



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 9, 2003

Ms. Julie B. Ross
Karger Key Barnes & Lynn, P.C.
1320 South University Drive, Suite 720
Fort Worth, Texas 76107

OR2003-6324

Dear Ms. Ross:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 186940.

The City of Mineola (the "city"), which you represent, received a request for a copy of the personnel file of a named individual, including, but not limited to, promotions, pay grades, certifications, awards, discipline reports, time records, reviews and evaluations, commendations, complaints, and applications for employment and work histories. You state that you have provided some responsive information to the requestor. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.117, 552.1175, 552.119, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses the doctrine of 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 Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (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. 540 S.W.2d at 683. 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). In addition,

information related to an individual's mortgage payments, assets, bills, and credit history is protected by the common law right to privacy. *See* Open Records Decision Nos. 545, 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.

This office has also concluded that other types of information are private under section 552.101. *See, e.g.*, Open Records Decision Nos. 659 at 4-5 (1999) (summarizing information attorney general has determined to be private), 594 at 4-5 (1991) (results of employee drug testing), 470 at 4 (1987) (illness from severe emotional job-related stress), 455 at 9 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 394 at 4-5 (1983) (identities of juvenile offenders), 343 at 1-2 (1982) (references in emergency medical records to a drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress). After reviewing the submitted information, we agree that it contains some information protected by common-law privacy. Accordingly, we have marked a small portion of information that is protected by the common-law right of privacy and must be withheld under section 552.101 of the Government Code.

Section 552.101 also excepts from disclosure information another statute makes confidential. As you point out, the requested documents include information obtained in the course of conducting a polygraph examination, 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.

Next, you argue that Exhibit 7 is excepted from disclosure under section 552.108 of the Government Code. 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[.]" Gov't Code § 552.108(a)(1). Section 552.108(b) excepts from disclosure "[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if: (1) release of the internal record or notation would interfere with law enforcement or prosecution[.]" Gov't Code § 552.108(b)(1). Section 552.108(b)(1) is intended to protect "information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State." *City of Ft. Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.-Austin 2002, no writ). Accordingly, we will address your arguments for withholding the submitted information under section 552.108(b) of the Government Code.

This office has stated that under the statutory predecessor to section 552.108(b), a governmental body may withhold information that would reveal law enforcement techniques. *See, e.g.,* Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines would unduly interfere with law enforcement), 456 (1987) (release of forms containing information regarding location of off-duty police officers in advance would unduly interfere with law enforcement), 413 (1984) (release of sketch showing security measures to be used at next execution would unduly interfere with law enforcement), 409 (1984) (if information regarding certain burglaries exhibits pattern that reveals investigative techniques, information is excepted under section 552.108), 341 (1982) (release of certain information from Department of Public Safety would unduly interfere with law enforcement because release would hamper departmental efforts to detect forgeries of drivers' licenses), 252 (1980) (section 552.108 is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted).

However, in order for a governmental body to claim this exception to disclosure, it must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. *See* Open Records Decision No. 562 at 10 (1990). Furthermore, generally known policies and techniques may not be withheld under section 552.108. *See, e.g.,* Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common law rules, and constitutional limitations on use of force are not protected under section 552.108), 252 at 3 (1980) (governmental body did not meet burden because it did not indicate why investigative procedures and techniques requested were different from those commonly known). Whether disclosure of particular records will interfere with law enforcement or prosecution must be decided on a case-by-case basis. *See* Attorney General Opinion MW-381 (1981).

You have provided an affidavit from the city's Chief of Police, in which he states that Exhibit 7 "contains information/internal records of a law enforcement agency and release of the information would interfere with the detection, investigation, or prosecution of crime and/or would interfere with law enforcement or prosecution of crime." The chief further states that Exhibit 7 "contains internal procedures followed by [city] police officers when a person is suspected of driving while under the influence of alcohol." Based on our review of your arguments and the submitted information, we find that you have not adequately demonstrated that the release of the submitted information would interfere with law enforcement or crime prevention. *See* Gov't Code § 552.108(b)(1); *see also* Open Records Decision No. 531 at 2-3 (1989) (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected by statutory predecessor to section 552.108), 508 at 4 (1988) (governmental body must demonstrate how release of particular information at issue would interfere with law enforcement efforts unless information does so on its face), 252 at 3 (1980) (governmental body did not meet its burden under statutory predecessor because it did not indicate why investigative procedures and techniques requested were any different from those commonly known). Accordingly, we

conclude that the city may not withhold any portion of the Exhibit 7 under section 552.108 of the Government Code.

Next, we address your argument under section 552.117 of the Government Code. Section 552.117(a)(2) excepts from disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of a peace officer regardless of whether the officer requests confidentiality for that information under section 552.024.¹ You indicate that the individual at issue was a licensed peace officer when the city received this request, and that the individual is currently a licensed peace officer. Therefore, we agree that the city must withhold the information we have marked under section 552.117(a)(2). We note that some of the information you have marked is not excepted under section 552.117(a)(2) and may not be withheld on that basis. Thus, the city may only withhold the information we have marked under section 552.117.²

We note, however, that the submitted information contains social security numbers of individuals other than the named peace officer. Such social security numbers may be confidential under federal law. Section 552.101 also encompasses amendments to the Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), that 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 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 Government Code imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that such information is not obtained or maintained by the city pursuant to any provision of law, enacted on or after October 1, 1990.

As you note, the requested information also includes photographs of the officers. Section 552.119 of the Government Code 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. 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

¹"Peace officer" is defined by article 2.12 of the Code of Criminal Procedure.

²As we are able to make this determination, we need not address your argument under section 552.1175 of the Government Code.

peace officer gives written consent to the disclosure. *Id.* § 552.119(b); *see also* Open Records Decision No. 502 (1988). It does not appear that any of the exceptions to withholding the submitted photographs of peace officers are applicable. Furthermore, you inform us that the peace officer in question has not given the city written consent to disclose any such photograph, and you do not inform us that any of the other depicted peace officers have executed written consents to disclosure. Accordingly, the city must withhold these photographs.

Next, you assert that certain information in the submitted documents is excepted under section 552.130 of the Government Code. Section 552.130 excepts from disclosure “information [that] relates to . . . a motor vehicle operator’s or driver’s license or permit issued by an agency of this state.” Some of the information you claim is excepted under section 552.130 was issued by a state other than Texas. Such information may not be withheld under this exception. Therefore, we have marked the information that the city must withhold pursuant to section 552.130.

Finally, we note that the submitted records contain fingerprint information that is subject to sections 559.001, 559.002, and 559.003 of the Government Code, which provide as follows:

Sec. 559.001. DEFINITIONS. In this chapter

(1) “Biometric identifier” means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.

(2) “Governmental body” has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 559.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

(1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:

(A) the individual consents to the disclosure;

(B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or

(C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and

(2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 559.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

It does not appear to this office that section 559.002 permits the disclosure of the submitted fingerprint information. Therefore, the city must withhold the fingerprints under section 552.101 in conjunction with section 559.003 of the Government Code.

To summarize, we conclude that: (1) the city must withhold the information we have marked under section 552.101 in conjunction with common-law privacy, (2) the city must withhold the polygraph information we have marked pursuant to section 552.101 and section 1703.306 of the Occupations Code, (3) the city must withhold the information we have marked under section 552.117(a)(2) of the Government Code, (4) other social security numbers may be confidential under federal law, (5) the city must withhold the photographs of peace officers under section 552.119 of the Government Code, (6) the city must withhold the information we have marked under section 552.130 of the Government Code, and (7) the submitted fingerprints must be withheld under section 552.101 in conjunction with section 559.003 of the Government Code. The remaining submitted information must be released to the requestor.

In closing, you ask this office to issue a previous determination "related to the withholding of drivers license numbers, copies of drivers' licenses, and other information excepted under § 552.130." However, because you have incorrectly applied section 552.130 to certain information within the submitted documents, we decline to issue a previous determination allowing the city to withhold information under section 552.130 at this time. Therefore, 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,



Sarah I. Swanson
Assistant Attorney General
Open Records Division

SIS/lmt

Ref: ID# 186940

Enc. Submitted documents

c: Mr. R.J. Parham
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(w/o enclosures)