a timely election to keep this information confidential under section 552.024. This individual's social security number may also be confidential under federal law. Photographs in the submitted information are excepted under section 552.119, to the extent the photographed individuals are licensed peace officers. Finally, you must withhold the information we have marked under section 552.130. The remaining 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).

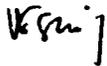
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 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,



V.G. Schimmel
Assistant Attorney General
Open Records Division

VGS/sdk

Ref: ID# 180649

Enc: Submitted documents

c: Ms. Linda Taylor
The Keller Citizen
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(w/o enclosures)