



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 15, 2005

Ms. Bettye Lynn
Lynn Pham Moore & Ross
1320 South University Drive, Suite 720
Fort Worth, Texas 76107

OR2005-03275

Dear Ms. Lynn:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 222132.

The City of Wichita Falls (the "city"), which you represent, received a request for information relating to the city's investigation into complaints against the city's Civil Service Director. You state that the city will release some of the requested information. You claim that the remaining responsive information is excepted from disclosure under sections 552.101, 552.117, 552.1175, 552.122, 552.130, 552.136, and 552.140 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of the information requested.¹ We have also received and considered comments from an interested third party. *See* Gov't Code § 552.304 (allowing interested party to submit comments indicating why requested information should or should not be released).

Initially, you tell us that the city contacted the requestor seeking clarification regarding his request for "any/all statements" and "any/all investigative documents." You inform us,

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.

however, that no clarification had been received as of the date of your request to this office. Section 552.222(b) of the Government Code provides the following:

If what information is requested is unclear to the governmental body, the governmental body may ask the requestor to clarify the request. If a large amount of information has been requested, the governmental body may discuss with the requestor how the scope of a request might be narrowed, but the governmental body may not inquire into the purpose for which information will be used.

Gov't Code § 552.222(b). Thus, if the city is uncertain about the scope of the request, it may ask the requestor to clarify the request and discuss with the requestor how the scope of the request might be narrowed. As you inform us that the requestor did not submit a clarified request as of the date of your submission to this office, you need not release information that may be responsive to the request for "any/all statements" and "any/all investigative documents." Should the requestor submit such a clarification, however, the city must seek a ruling from this office before withholding any responsive information from the requestor. *See also* Open Records Decision No. 663 (1999) (providing for tolling of the ten business day time limit to request attorney general decision while governmental body awaits clarification).

Next, we address your assertion that Exhibit P is excepted from disclosure because it is "a form of a record of executive sessions that were conducted by" the city. Section 552.101 of the Government Code excepts from disclosure information deemed confidential by law. Section 551.104(c) of the Government Code provides that "[t]he certified agenda or tape of a closed meeting is available for public inspection and copying *only under a court order issued under Subsection (b)(3).*" (Emphasis added.) Thus, such information cannot be released to a member of the public in response to an open records request. *See* Open Records Decision No. 495 (1988). Exhibit P does not consist of either a certified agenda or a tape recording of a closed meeting. You assert that Exhibit P is "a form of transcription of executive session proceedings." We find, however, that Exhibit P is not a form of transcription of an executive session proceeding but is instead a document that was presented during executive session. The fact that a subject was discussed in an executive session does not make information related to that discussion confidential. Open Records Decision Nos. 605 (1992), 485 (1987). The city may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with section 551.104(c) of the Government Code.

We now address the information that you have submitted as responsive to the instant request. 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 L-2 Declaration of Medical Condition and L-3 Declaration of Psychological and Emotional Health required

by the Texas Commission on Law Enforcement Officer Standards and Education ("TCLEOSE") are confidential pursuant to section 1701.306 of the Occupations Code. 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.

Occ. Code § 1701.306(a), (b). The city must withhold the declarations submitted as Exhibit K under section 552.101 in conjunction with section 1701.306 of the Occupations Code.

We now address the polygraph testing information submitted as Exhibit I. Section 1703.306 of the Occupations Code provides as follows:

(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.

(b) The [Polygraph Examiners B]oard or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Occ. Code § 1703.306. We have marked the information that must be withheld under section 1703.306 of the Occupations Code in conjunction with section 552.101 of the Government Code.

You claim that sections 143.032 and 143.034 of the Local Government Code deem promotional examinations confidential for purposes of section 552.101.² Section 143.032 provides that a person commits an offense if the person knowingly or intentionally reveals a part of a promotional examination to an unauthorized person or receives from an authorized or unauthorized person a part of a promotional examination for unfair personal gain or advantage. *See* Local Gov't Code § 143.032(h); *see also* Local Gov't Code § 143.032 (classifying violation of subsection (h) as criminal offense). Section 143.034 entitles eligible promotional candidates from fire or police departments to inspect their own promotional examination and answers, the examination grading, and the source material for the examination.³ *See* Local Gov't Code § 143.034(a); *see also* Local Gov't Code § 143.034(b) (prohibiting eligible promotional candidate from removing examination or copying examination questions). We agree that the clear language of section 143.032 makes the promotional examination questions and answer sheets, as "part of a promotional examination," confidential and permits their disclosure only to an authorized person. *Cf.* Open Records Decision No. 584 (1991) (statute making release of information criminal offense deems information confidential by law for purposes of section 552.101). Therefore, assuming the requestor is not authorized to receive the information at issue, you must withhold the information submitted as Exhibits F and G under section 552.101 of the Government Code in conjunction with section 143.032 of the Local Government Code.

²We understand Wichita Falls to be a civil service city under this chapter.

³Based on our review of the submitted materials, we understand that the requestor is not an eligible promotional candidate who would be entitled to inspect examination materials pursuant to section 143.034.

You assert that some of the information submitted as Exhibit M is confidential under the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

The medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). After reviewing the submitted documents, we find that the release of some of the documents in Exhibit M, and elsewhere in the submitted information, is governed by the MPA. We have marked those documents. However, we do not find that the remainder of the information in Exhibit M consists of records that were *created* or *maintained* by a physician or someone under the supervision of a physician. *See* Occ. Code § 159.002(b). As such, the MPA is inapplicable to those documents.

However, some of the information in Exhibit M that is not covered by the MPA is protected by common law privacy. Section 552.101 of the Government Code 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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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. This office has since concluded that other types of information also are private under section 552.101. *See* Open Records Decision Nos. 659 at 4-5 (1999) (summarizing information attorney general has held to be private), 470 at 4 (1987) (illness from severe emotional job-related stress), 455 at 9 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 343 at 1-2 (1982) (references in emergency medical records to drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or

emotional/mental distress). We have marked the information that the city must withhold under section 552.101 in conjunction with common law privacy.

You also indicate that the documents submitted as Exhibit J contain personal financial information relating to some of the individuals to whom the submitted information pertains. This office has found that personal financial information not related to a financial transaction between an individual and a governmental body is generally protected by 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), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common law privacy). We have marked the financial information that is protected under section 552.101 and common law privacy. As our ruling on this issue is dispositive, we need not address your arguments under section 552.136 of the Government Code for this information.

Section 552.101 of the Government Code and common law privacy can also protect criminal history record information. You assert that some of the submitted information consists of criminal history record information that may not be disclosed. Where an individual's criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual's right to privacy. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). Information relating to routine traffic violations is not excepted from release under section 552.101 in conjunction with common law privacy and *Reporters Committee*. *Cf.* Gov't Code § 411.082(2)(B). You also argue that some of the submitted information is protected under common law privacy because it relates to applicants for employment with the city's police department who failed to pass the city's background investigations. However, the work behavior of a public employee is a matter of legitimate public interest not protected by the common law right of privacy. Open Records Decision No. 438 (1986). Similarly, information about a public employee's qualifications, disciplinary action and background is not protected by common law privacy. Open Records Decision No. 444 (1986) (public has obvious interest in having access to information concerning qualifications and performances of governmental employees, particularly employees who hold positions as sensitive as those held by members of sheriff's department); *see also* Open Records Decision No. 562 at 9, n.2 (1990) (public has interest in preserving credibility and effectiveness of police force). Therefore, we conclude that most of the submitted information concerning background checks is not protected under common law privacy. We have marked the information that must be withheld under section 552.101 in conjunction with common law privacy.

The submitted records also contain information that is excepted from disclosure under section 552.117(a)(2) of the Government Code. Section 552.117(a)(2) excepts the current

and former home address and telephone number, social security number, and the family member information of a peace officer regardless of whether the officer made an election under section 552.024 of the Government Code or complies with section 552.1175 of the Government Code. This section applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. The city must withhold those portions of the records that reveal current or former officers' home addresses, home telephone numbers, and social security numbers. The city must also withhold the officers' *former* home addresses and telephone information from disclosure. *See* Open Records Decision No. 622 (1994). Section 552.117(a)(2) does not apply to applicants for employment.

Section 552.117(a)(1) of the Government Code may also be applicable to some of the submitted information. 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 request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the city may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 *prior* to the date on which the request for this information was made. For those employees who timely elected to keep their personal information confidential, the city must withhold the employees' home addresses and telephone numbers, social security numbers, and any information that reveals whether these employees have family members under section 552.117(a)(1). The city may not withhold this information under section 552.117 for those employees who did not make a timely election to keep the information confidential. We have marked the information that may fall within section 552.117.

Next, we address your arguments under section 552.1175 of the Government Code. This exception provides in part:

(a) This section applies only to:

- (1) peace officers as defined by Article 2.12, Code of Criminal Procedure;
- (2) county jailers as defined by Section 1701.001, Occupations Code;
- (3) current or former employees of the Texas Department of Criminal Justice or of the predecessor in function of the department or any division of the department in function of the department; and
- (4) commissioned security officers as defined by Section 1702.002, Occupations Code.

(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(a)-(b). The city must withhold the home address and telephone number, social security number, and family member information we have marked under section 552.1175 if the individual at issue elects to restrict access to the information in accordance with section 552.1175(b).

Even if some of the submitted social security numbers are not excepted under section 552.117 or 552.1175, they may be confidential under federal law. The 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), make confidential social security numbers and related records that are obtained or 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 any of the social security numbers in the file 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 Public Information Act (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 now address your arguments against disclosing the information submitted as Exhibit E. Section 552.122(b) of the Government Code 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). Having reviewed the information submitted as Exhibit E, we agree that they are "test items" as contemplated by section 552.122(b). Therefore, you may withhold the questions and answers in Exhibit E under section 552.122(b) of the Government Code.

We next address the driver's license information that you have highlighted in Exhibit D. Section 552.130 of the Government Code provides in relevant part:

(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[.]

You must withhold the marked Texas driver's license numbers under section 552.130. You have also highlighted driver's license numbers from other states. We note that section 552.130 only applies to Texas motor vehicle information. Therefore, the city may not withhold the out-of-state driver's license numbers it has marked on this basis. The city must withhold the Texas driver's license numbers that we have marked under section 552.130 of the Government Code.

Finally, you claim that Exhibit L constitutes information that is excepted from disclosure pursuant to section 552.140 of the Government Code. Section 552.140 provides in relevant part:

(a) This section applies only to a military veteran's Department of Defense Form DD-214 or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003.

Gov't Code § 552.140(a). Section 552.140 provides that a military veteran's DD-214 form or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003 is confidential for a period of seventy-five years and may only be disclosed in accordance with section 552.140 or in accordance with a court order. *See* Gov't Code § 552.140(a), (b). You do not indicate when the city first came into possession of the information submitted as Exhibit L. Therefore, to the extent that the information submitted as Exhibit L came into the possession of the city on or after September 1, 2003, we conclude that the city must withhold the information under section 552.140 of the Government Code. If Exhibit L was not so obtained, the city may not withhold the information on this basis.

In summary, the city must withhold the following information under section 552.101 of the Government Code: (1) the information we have marked in conjunction with section 1701.306 of the Occupations Code; (2) the information we have marked in conjunction with section 1703.306 of the Occupations Code; (3) the information we have marked in

conjunction with section 143.032 of the Local Government Code; and (4) the information we have marked in conjunction with common law privacy. The city may only release the information we have marked under the MPA in accordance with the provisions of that statute. The city must withhold the home address, home phone number, social security number, and family member information under section 552.117(a)(2) of the Government Code for any current or former licensed peace officer as defined by article 2.12 of the Code of Criminal Procedure. The city must also withhold the home address, home phone number, social security number, and family member information under section 552.117(a)(1) of the Government Code for any current or former city employee or official who made a timely election under section 552.024 of the Government Code. The city must withhold the home address and telephone number, social security number, and family member information we have marked under section 552.1175 of the Government Code if the individual at issue elects to restrict access to the information in accordance with section 552.1175(b). Notwithstanding the application of section 552.117 or 552.1175 of the Government Code, the submitted social security numbers may be confidential under federal law. The Texas driver's license numbers that we have marked must be withheld under section 552.130 of the Government Code. The city must also withhold the DD-214 form submitted as Exhibit L under section 552.140 of the Government Code if the form came into the possession of the city on or after September 1, 2003. The city may withhold the information submitted as Exhibit E under section 552.122 of the Government Code. 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,



Amanda Crawford
Assistant Attorney General
Open Records Division

AEC/sdk

Ref: ID# 222132

Enc. Submitted documents

c: Mr. Lance F. Wyatt
Law Office of Lance F. Wyatt
5840 West I-20, Suite 120
Arlington, Texas 76017
(w/o enclosures)