



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

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Mr. James C. Tidwell  
Tidwell & McCoy, LLP  
123 North Crockett Street, Suite 100  
Sherman, Texas 75090

OR2005-08049

Dear Mr. Tidwell:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 231486.

The City of Howe (the "city") received a request for several records concerning Police Chief Roy Keesey. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.108 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We first note that a portion of the submitted information is made expressly public under section 552.022 of the Government Code. This section provides, in pertinent part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, excepted as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The submitted materials in Tab 5 contain completed evaluations that are expressly public pursuant to section 552.022(a)(1). Therefore, the city

may only withhold this information if it is confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Although you argue that the completed evaluations are excepted under section 552.111 of the Government Code, we note that section 552.111 is a discretionary exception to disclosure and is not "other law" for purposes of 552.022.<sup>1</sup> Thus, the completed evaluations may not be withheld under section 552.111. However, as you contend that this information is excepted under sections 552.101, 552.102 and 552.108, we will address your claims under those provisions.

The city claims sections 552.101 and 552.102 of the Government Code for the submitted portions of the submitted personnel file records and the completed evaluations subject to section 552.022(a)(1). Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses information protected by common law privacy. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101. We will therefore consider your claims regarding sections 552.101 and 552.102 together.

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.*, 540 S.W.2d at 685. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under common law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 545 (1990); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). After reviewing the

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<sup>1</sup>Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See* Open Records Decision No. 473 (1987) (governmental body may waive statutory predecessor to section 552.111); *see also* Open Records Decision No. 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions do not constitute "other law" that makes information confidential.

information, we find that portions of Tab 6 are protected by common law privacy and must be withheld under section 552.101. However, none of the submitted materials under Tab 3, Tab 4 or Tab 5 contain highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and the information is of legitimate concern to the public. Therefore, this information is not protected from disclosure by the common law right to privacy. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (statutory predecessor applicable when information would reveal intimate details of highly personal nature), 405 at 2 (1983) (manner in which employee performed his job cannot be said to be of minimal public interest), 400 at 5 (1983) (statutory predecessor protected information only if its release would lead to clearly unwarranted invasion of privacy). Thus, none of the information submitted under Tab 3, Tab 4 or Tab 5 may be withheld under section 552.101 or section 552.102 on the basis of common law privacy.

We next turn to your arguments under section 552.108(b) of the Government Code for the information at Tabs 3, 4 and 5. Section 552.108(b)(1) 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.” 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 Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.).

To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a law-enforcement agency must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. Instead, the governmental body 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) (construing statutory predecessor). In addition, 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 law enforcement exception), 252 at 3 (1980) (governmental body did not meet burden because it did not indicate why investigative procedures and techniques requested were any different from those commonly known). The determination of whether the release of particular records would interfere with law enforcement is made on a case-by-case basis. *See* Open Records Decision No. 409 at 2 (1984) (construing statutory predecessor).

You assert that the information at issue “further[s] the necessary task of managing a law enforcement agency.” However, you have not otherwise explained how release of the records at issue would interfere with law enforcement. *See* ORD 562. Therefore, the materials submitted in Tab 3, Tab 4 and Tab 5 of the submitted materials may not be withheld on the basis of section 552.108(b).

You also claim that, with regard to the documents in Tab 4, “[i]nformant ... rights should be recognized, and are clearly evident.” The informer’s privilege, incorporated into the Public Information Act by section 552.101, protects the identity of persons who report violations of the law to officials having the duty of enforcing particular laws. *See Roviario v. United States*, 353 U.S. 53, 59 (1957). The informer’s privilege does not, however, apply to information that does not describe alleged illegal conduct. Open Records Decision No. 515 at 5 (1988). For example, the informer’s privilege aspect of section 552.101 does not protect memoranda and written statements complaining of a fellow employee’s work performance when those statements do not reveal the suspected violation of specific laws to the officials charged with enforcing those laws. *See* Open Records Decision Nos. 579 at 8 (1990), 515 at 3 (1988). In addition, the informer’s privilege protects the content of the communication only to the extent that it identifies the informant. *Roviario*, 353 U.S. at 60. The identities of informants are excepted from required public disclosure by the informer’s privilege and section 552.101. Because none of the submitted letters report violations of the law, they are not protected under the informer’s privilege and must be released.

Next, we turn to your argument that the materials in Tab 3, Tab 4 and the remaining information in Tab 5 may be protected under section 552.111 of the Government Code. Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). An agency’s policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. The documents at issue relate solely to a personnel matter and not to its policymaking functions. Therefore, the submitted materials may not be withheld under section 552.111.

The city also asserts the information in Tab 5 may be confidential under section 551.074 of the Government Code. Section 552.101 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. You inform us that the

requested information encompasses information that involves “confidential matters related to a closed session.” We understand you to claim that the submitted information, which you state is “related to a closed session,” may be made confidential under the Open Meetings Act (the “OMA”), Chapter 551 of the Government Code.

The OMA, which establishes the general rule that every meeting of every governmental body shall be open to the public, permits closed meetings for certain purposes. Section 551.074 of the Government Code provides as follows:

(a) This chapter does not require a governmental body to conduct an open meeting:

(1) to deliberate the appointment, employment, evaluation, reassignment, duties, discipline, or dismissal of a public officer or employee;

(b) [unless] the officer or employee who is the subject of the deliberation or hearing requests a public hearing.

Gov't Code § 551.074(a)(1), (b). Thus, the board may meet in closed session to discuss the appointment or employment of public officers or employees. Nevertheless, final action or voting by the board on an individual's appointment or employment must be taken in open session. *See* Gov't Code § 551.102.

A governmental body that conducts a closed meeting must either keep a certified agenda or make a tape recording of the proceeding, except for private attorney consultations. Gov't Code § 551.103. The agenda or tape is kept as potential evidence in litigation involving an alleged violation of the OMA. *See* Attorney General Opinion JM-840 (1988). 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). Section 551.146 penalizes the unlawful disclosure of a certified agenda or tape recording of a lawfully closed meeting as a Class B misdemeanor, and makes the person responsible for disclosure liable for damages to a person injured or damaged by the disclosure. 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). In addition, minutes of a closed meeting are confidential. *See* Open Records Decision No. 60 (1974) (closed meeting minutes are confidential under predecessor to section 551.104); *see also* Open Records Decision Nos. 563 (1990) (minutes of properly held executive session are confidential under OMA); Open Records Decision No. 495 (1988) (information protected under predecessor to section 551.104 cannot be released to member of public in response to open records request). However, records discussed in a closed meeting and records created in a closed meeting, other than a certified agenda or tape recording, are not made confidential by chapter 551 of the Government Code. Open Records Decision No. 605 (1992). Thus, the

submitted information is not confidential under section 551.104(c) of the Government Code, and must be released unless an exception to disclosure applies.

Tab 6 contains information which is subject to section 552.130, which 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 Texas driver's license information we have marked in Tab 6 under section 552.130.

Tab 6 includes an Employment Eligibility Verification, Form I-9. Form I-9 is governed by title 8, section 1324a of the United States Code, which provides that the 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. 8 U.S.C. § 1324a(b)(5); *see* 8 C.F.R. § 274a.2(b)(4). Release of this document under the Public Information Act would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we conclude that Form I-9 is confidential under section 552.101 and may only be released in compliance with the federal laws and regulations governing the employment verification system.

Tab 6 also contains the a W-4 form. 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). We determine that the submitted W-4 form is tax return information and is excepted from disclosure under section 552.101 of the Government Code as information made confidential by federal law.

The requested records contain information that is excepted from disclosure under section 552.117(a)(2). The city must withhold those portions of the records that reveal the 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). The records also include information revealing

whether officers have family members. The city must also withhold this information from disclosure under section 552.117(a)(2). We have marked the documents accordingly

In summary, we have marked information contained in Tab 6 that must be withheld under section 552.101 and common law privacy. I-9 and W-4 forms in Tab 6 must be withheld under section 552.101 and federal law. We have marked information in Tab 6 that must be withheld under sections 552.117(a)(2) and 552.130. The remaining submitted 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).

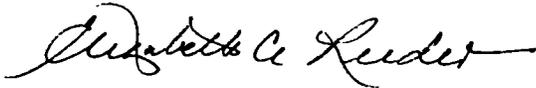
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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 Office of the Attorney General 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,



Elizabeth C. Reeder  
Assistant Attorney General  
Open Records Division

ECR/sdk

Ref: ID# 231486

Enc. Submitted documents

c: Ms. Amanda Smiers  
Staff Writer  
Van Alstyne Leader  
P.O. Box 578  
Van Alstyne, Texas 75495  
(w/o enclosures)