



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 15, 2003

Ms. J. Middlebrooks
Assistant City Attorney
Criminal Law and Police Division
City of Dallas
1400 South Lamar Street #300A
Dallas, Texas 75215

OR2003-7360

Dear Ms. Middlebrooks:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 189403.

The Dallas Police Department (the "department") received seven requests for information relating to former officer Derrick Evans. Specifically, the following requests were made concerning Officer Evans:

1. Jason Trahan of the Dallas Morning News requested all personnel, discipline, commendation, Internal Affairs, Public Integrity, recruit, training, and work history records for Derrick Evans, as well as information on all calls for police service at a specified address in the City of Dallas for the past three years.
2. Mary Ann Razzuk of WFAA-TV requested all personnel records of Officer Evans, to include Internal Affairs investigations, dating from the time of his application for employment with the department. Ms. Razzuk also requested information concerning Officer Evans' knowledge of or involvement in any misdemeanor or felony crimes dating from the time of his application for employment with the department, as well as information concerning Officer Evans' involvement as a suspect or witness in any criminal investigation.

3. Paul Adrian of Fox 4 TV requested incident report number 0571462-M, pertaining to a shooting involving Officer Evans at the Pleasant Oaks Park Recreation Center on July 28, 2003.
4. Holly Becka and Tanya Eiserer of the Dallas Morning News requested “[a]ny and all copies of internal affairs and/or public integrity records concerning the firing of Officer Derrick C. Evans.”
5. Mary McKee of the Fort Worth Star-Telegram requested the personnel file of Officer Evans, to include the application for employment, disciplinary history, reports related to polygraph exams, and “[a]ll memos related to Officer Evans.”
6. J.D. Miles of CBS 11 TV requested all personnel files, internal investigation files, and public integrity files related to Officer Evans.
7. Mary Ann Razzuk of WFAA-TV requested “[a]ny and all records pertaining to the termination file for Derrick Evans.”

We ruled on request number 3 in Open Records Letter No. 2003-5610 (2003), issued August 13, 2003. Thus, with respect to incident report number 0571462-M, which you have submitted for our review, the department may rely on our decision in Open Records Letter No. 2003-5610 as a previous determination regarding the public availability of the incident report. *See* Gov’t Code § 552.301(f); *see also* Open Records Decision No. 673 (2001) (regarding previous determinations). With respect to the remaining requested information regarding Officer Evans, you claim that portions of the information are excepted from disclosure under sections 552.101, 552.108, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

As a preliminary matter, we note you have not submitted any information responsive to the portion of request number 1 regarding calls for service at a specified address, nor have you raised any exceptions to its disclosure. We therefore assume that, to the extent this information exists, it has been released to the requestor. If not, you must release it immediately. *See* Gov’t Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000) (concluding that section 552.221(a) requires that information not excepted from

¹ We 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.

disclosure must be released as soon as possible under the circumstances). With respect to the remaining information at issue, we address your claimed exceptions to disclosure.

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 protected by other statutes. The submitted information includes an accident report form that appears to have been completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (Texas Peace Officer's Accident Report form). Section 550.065(b) of the Transportation Code 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. Transp. Code § 550.065(c)(4). Under this provision, the Department of Public Safety or another governmental body is required to release a copy of an accident report to a person who provides the governmental body with two or more pieces of information specified by the statute. *Id.* In this instance, the requestors have not provided the department with the requisite two of three pieces of information. Accordingly, the department must withhold the marked accident report pursuant to section 552.101 in conjunction with section 550.065(b) of the Transportation Code.

You also indicate that the submitted information contains mental health records. Section 611.002 of the Health and Safety Code applies to "[c]ommunications between a patient and a professional, [and] records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional." *See also* Health & Safety Code § 611.001 (defining "patient" and "professional"). We have marked mental health records that are within the scope of section 611.002 and may not be released except in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. Health & Safety Code § 611.002(b); *see id.* §§ 611.004, 611.0045.

Next, criminal history record information ("CHRI") is confidential and not subject to disclosure. 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). Furthermore, information compiled by a law enforcement agency that depicts a particular individual as a criminal suspect, arrestee, or defendant takes on a character that implicates the individual's right to privacy in a manner that the same

information in an uncompiled state does not. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989).² Therefore, the department must withhold any CHRI falling within the ambit of these state and federal regulations, as well as any information that is private under *Reporters Committee*, pursuant to section 552.101 of the Government Code.

Next, you contend that portions of the submitted information are excepted from disclosure under section 552.101 of the Government Code in conjunction with article 61.03 of the Code of Criminal Procedure. Chapter 61 of the Code of Criminal Procedure deals with intelligence information pertaining to street gangs. Article 61.02 provides in part that "a criminal justice agency may compile criminal information into an intelligence database for the purpose of investigating or prosecuting the criminal activities of criminal combinations or criminal street gangs." Article 61.03 provides in relevant part:

(a) A criminal justice agency that maintains criminal information under this chapter may release the information on request to:

- (1) another criminal justice agency;
- (2) a court; or
- (3) a defendant in a criminal proceeding who is entitled to the discovery of the information under Chapter 39.

Crim. Proc. Code art. 61.03(a). You indicate that portions of the submitted information consist of intelligence information relating to criminal street gangs. Furthermore, you do not indicate that the requestors are entitled to the information under article 61.03. Based on your representations and our review of the submitted information, we determine that the department must withhold the gang information you have marked under section 552.101 in conjunction with article 61.03 of the Code of Criminal Procedure.

The submitted documents also include information relating to a polygraph examination. Section 1703.306(b) of the Occupations Code provides that "[a] governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information." The department must withhold the marked polygraph examination information under section 552.101 of the Government Code in conjunction with section 1703.306(b) of the Occupations Code.

²Section 552.101 also encompasses the common-law right to 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; Open Records Decision No. 616 at 2-3 (1993).

The submitted documents also contain fingerprint information that is subject to sections 559.001, 559.002, and 559.003 of the Government Code. Sections 559.001, 559.002, and 559.003 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.

Upon review, we find section 559.002 does not permit the disclosure of the submitted fingerprint information in this instance. Therefore, the department must withhold the fingerprints, which we have marked, under section 552.101 in conjunction with section 559.003 of the Government Code.

Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential under section 58.007 of the Family Code. Section 58.007(c) provides in pertinent part 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.

A portion of the information at issue involves juvenile conduct that occurred after September 1, 1997. It does not appear that any of the exceptions in section 58.007 apply; therefore, we have marked the information that is confidential pursuant to section 58.007(c) of the Family Code. The department must withhold the marked information from disclosure under section 552.101 of the Government Code.

We note that a portion of the submitted personnel information consists of personal financial information pertaining to Officer Evans. This office has found that information that reflects an individual's personal financial decisions and is not related to a financial transaction between the individual and a governmental body is generally excepted from disclosure under common-law privacy. Open Records Decision Nos. 600 (1992) (public employee's withholding allowance certificate, designation of beneficiary of employee's retirement benefits, direct deposit authorization, and employee's decisions regarding voluntary benefits programs, among others, protected under common-law privacy), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history protected under common-law privacy). This office has also ruled, however, that 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 No. 600 (1992) (information revealing that employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure). We have marked personal financial information in the submitted documents that is excepted from disclosure under section 552.101 in conjunction with common-law privacy.

We next address your claims 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.” Generally, a governmental body claiming section 552.108 must reasonably explain 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).

You indicate that portions of the submitted information consist of the department’s investigative information pertaining to pending criminal investigations. Furthermore, you advise that the submitted records from internal affairs file number 03-349 are closely related to a pending criminal investigation, and you contend that release of these internal affairs records would jeopardize the pending case.³ Based on your representations and our review of the submitted information, we agree that release of the submitted records from internal affairs file number 03-349, and the submitted investigative information pertaining to pending cases, would interfere with the detection, investigation, or prosecution of crime. *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). Thus, we agree that section 552.108(a)(1) is applicable in this instance, and we have marked information that the department may generally withhold under section 552.108(a)(1) of the Government Code.

We note, however, that information normally found on the front page of an offense report is generally considered public. *See generally* Gov’t Code § 552.108(c); *Houston Chronicle*, 531 S.W.2d 177; Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Thus, with respect to the information subject to section 552.108(a)(1), the department must release the types of information that are considered to be front page offense report information, even if this information is not actually located on the front page of the pertinent offense reports.

We next address your claim under section 552.117 of the Government Code. Section 552.117(a)(2) of the Government Code excepts from required public disclosure the home address, home telephone number, social security number, and the family member information of a peace officer as defined by article 2.12 of the Code of Criminal Procedure. *See* Open Records Decision No. 622 (1994). We note that a post office box number is not

³We note that section 552.108 is ordinarily not applicable to internal administrative investigations involving law enforcement officers. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320, (Tex. App. 2002, no pet. h.); Open Records Decision No. 562 at 10 (1990); *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor not applicable to internal investigation that did not result in criminal investigation or prosecution); Open Records Decision No. 350 at 3-4 (1982).

a home address for purposes of this section. We have marked the information that the department must withhold under section 552.117(a)(2).

The submitted documents contain information that is excepted from disclosure under section 552.130 of the Government Code. Section 552.130 provides in pertinent part:

(a) Information is excepted from the requirements 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[.]

We have marked information pertaining to Texas driver's licenses and Texas motor vehicle titles and registrations that the department must withhold under section 552.130. Information pertaining to driver's licenses and motor vehicle titles and registrations issued by other states is not excepted under section 552.130 and may not be withheld under that section.

Finally, we note that some of the materials at issue are protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are protected by copyright. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of materials protected by copyright, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, we have marked an accident report that must be withheld under section 552.101 of the Government Code in conjunction with section 550.065(b) of the Transportation Code. The marked mental health records may not be released except in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. Any criminal history record information in the submitted documents must be withheld pursuant to section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code and federal regulations, or pursuant to common-law privacy as contemplated in *Reporters Committee*. We have marked information that must be withheld under section 552.101 in conjunction with article 61.03 of the Code of Criminal Procedure. The marked polygraph examination information must be withheld under section 552.101 in conjunction with section 1703.306 of the Occupations Code. The fingerprint information we have marked must be withheld under section 552.101 in conjunction with section 559.003 of the Government Code. Juvenile law enforcement records must be withheld under section 552.101 in conjunction

with section 58.007 of the Family Code. We have marked personal financial information that is excepted under section 552.101 in conjunction with common-law privacy. We have marked information that the department may withhold pursuant to section 552.108(a)(1) of the Government Code; however, the department must release basic information. We have marked information that the department must withhold pursuant to section 552.117(a)(2) of the Government Code. The marked information relating to Texas driver's licenses and motor vehicle titles and registrations must be withheld under section 552.130. The remainder of the submitted information must be released to the requestors in compliance with copyright law.

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,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 189403

Enc: Submitted documents

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