



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

August 5, 2003

Ms. Elizabeth Lutton
Assistant City Attorney
City of Arlington
P.O. Box 90231
Arlington, Texas 76004-3231

OR2003-5444

Dear Ms. Lutton:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 185442.

The City of Arlington (the "City") received a request for copies of or access to copy the following categories of information relating to a named Arlington Police Department officer:

1. [T]he officer's personnel file, to include all disciplinary action, awards, and reprimands given to him.
2. [A]ll training records and certificates received.
3. [H]is Internal Affairs file, if kept separately from the personnel file.
4. [A]ll materials dealing with the hiring of the officer, initial interview, oral review board and all other exams (psychological, polygraph) that were conducted prior to hiring the officer.

You assert the requested information is excepted from disclosure under sections 552.101, 552.115, 552.117, 552.119, 552.122, and 552.130 of the Government Code. We reviewed

the representative sample of information you submitted and considered the exceptions you claim.¹

Initially, we note Exhibit 5 contains an accident report form, ST-3, governed by chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer's accident report). Section 550.065(b) states that, except as provided by subsection (c), accident reports are privileged and confidential. Section 550.065(c)(4) provides for the release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *See* Transp. Code § 550.065(c)(4). This provision requires the Department of Public Safety or another governmental entity to release a copy of an accident report to a person who provides the agency with two or more pieces of information specified by the statute. *Id.* In this instance, the requestor has not provided the City the requisite pieces of information. Therefore, the City must withhold the ST-3 accident report in Exhibit 5, in its entirety, in accordance with section 550.065(c)(4) of the Transportation Code.

Next, we address your claims under section 552.101 of the Government Code, which excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses the doctrine of common-law privacy and information made confidential by other statutes.

Common-law privacy protects information when (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the public has no legitimate interest in the information. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). 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. *Id.* at 683. Based on our review of the submitted information, we believe a portion of the submitted information contains such highly intimate or embarrassing facts in which the public has no legitimate interest. Therefore, the City may withhold some of the information you have marked under section 552.101 in conjunction with common-law privacy. However, because we believe the public has a legitimate interest in the information you seek to withhold under common-law privacy in Exhibit 6, the City may not withhold this information, which we have marked for release.

We also note that in Open Records Decision No. 339 (1982), this office determined common-law privacy permits the withholding of information tending to identify a sexual

¹ We assume 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 those records contain substantially different types of information than that submitted to this office.

assault victim. However, the information in Exhibit 14, which you seek to withhold under this aspect of common-law privacy, contains a hypothetical test question with fictitious facts used for training. Therefore, as no individual's right to common-law privacy is implicated, the City may not withhold the information you have marked in Exhibit 14 relating to sexual assault victims under section 552.101 and common-law privacy.

Additionally, as you acknowledge, common-law privacy protects certain personal financial information. 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; however, the public has a legitimate 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 No. 600 (finding personal financial information to include 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.

In this instance, the submitted information contains personal financial information protected by common-law privacy. Therefore, the City must withhold most of the personal financial information you have redacted under section 552.101 of the Government Code and common-law privacy. We have marked additional information the City either must withhold or release. We note that for information relating to health, dental, and life insurance, the City must withhold such information as private only if these are optional plans offered by the City.

Next, we address your claims under statutes as encompassed by section 552.101. Section 6103(a) of title 26 of the United States Code makes federal tax return information confidential. *See* 26 U.S.C. § 6103(a). The term "return information" includes "the nature, source, or amount of income" of a taxpayer. *See* 26 U.S.C. § 6103(b)(2). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), *dism'd in part, aff'd in part, vacated in part, and remanded*, 993 F.2d 1111 (4th Cir. 1993). Our office has specifically held that a governmental body must withhold Form W-4 in its entirety. Open Records Decision No. 600 at 9 (1992). Therefore, the City must withhold the

submitted Form W-4 information from disclosure under section 552.101 and section 6103 of title 26 of the United States Code.

As you note, the submitted information includes an Employment Eligibility Verification, Form I-9, governed by section 1324a of title 8 of the United States Code. This statute provides that Form I-9 “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 Act would be “for purposes other than for enforcement” of the referenced federal statutes. Accordingly, we conclude that Form I-9 is confidential under section 552.101; and therefore, the City may release this form only in compliance with the federal laws and regulations governing the employment verification system.

You also assert chapter 411 of the Government Code governs some of the submitted information. Criminal history record information (“CHRI”) generated by the National Crime Information Center (“NCIC”) or by the Texas Crime Information Center (“TCIC”) 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.

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 information submitted for our review is CHRI generated by TCIC and NCIC. Accordingly, the City must withhold the information in Exhibit 15 under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code.

Next, Exhibit 8 contains declarations of medical condition and psychological and emotional health as required by the Texas Commission on Law Enforcement Officer Standards and Education. Section 1701.306 of the Occupations Code makes such information confidential. Specifically, section 1701.306 provides as follows:

(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.*

Therefore, the City must withhold the declarations in Exhibit 8, in their entirety, under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.

Additionally, Exhibit 9 contains information derived from a polygraph examination, access to which is governed by section 1703.306 of the Occupations Code. This provision states the following:

(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.

Occ. Code § 1703.306. After reviewing the information at issue, we find no evidence that any of the access provisions of section 1703.306 apply in this instance. Therefore, the City must withhold the polygraph information we have marked in Exhibit 9 under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.

You also assert section 58.007 of the Family Code governs information in Exhibit 13. Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential under section 58.007. The relevant language of section 58.007(c) reads as follows:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
- (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

Fam. Code § 58.007(c). Based on our review of the information at issue, we find that Exhibit 13 contains a hypothetical test question with fictitious facts used for training. Thus, the City may not withhold the information you have redacted under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code.

Next we address your other claimed exceptions under the Act. First, you contend section 552.115 of the Government Code excepts Exhibit 12 from disclosure. Section 552.115 provides that a birth record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official is excepted from required public disclosure except that “a birth record is public information and available to the public on and after the 50th anniversary of the date of birth as shown on the record filed with the bureau of vital statistics or local registration official.” *See Gov’t Code § 552.115.* However, as section 552.115 only applies to a birth certificate maintained by the bureau of vital statistics or local registration official, the City may not withhold the certification of birth in Exhibit 12 under this provision. *See Gov’t Code § 552.115; Open Records Decision No. 338 (1982).*

Second, we address your claim under section 552.117(a)(2) of the Government Code, which excepts from public disclosure information that reveals a peace officer's home address, home telephone number, social security number, and whether the officer has family members.² Gov't Code § 552.117(a)(2). "Peace officer" is defined by article 2.12 of the Code of Criminal Procedure. As the submitted documents contain personal information about peace officers, we agree that the City must withhold most of the information you have redacted and the additional information we have marked under section 552.117 of the Government Code. We note that section 552.117 does not apply to information relating to deceased family members.

To the extent that the document in Exhibit 2, titled "Overall Average 01-05-97" contains social securities numbers of individuals who are no longer licensed peace officers, and therefore, not protected by section 552.117(a)(2), we note the applicability of section 552.117(a)(1). Section 552.117(a)(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 timely request that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). 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). The information at issue may not be withheld from disclosure under section 552.117(a)(1) if the employees did not request confidentiality for this information in accordance with section 552.024 or if the request for confidentiality under section 552.024 for the information was not made until after the City received the request for information. Accordingly, to the extent the document at issue in Exhibit 2 contains social security numbers of individuals who are no longer licensed peace officers, we conclude the City must withhold the information you have marked on the document at issue pursuant to section 552.117(a)(1) of the Government Code, if the current or former officials or employees timely elected confidentiality for this information in accordance with section 552.024 of the Government Code prior to the time the City received this request for information.

The social security numbers contained in the submitted information also may be confidential under federal law. A social security number may be withheld in some circumstances under section 552.101 of the Government Code in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I).³ *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

² In Senate Bill 1388, which became effective on June 20, 2003, the Seventy-eighth Legislature recently amended section 552.117 of the Government Code by adding "(a)" to the relevant language of this provision.

³ Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

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 responsive records are confidential under section 405(c)(2)(C)(viii)(I), and therefore, excepted from public disclosure under section 552.101 and the referenced federal provision. However, we caution the City that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number, 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.

Third, as you note, 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). Exhibit 10 contains a photograph of a peace officer. You have not informed us that the peace officer has executed a written consent to disclosure. Thus, we agree that you must withhold the photograph depicting the peace officer under section 552.119 of the Government Code.

Fourth, you assert section 552.122(b), which excepts from disclosure test items developed by a licensing agency or governmental body. In Open Records Decision No. 626 (1994), this office determined that the term "test item" in section 552.122 includes any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated, but does not encompass evaluations of an employee's overall job performance or suitability. Whether information falls within the section 552.122 exception must be determined on a case-by-case basis. Open Records Decision No. 626 at 6 (1994). Traditionally, this office has applied section 552.122 where release of "test items" might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Additionally, when answers to test questions might reveal the questions themselves, the answers may be withheld under section 552.122(b). *See* Open Records Decision No. 626 at 8 (1994).

You explain Exhibit 11 consists of tests taken by the officer at the Academy. You explain that release of these tests could give an advantage to police recruits. Having reviewed your arguments and the information at issue, we conclude the contents of Exhibit 11 constitute "test items" for the purposes of section 552.122(b). Therefore, the City may withhold Exhibit 11 under section 552.122(b) of the Government Code.

Fifth, you argue the submitted documents contain information excepted from disclosure by section 552.130 of the Government Code. Section 552.130 excepts from public disclosure information relating to a driver's license or a motor vehicle title or registration issued by an agency of this state. The information subject to release contains motor vehicle information

and thus, we concur with your redactions and we have marked additional information the City must withhold under section 552.130 of the Government Code.

In summary, the City must withhold the following under section 552.101 of the Government Code in conjunction with the following doctrine or statute: 1) Exhibit 5, the accident report form, ST-3, in accordance with section 550.065(c)(4); 2) the information you have redacted and we have marked under common-law privacy; 3) Exhibit 4, Form W-4 information pursuant to section 6103 of title 26 of the United States Code; 4) Exhibit 7, Form I-9 in compliance with section 1324a of title 8 of the United States Code; 5) Exhibit 15, NCIC and TCIC information under chapter 411 of the Government Code; 6) Exhibit 8, declarations of medical condition and psychological and emotional health in accordance with section 1701.306 of the Occupations Code; and, 7) polygraph information in Exhibit 9 under section 1703.306 of the Occupations Code. The City must withhold personal information of peace officers under section 552.117(a)(2) of the Government Code. If applicable, the City must withhold the social security numbers in Exhibit 2 of individuals who are no longer licensed peace officers under section 552.117(a)(1) of the Government Code or federal law. The City must withhold the photograph of the peace officer in Exhibit 10 under section 552.119 of the Government Code. The City must withhold the motor vehicle information either you have redacted or we have marked under section 552.130 of the Government Code. The City may withhold the test items in Exhibit 11 pursuant to section 552.122(b) of the Government Code. The City must release the remaining information 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 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,



Christen Sorrell
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CHS/seg

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