



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 17, 2007

Mr. R. Rene Escobedo
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OR2007-09019

Dear Mr. Escobedo:

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# 284008.

The City of Dilley (the "city"), which you represent, received a request for a copy of a named former police officer's personnel file. You claim that the submitted information is excepted from disclosure under sections 552.102, 552.108, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the city's obligations under the Act. Pursuant to section 552.301(e) of the Government Code, a governmental body receiving an open records request for information that it wishes to withhold pursuant to one of the exceptions to public disclosure is required to submit to this office within fifteen business days of receiving the request (1) general 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. *See id.* § 552.301(e). You state that the city received the request on March 25, 2007. However, as of this date, you have not submitted comments stating the reasons why the stated exceptions apply that would allow the information to be withheld. Consequently, we find that the city failed to comply with the procedural requirements of section 552.301 of the Government Code.

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 a compelling reason exists to withhold the information from disclosure. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Section 552.108 of the Government Code is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decisions No. 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). *But see* Open Records Decision No. 586 (1991) (need of another governmental body to withhold information may provide compelling reason for non-disclosure under Gov't Code § 552.108). In this instance, your claim under section 552.108 does not provide a compelling reason to overcome the presumption of openness. Thus, the city may not withhold any of the submitted information under section 552.108 of the Government Code. Because sections 552.102 and 552.117 of the Government Code can provide compelling reasons to overcome the presumption of openness, we will address these exceptions.

Section 552.102(a) of the Government Code excepts from public 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). Section 552.102 is applicable to information that relates to public officials and employees. *See* Open Records Decision No. 327 at 2 (1982) (anything relating to employee's employment and its terms constitutes information relevant to person's employment relationship and is part of employee's personnel file). The privacy analysis under section 552.102(a) is the same as the common-law privacy standard under section 552.101 of the Government Code.¹ *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (addressing statutory predecessor). We will therefore consider the applicability of common-law privacy under section 552.101 together with your claim regarding section 552.102.

In *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), the Texas Supreme Court held that information is protected by common-law privacy 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 a legitimate concern to the public. *See Indus. Found.*, 540 S.W.2d at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. 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

¹Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses the doctrine of common-law privacy. Gov't Code § 552.101.

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 personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990). We have reviewed the submitted documents and marked the information that is highly intimate or embarrassing and of no legitimate concern to the public. This marked information is confidential under the doctrine of common-law privacy and must be withheld under section 552.102 of the Government Code. We find, however, that the remaining information is either not intimate or embarrassing or is of a legitimate public interest. Therefore, none of the remaining information is confidential under the doctrine of common-law privacy, and it may not be withheld under section 552.101 or 552.102 of the Government Code on that basis.

Section 552.101 of the Government Code also 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 forms 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.

Section 6103(a) of Title 26 of the United States Code provides that tax return information is confidential. The term “return information” includes “the nature, source, or amount of income” of a taxpayer. *See* 26 U.S.C. § 6103(b)(2). Accordingly, the city must withhold the submitted W-4 form pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

Section 552.117(a)(2) of the Government Code excepts from required public disclosure the home address, home telephone number, social security number, and the family member information of a peace officer as defined by article 2.12 of the Code of Criminal Procedure, or of a security officer commissioned under section 51.212 of the Education Code. *See* Open Records Decision No. 622 (1994). In this case, the individual at issue is no longer employed as an officer by the city. If the named individual at issue remains either a licensed peace officer as defined by article 2.12 or a security officer commissioned under section 51.212 of the Education Code, the city must withhold the personal information we have marked pursuant to section 552.117(a)(2) of the Government Code.

If the named former police officer is no longer a peace officer or security officer, his personal information may be excepted under section 552.117(a)(1) of the Government Code. 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 of the Government Code. 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). The city may only withhold information under section 552.117(a)(1) if the former police officer made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. If the former officer timely elected to keep his personal information confidential, the city must withhold the marked personal information regardless of whether he is still a peace officer or security officer. The city may not withhold this information under section 552.117(a)(1) if the former officer did not make a timely election to keep the information confidential.²

We note that the submitted documents contain information subject to section 552.130 of the Government Code.³ 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 this state [or] a motor vehicle title or registration issued by an agency of this state.” Gov’t Code § 552.130. The city must withhold the information we have marked under section 552.130 of the Government Code.

We note that the submitted information contains an insurance account number. Section 552.136(b) of the Government Code states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” *Id.* § 552.136. The city must withhold the insurance account number we have marked under section 552.136 of the Government Code.

We note that the submitted information contains a personal e-mail address. Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). The e-mail address we have marked does not appear to be of a type specifically excluded by section 552.137(c). You do not inform us that the individual to whom the address pertains has consented to the release of his address. Therefore, the city must withhold the marked e-mail address under section 552.137 of the Government Code.

²We note that even if the submitted social security numbers are not protected under sections 552.117(a)(2) or 552.117(a)(1) of the Government Code, 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. *See* Gov’t Code § 552.147(b).

³The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

We note that some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the city must withhold the information we have marked under section 552.102 of the Government Code in conjunction with common-law privacy. The city must withhold the submitted I-9 and W-4 forms under federal law. If the named individual at issue remains either a licensed peace officer as defined by article 2.12 or a security officer commissioned under section 51.212 of the Education Code, the city must withhold the personal information we have marked pursuant to section 552.117(a)(2) of the Government Code. If the named former police officer is no longer a peace officer or security officer, then the city must withhold the marked personal information under section 552.117(a)(1) of the Government Code only if the former officer timely elected to keep his personal information confidential under section 552.024 of the Government Code. The city must withhold the information we have marked under sections 552.130, 552.136, and 552.137 of the Government Code. The remaining information must be released to the requestor, but any information protected by copyright may only be released in accordance with copyright law.

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,



Jaime L. Flores
Assistant Attorney General
Open Records Division

JLF/ma

Ref: ID# 284008

Enc. Submitted documents

c: Mr. Moses Alaniz
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(w/o enclosures)