



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 16, 2004

Ms. Melissa L. Barloco
Assistant County Attorney
Harris County
1019 Congress, 15th Floor
Houston, Texas 77002-1700

OR2004-2003

Dear Ms. Barloco:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 197674.

The Harris County Constable, Precinct 8 (the "constable") received a request for the personnel file of a former deputy and the audiotapes and videotapes pertaining to a specified motor vehicle accident. You state that the constable does not have any responsive audiotapes. The Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). You claim that the portions of the remaining requested information are excepted from disclosure under sections 552.101, 552.108, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We begin by addressing your argument for the submitted videotapes. Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. You state that the videotapes pertain to a closed criminal investigation that did not result in a conviction or deferred adjudication. Thus, we determine that the

constable may withhold the submitted videotapes pursuant to section 552.108(a)(2) of the Government Code.

We next address the submitted personnel information. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information made confidential by other statutes. The submitted personnel information includes an F-5 Report of Resignation or Separation of License Holder addressed to the Texas Commission on Law Enforcement Officer Standards and Education ("TCLEOSE"). Section 1701.452 of the Occupations Code requires that a law enforcement agency submit a report to TCLEOSE regarding a licensed peace officer who resigns from employment with the law enforcement agency. *See* Occ. Code § 1701.452. Section 1701.454 provides in relevant part:

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

Occ. Code § 1701.454. We determine that the constable must withhold the submitted F-5 form, which we have marked pursuant to section 552.101 in conjunction with section 1701.454 of the Occupations Code.

The submitted information also includes the former deputy's Employment Eligibility Verification, Form I-9. The I-9 form is governed by title 8, section 1324a of the United States Code, which provides that an I-9 form and "any information contained in or appended to such form, 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. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). Release of the I-9 form in this instance would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we determine that this document and the information attached thereto is confidential and may only be released in compliance with the federal laws and regulations governing the employment verification system.

The documents at issue also contain the former deputy's W-4 forms. Prior decisions of this office have held that section 6103(a) of title 26 of the United States Code renders tax return information confidential. *See* Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Tax return information is defined as data furnished to or collected by the IRS with respect to the determination of possible existence of liability of any person under title 26 of the United States Code for any tax. *See* 26 U.S.C. § 6103(b). The submitted W-4 forms are tax return information and are excepted from disclosure under section 552.101 of the Government Code as information made confidential by federal law.

We note that the personnel information contains the former deputy's fingerprints. Fingerprint information is subject to sections 560.001, 560.002, and 560.003 of the Government Code. Sections 560.001, 560.002, and 560.003 provide as follows:

Sec. 560.001. 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. 560.002. 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. 560.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

Section 560.002 does not permit the disclosure of the submitted fingerprint information in this instance. Therefore, the constable must withhold the fingerprints, which we have marked, under section 552.101 in conjunction with section 560.003 of the Government Code.

Next, section 552.101 also encompasses the doctrine of common-law privacy, which 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). This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally excepted from required public disclosure under common-law privacy. *See* 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, are 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 that the constable must withhold under section 552.101 of the Government Code in conjunction with common-law privacy.

We note that the personnel information at issue also contains bank account information that is excepted from disclosure under section 552.136 of the Government Code. Section 552.136 provides in relevant part:

(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. The constable must withhold the account number information that we have marked pursuant to section 552.136 of the Government Code.

We note you seek to withhold photographs of the former deputy contained in the personnel information at issue pursuant to section 552.119 of the Government Code, which provides:

(a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under Section 51.212, Education Code, the release of which would endanger the life or physical safety of the officer, is excepted from [required public disclosure] unless:

- (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.

(b) A photograph exempt from disclosure under Subsection (a) may be made public only if the peace officer or security officer gives written consent to the disclosure.

Gov't Code § 552.119. In this instance, you have not demonstrated, nor is it apparent from our review of the submitted information, that release of the photograph at issue would endanger the life or physical safety of the deputy. We therefore determine that the constable may not withhold the photograph of the former deputy pursuant to section 552.119.

You contend that portions of the remaining information are excepted from disclosure under section 552.117(a)(2) of the Government Code. Section 552.117(a)(2) 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 have marked the information that the constable must withhold under section 552.117(a)(2).

We also note that portions of the information at issue pertaining to individuals who may be peace officers may be excepted under section 552.1175. The protections of section 552.117 only apply to information that the constable holds as a peace officer's employer. We have marked information in the submitted documents that pertains to individuals who may be peace officers, and that is not held by the constable as the employer of the individuals. Section 552.1175 of the Government Code provides in pertinent part:

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may

not be disclosed to the public under this chapter if the individual to whom the information relates:

- (1) chooses to restrict public access to the information; and
- (2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(b). The submitted information indicates that one of the individuals at issue is a peace officer with another agency. With respect to the remaining individuals, however, you do not inform this office, nor does any of the submitted information indicate, whether the individuals are licensed peace officers who have notified the constable of their election of confidentiality for the information. *See, e.g.,* Open Records Decision No. 678 (2003) (concluding that county voter registrar was authorized to release voter information made confidential under section 552.1175 of Government Code to another governmental entity, but that transferred information would not be confidential in possession of transferee until recipient governmental entity receives a section 552.1175 notification). Thus, if the individuals whose information we have marked under section 552.1175 are currently licensed peace officers who comply with section 552.1175(b), the constable must withhold the marked information under section 552.1175 of the Government Code.

Finally, 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[.]

Gov't Code § 552.130. We have marked the information that the constable must withhold under section 552.130 of the Government Code.

In summary, the constable may withhold the submitted videotapes under section 552.108(a)(2) of the Government Code. A TCLEOSE F-5 form must be withheld under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code. The former deputy's I-9 form, and the attached documents, must be withheld under section 552.101 in conjunction with federal law. We have marked tax information that must be withheld under section 552.101 in conjunction with federal law.

Fingerprint information must be withheld under section 552.101 in conjunction with section 560.003 of the Government Code. We have marked personal financial information that must be withheld pursuant to section 552.101 in conjunction with common-law privacy. The marked bank account information must be withheld under section 552.136 of the Government Code. We have marked information that must be withheld under section 552.117(a)(2) of the Government Code, as well as information that may be excepted under section 552.1175, provided the individuals at issue comply with section 552.1175(b) of the Government Code. We have also marked motor vehicle driver's license information that must be withheld under section 552.130 of the Government Code. The remainder of the submitted information must be released 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,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 197674

Enc: Submitted documents

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c: Mr. Waldemar Ruiz
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(w/o enclosures)