



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 18, 2007

Ms. Patricia Brunson
Assistant City Manager
City of Harker Heights
305 Millers Crossing
Harker Heights, Texas 76548

OR2007-04375

Dear Ms. Brunson:

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# 276308.

The City of Harker Heights (the "city") received a request for the personnel file of a named former police officer, specifically including his employment application, background information and questionnaires, personal history statements and questionnaires, investigative results, complaints and disciplinary action(s), scheduled or unscheduled evaluation reports by any supervisor, and documentation of the officer's resignation or dismissal from the Harker Heights Police Department. We understand you to claim that the requested information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we address your claim that the present request seeks all information concerning the named officer and therefore implicates his right to privacy. 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 (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). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82.

A compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Furthermore, we find that a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. However, we note that a request for personnel information does not require the city to compile unspecified law enforcement records, and therefore does not implicate an individual's common-law right to privacy. Accordingly, the city may not withhold the submitted information in its entirety under section 552.101 in conjunction with common-law privacy.

In addition to compilations of criminal history record information, 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. 600 (1992), 545 (1990); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). Upon review, we have marked information that is protected under common-law privacy. However, we find that there is a legitimate public interest in the remaining information. The information at issue relates to the qualifications and conduct of a named police officer. As this office has frequently stated, such information is generally a matter of legitimate public interest. *See, e.g.*, Open Records Decision Nos. 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of governmental employees, particularly those involved in law enforcement), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest). Accordingly, the city must withhold only the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.108 of the Government Code provides in relevant part the following:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

...

(b) An 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 is excepted from the requirements of Section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution[.]

Gov't Code § 552.108(a)(1), (b)(1). A governmental body claiming subsection 552.108(a)(1) or 552.108(b)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), (b)(1), 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

As a general rule, section 552.108 is not applicable to a law enforcement agency's personnel records. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 329 (Tex. App. – Austin 2002, no pet.) (Section 552.108(b)(1) not applicable to documents obtained by police department for purpose of evaluating applicant's fitness for employment), *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App. – El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution). You have not explained how or why the release of the submitted personnel records would interfere with a criminal investigation. Therefore, having considered your arguments, we conclude that you have not demonstrated that any of the submitted information is excepted from disclosure under section 552.108 and none of it may be withheld on that basis. *See* Gov't Code § 552.108(a)(1); *see also* Open Records Decision Nos. 562 at 10 (1990) (predecessor to section 552.108(b) not applicable to employment information in police officer's file), 361 at 2-3 (1983) (statutory predecessor to section 552.108(b) not applicable to background information collected on unsuccessful applicant for employment with sheriff's department).

Section 552.101 of the Government Code encompasses information protected by other statutes. Gov't Code § 552.101. We note that the requested documents include a ST-3 accident report form 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 an unredacted 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 the present request, the requestor has not

provided the required information. Accordingly, the city must withhold the accident report in its entirety pursuant to section 550.065(c).

Section 552.101 encompasses federal statutes. The submitted information contains an I-9 form (Employment Eligibility Verification), which is governed by section 1324a of Title 8 of the United States Code. This section 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 form in this instance would be “for purposes other than for enforcement” of the referenced federal statutes. Accordingly, we conclude that the I-9 form is confidential and may only be released in compliance with the federal laws and regulations governing the employment verification system.

We note that the submitted information also includes W-2 forms, which are excepted from disclosure under section 552.101. Section 6103(a) of title 26 of the United States Code renders tax return information confidential. This term has been interpreted by federal courts to include any information gathered by the Internal Revenue Service regarding a taxpayer’s liability under title 26 of the United States Code. *Mallas v. Kolak*, 721 F. Supp 748 (M.D.N.C. 1989). Because the W-2 forms constitute tax return information, the city must withhold this information under section 552.101 of the Government Code in conjunction with federal law.

Section 552.101 also encompasses criminal history record information (“CHRI”) generated by the National Crime Information Center or by the Texas Crime Information Center. Title 28, part 20 of the Code of Federal Regulations, which governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety (“DPS”) maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. Gov’t Code § 411.083.

Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 in conjunction with chapter 411, subchapter F of the

Government Code. We have marked the confidential CHRI that must be withheld under section 552.101. However, we note that driving record information is not considered CHRI. *Cf.* Gov't Code § 411.082(2)(B) (criminal history record information does not include driving record information).

The submitted documents also contain fingerprint information. Section 552.101 additionally encompasses sections 560.001, 560.002, and 560.003 of the Government Code. These sections govern the public availability of fingerprint information and 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.

Gov't Code §§ 560.001, 560.002, 560.003. You do not inform us, and the submitted information does not indicate, that section 560.002 permits the disclosure of the submitted fingerprint information. Therefore, the city must withhold the fingerprint information we have marked under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code.

We note that a portion of the remaining submitted information may be confidential pursuant to section 552.117 of the Government Code.¹ Section 552.117(a)(2) of the Government Code excepts from public disclosure the current and former home addresses, home telephone numbers, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code.² We have marked the information pertaining to the named individual to which section 552.117 of the Government Code applies. In this case, the individual is no longer employed by the city. If the individual remains a licensed peace officer as defined by article 2.12 of the Code of Criminal Procedure, the city must withhold the information we have marked pursuant to section 552.117(a)(2) of the Government Code.

If the individual is no longer a licensed peace officer, his home address and telephone number will be excepted under section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) of the Government Code 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 of the Government Code. Whether a particular piece of information is protected by section 552.117(a)(1) of the Government Code must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The submitted information contains the timely election of the individual whose information is at issue to keep his home address and telephone number confidential; therefore, the city must withhold these types of information, which we have marked, under section 552.117. However, the individual did not elect to keep confidential his family member information or social security number. Therefore, the city may not withhold the individual's family member information or social security number under section 552.117(a)(1).

Next, we note that the submitted documents contain information subject to section 552.130 of the Government Code. Section 552.130 excepts from disclosure "information [that] relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of

¹The 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).

²"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

this state [or] a motor vehicle title or registration issued by an agency of this state.” Gov’t Code § 552.130. We note that section 552.130 does not apply to out-of-state motor vehicle record information. Accordingly, the city must withhold the Texas driver’s license numbers and motor vehicle record information we have marked pursuant to section 552.130 of the Government Code.

In summary, the city must withhold the information we have marked pursuant to section 552.101 in conjunction with common-law privacy. The city must withhold the ST-3 accident report pursuant to section 552.101 of the Government Code in conjunction with section 550.065 of the Transportation Code. The submitted I-9 and W-2 forms must be withheld under section 552.101 of the Government Code in conjunction with federal law. The city must also withhold the CHRI under section 552.101 in conjunction with chapter 411, subchapter F of the Government Code. The city must withhold the fingerprints we have marked pursuant to section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code. If the individual remains a licensed peace officer as defined by article 2.12 of the Code of Criminal Procedure, the city must withhold the information we have marked pursuant to section 552.117(a)(2) of the Government Code. If the individual is no longer a licensed peace officer, then his home address and phone number must be withheld under section 552.117(a)(1) of the Government Code. The city must withhold the information we have marked under section 552.130 of the Government Code. The remaining information must be released.³

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

³We note that the submitted information contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person’s social security number from public release without the necessity of requesting a decision from this office under the Act.

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,



Jordan Johnson
Assistant Attorney General
Open Records Division

JJ/eb

Ref: ID# 276308

Enc. Submitted documents

c: Mr. James H. Kreimeyer
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(w/o enclosures)