



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 21, 2006

Mr. John Dewey
City Attorney
City of Lake Jackson
5 Oak Drive
Lake Jackson, Texas 77566

OR2006-01671

Dear Mr. Dewey:

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# 242637

The Lake Jackson Police Department (the "department") received two requests from the same requestor for the employment records of two named officers, complaints against the officers, and all audio and videotapes related to a particular case. You claim that the requested information is excepted from disclosure under sections 552.102 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note that a portion of the submitted information is illegible. As this office cannot review illegible information, we are unable to determine if any of this illegible information must be withheld from disclosure. *See* Gov't Code § 552.301(e)(1)(D). Therefore, we are returning the illegible portion of the submitted information unmarked. To

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.

the extent, however, that the department maintains a legible copy of the information at issue, it must be released or withheld in conformity with this ruling.

Next, we must address the department's obligations under the Act, chapter 552 of the Government Code. Section 552.301(b) of the Government Code provides that a governmental body that wishes to withhold requested information must "ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the tenth business day after the date of receiving the written request." Gov't Code § 552.301(b). Pursuant to section 552.301(e), the governmental body must, within fifteen business days of receiving the request, submit to this office (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e)(1)(A)-(D). You indicate that the department received the first request on November 28, 2005. However, you did not request a ruling regarding the request received on November 28, 2005 until December 19, 2005, or submit the information requested in the first request for our review until December 21, 2005. Thus, the department has failed to comply with the procedural requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ). In order to overcome the presumption that the requested information is public information, a governmental body must provide a compelling reason why the information should not be disclosed. *Id.*; *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason sufficient to overcome the section 552.302 presumption of openness exists only where the information is confidential by law or its release implicates third party interests. *See, e.g.*, Open Records Decision No. 150 (1977). Section 552.108 of the Government Code is a discretionary exception and does not provide a compelling reason sufficient to overcome the presumption of openness. *See* Open Records Decision Nos. 586 (1991) (governmental body may waive predecessor to section 552.108), 522 at 4 (1989) (discretionary exceptions in general). However, the need of another governmental body to withhold information under section 552.108 can provide a compelling reason under section 552.302. *See* Open Records Decision No. 586 at 3 (1991). You state that the District Attorney for Brazoria County objects to the release of the requested information. Accordingly, we will consider your argument under section 552.108. Additionally, because section 552.102 can provide a compelling reason for overcoming the presumption of openness, we will consider your argument under this exception as well.

Section 552.108(a) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime.” Gov’t Code § 552.108(a)(1). 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), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). The department has provided a statement from the Brazoria County District Attorney’s Office stating that there is a pending prosecution regarding the case at issue. However, the submitted information consists of both audio and visual information of the incident at issue and information from the personnel files of two officers. We agree that the requested audio and visual information may be withheld under section 552.108(a)(1). *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.) (court delineates law enforcement interests that are present in active cases).

However, neither the department nor the Brazoria County District Attorney’s Office have demonstrated how section 552.108 is applicable to the submitted personnel information. Therefore, we find that no portion of this information may be withheld under section 552.108. *See* Gov’t Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706; Open Records Decision No. 434 at 2-3 (1986).

Section 552.102 of the Government Code 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 address common law privacy under section 552.101 together with your claim regarding section 552.102.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses the doctrine of common law privacy, which protects information if it: (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person; and (2) is not of legitimate concern to the public. *Indust. 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: personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992)(designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care), 545 (1990); 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); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). We note, however, that the work conduct, job performance, and salary information of public employees is subject to a legitimate public interest and therefore generally not protected from disclosure under common law privacy. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute employee's private affairs), 455 (1987) (public employee's job performance or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (scope of public employee privacy is narrow). We have reviewed the submitted information and have marked the information that must be withheld pursuant to section 552.102 and common law privacy. However, the department has failed to demonstrate how any of the remaining information is protected under common law privacy, and thus no portion of it may be withheld on that basis.

The remaining submitted information contains W-2 and W-4 tax forms.² Section 552.101 of the Government Code encompasses federal law. Section 6103(a) of Title 26 of the United States Code provides that tax return information is confidential. *See* 26 U.S.C. § 6103(a)(2), (b)(2)(A), (p)(8); *see also* Open Records Decision No. 600 (1992); Attorney General Op. MW-372 (1981). Accordingly, the department must withhold the W-2 and W-4 tax forms we have marked pursuant to section 552.101 in conjunction with section 6103(a) of Title 26 of the United States Code.

Section 552.101 of the Government Code also encompasses section 1703.306 of the Occupations Code, which governs information obtained in the course of conducting a polygraph examination and provides that "a person for whom a polygraph examination is conducted . . . may not disclose information acquired from a polygraph examination" except to certain categories of people. Occ. Code § 1703.306(a). The requestor does not fall within

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

any of the enumerated categories; therefore, the department must withhold the polygraph information we have marked under section 552.101 in conjunction with section 1703.306 of the Occupations Code.

We next address section 552.117 of the Government Code. Section 552.117(a)(2) excepts the home address and telephone number, social security number, and family member information of a peace officer as defined by article 2.12 of the Code of Criminal Procedure, regardless of whether the officer made an election under section 552.024. Gov't Code § 552.117(a)(2); *see* Open Records Decision No. 622 (1994). Accordingly, we conclude that the department must withhold the information we have marked under section 552.117(a)(2).

The submitted documents also contain information pertaining to individuals who appear to be peace officers who are not employed by the department. Section 552.1175 of the Government Code provides in part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure[.]

(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). If the individuals in question are still peace officers and elect to restrict access to their personal information in accordance with section 552.1175, the department must withhold the information we have marked. *See* Open Records Decision No. 678 (2003). Otherwise, this information must be released.

We note that some of the remaining information contains Texas motor vehicle record information. 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[.]

Gov't Code § 552.130. The department must withhold the Texas motor vehicle record information we have marked under section 552.130.

Finally, we note that the remaining submitted information contains military discharge information. Section 552.140 of the Government Code 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 department first came into possession of the submitted DD-214 form. Therefore, if this form came into the department's possession on or after September 1, 2003, we conclude that the department must withhold this information, which we have marked, under section 552.140. Otherwise, the form must be released, subject to the markings we have made under section 552.117(a)(2).

In summary, the requested audio and video of the incident at issue may be withheld pursuant to section 552.108 of the Government Code. The personal financial information we have marked must be withheld under section 552.102 of the Government Code in conjunction with common law privacy. The W-2 and W-4 tax forms we have marked must be withheld pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of Title 26 of the United States Code. The polygraph examination results we have marked must be withheld under section 552.101 of the Government Code pursuant to section 1703.306 of the Occupations Code. Further, the marked home addresses and telephone numbers, social security numbers, and family member information relating to peace officers employed by the department must be withheld pursuant to section 552.117 of the Government Code. If the information we have marked under section 552.1175 pertains to individuals who are still peace officers who elect to restrict access to their personal information, the department must

withhold this marked information. Finally, the military discharge record which we have marked must be released or withheld in compliance with section 552.140 of the Government Code. 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. 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,

A handwritten signature in black ink, appearing to read "Matt McLain". The signature is written in a cursive, flowing style.

Matthew T. McLain
Assistant Attorney General
Open Records Division

MM/jh

Ref: ID# 242637

Enc. Submitted documents

c: Ms. Sharon Jenkins
Black People for Justice
P.O. Box 36739
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(w/o enclosures)