



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

June 3, 2011

Ms. Samantha Friedman  
Assistant Special Counsel  
Counsel for City of Lampasas  
Law Offices of JC Brown, P.C.  
1411 West Avenue, Suite 100  
Austin, Texas 78701

OR2011-07890

Dear Ms. Friedman:

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# 419414.

The City of Lampasas (the "city"), which you represent, received a request for three categories of information, including (1) a complete list of all police abuse accusations during the past seven years; (2) a copy of two named police officers' personnel files; and (3) a copy of the audio records from a call for service incident. You state the city will release some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.122 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

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. This section encompasses information protected by other statutes. Section 6103(a) of title 26 of the United States Code renders tax return information

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<sup>1</sup>We assume 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 those records contain substantially different types of information than that submitted to this office.

confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 600 (1992) (W-4 forms). Section 6103(b) defines the term "return information" as:

a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments ... or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return or with respect to the determination of the existence, or possible existence, of liability ... for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense[.]

See 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. See *Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *dismissed in part, aff'd in part, vacated in part, and remanded*, 993 F.2d 1111 (4th Cir. 1993). The records you seek to withhold are routine payroll records created by the city. You have failed to demonstrate how any portion of Tab 1 is tax return information as defined by section 6103(b)(2)(A). Thus, no portion of Tab 1 may be withheld under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

Section 552.101 also 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. *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 established. *Id.* at 681-82. You seek to withhold the records in Tab 3 under common-law privacy. These records are a police officer's firearms qualification records. This office has stated in numerous formal decisions that the public has a legitimate interest in the qualifications and performance of public employees. See *e.g.*, Open Records Decisions Nos. 542 (1990), 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow). Thus, the city may not withhold the records in Tab 3 under section 552.101 in conjunction with common-law privacy.

You assert Tabs 1 and 2 contain financial information which is protected by common-law privacy. Some of the financial information contained in Tabs 1 and 2 concerns the voluntary allocation of an officer's salary to optional health and financial programs offered by the city. This office has found a public employee's allocation of part of the employee's salary to a voluntary investment, health or other program offered by the employer is a personal

investment decision, and information about that decision is protected by common-law privacy. *See, e.g.*, Open Records Decision Nos. 600 (1992) (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1991) (deferred compensation information, participation in voluntary investment program, and election of optional insurance coverage). Thus, the city must withhold the information which reveals the officer's financial decisions that we marked in Tabs 1 and 2 under section 552.101 of the Government Code in conjunction with common-law privacy. Some of the remaining information in Tabs 1 and 2 concerns the officer's participation in health and retirement programs that are funded in whole or in part by the city. This office has stated there is a legitimate public interest in an employee's participation in an insurance or retirement program funded in whole or in part by a governmental body. *See* Open Records Decision No. 600 at 9-12 (1992) (identifying public and private portions of certain state personnel records). Thus, this financial information is not protected by common-law privacy. Finally, we find the public has a legitimate interest in the remaining financial information in Tabs 1 and 2 because it concerns other financial transactions between the officer and the city. *See generally* Open Record Decision No. 545 (1990) (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common-law privacy). Accordingly, no portion of the remaining information in Tabs 1 and 2 may be withheld under section 552.101 in conjunction with common-law privacy.

You also raise section 552.122 of the Government Code for the information in Tab 3. Section 552.122(b) of the Government Code excepts from public disclosure "a test item developed by a . . . governmental body[.]" Gov't Code § 552.122(b). 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. ORD 626 at 6. The question of whether specific information falls within the scope of section 552.122(b) must be determined on a case-by-case basis. *Id.* Traditionally, this office has applied section 552.122 where release of "test items" might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Upon review, we find the written exam submitted in Tab 3 consists of questions that evaluate a police officer's specific knowledge or ability in a particular area, and therefore qualify as "test items" under section 552.122(b) of the Government Code. Furthermore, you state it is possible these test items will be used on future exams and release would compromise the effectiveness of those exams. Thus, we conclude the city may withhold the written exam, which we marked, in its entirety under section 552.122 of the Government Code. However, you have failed to demonstrate the remaining records in Tab 3 contain test items for purposes of section 552.122, and this information may not be withheld on that basis.

You next raise section 552.102(a) of the Government Code which excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly

unwarranted invasion of personal privacy.” *Id.* § 552.102(a). The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex. & The Dallas Morning News, Ltd.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). We have marked a birth date in Tabs 1, 2 and 3 that must be withheld under section 552.102(a) of the Government Code.

We note the remaining information in Tabs 1, 2 and 3 includes an officer’s personal information. Section 552.117(a)(2) of the Government Code excepts from public disclosure the 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. *See* Gov’t Code § 552.117(a)(2).<sup>2</sup> Therefore, the city must withhold the information we marked under section 552.117(a)(2) of the Government Code.

The remaining information in Tab 1 also contains an officer’s Texas driver’s license number, expiration date, and class designation. Section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle operator’s or driver’s license or permit issued by an agency of this state. *See* Gov’t Code § 552.130(a)(1).<sup>3</sup> Thus, the city must withhold the Texas driver’s license information we marked under section 552.130 of the Government Code. The remaining information in Tabs 1, 2, and 3 must be released.

In summary, the city must withhold the financial information in Tabs 1 and 2 marked under section 552.101 in conjunction with common-law privacy. The birth date in Tabs 1, 2, and 3 must be withheld under section 552.102(a) of the Government Code. The city may withhold the written exam in Tab 3 under section 552.122 of the Government Code. The marked personal information in Tabs 1, 2, and 3 must be withheld under section 552.117(a)(2) of the Government Code. Finally, the marked Texas driver’s license information in Tab 1 must be withheld pursuant to section 552.130 of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

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<sup>2</sup>The 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).

<sup>3</sup>This office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas driver’s license numbers under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Kenneth Leland Conyer  
Assistant Attorney General  
Open Records Division

KLC/eb

Ref: ID# 419414

Enc. Submitted documents

c: Requestor  
(w/o enclosures)