ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 5, 2012

Mr. Jason M. Rammel
Attorney for City of Hutto
Sheets & Crossfield, PC
309 East Main Street
Round Rock, Texas 78664-5246

OR2012-19569

Dear Mr. Rammel:

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# 473272.

The City of Hutto (the "city"), which you represent, received a request for a named city police officer's personnel file. You state some information is being released. You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.117, 552.119, 552.122, 552.130, and 552.137 of the Government Code. We have considered the claimed exceptions and reviewed the submitted information.

Initially, we note the requestor has excluded social security numbers, driver's license numbers, and home addresses from her request. Therefore, such information is not responsive to request. This ruling does not address the public availability of the non-responsive information, nor is the city required to release non-responsive information in response to this request.

We next note Exhibit I contains a completed performance evaluation that is subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless it is excepted by section 552.108 of the Government Code or "made confidential under [the Act] or other law[.]" Gov't Code § 552.022(a)(1).

Although you raise section 552.122 of the Government Code for this information, this is a discretionary exception to disclosure that may be waived and do not make information confidential under the Act. *See id.* § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). As such, section 552.122 does not make information confidential for the purposes of section 552.022(a)(1), and the information we have marked may not be withheld on that basis. As you raise no additional exceptions to disclosure for the information subject to section 552.022(a)(1), it must be released. However, we will address your arguments against disclosure for the remaining information.

Next, we address your claim that Exhibit E consists of education records that must be withheld under the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232. These provisions apply only to student records in the custody of educational institutions and to records directly transferred from an educational institution to a third party. *See* 34 C.F.R. §§ 99.33(a)(2), 99.3 (defining "student"). The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.[1] We note the city is not an educational institution. Thus, documents in the possession of the city are not education records unless they were directly transferred from an educational institution to the city. You state some of the records in Exhibit E may have been directly obtained from an educational institution. Because our office is prohibited from reviewing education records to determine the applicability of FERPA, we will not address FERPA with respect to any records the city obtained directly from an educational institution. Such determinations under FERPA must be made by the educational authority from which the records were obtained. Thus, to the extent the records in Exhibit E were obtained directly from the educational institution, the city must contact the educational institution from which the records were obtained, as well as the DOE, regarding the applicability of FERPA to these records. However, we note some of the records in Exhibit E reflect they were issued to the student. To the extent the records in Exhibit E were not obtained by the city directly from an educational institution, they are not education records and may not be withheld under FERPA.

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, such as chapter 411 of the Government Code, which pertains to criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center. *See id.* § 411.083(a). Title 28, part 20 of the Code of Federal

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[1]A copy of this letter may be found on the Office of the Attorney General's website: http://www.oag.state.tx.us/open/20060725usdoe.pdf.

Regulations governs the release of CHRI 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 laws with respect to the CHRI it generates. *See id.* Section 411.083 of the Government Code deems confidential CHRI the Texas Department of Public Safety ("DPS") maintains, except DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* 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. Similarly, 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 note section 411.083 does not apply to active warrant information or other information relating to one's current involvement with the criminal justice system. *See id.* § 411.081(b) (police department allowed to disclose information pertaining to person's current involvement in the criminal justice system). Further, CHRI does not include driving record information. *See id.* § 411.082(2)(B). You assert Exhibit G consists of CHRI. Upon review, we find the information we have marked constitutes CHRI. Thus, the city must withhold the marked information under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code.[2] However, we find the remaining information in Exhibit G does not consist of CHRI for purposes of chapter 411 and may not be withheld on that basis.

Section 552.101 of the Government Code also encompasses section 1703.306 of the Occupations Code, which provides in relevant part:

> (a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:
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> > (1) the examinee or any other person specifically designated in writing by the examinee;
> >
> > (2) the person that requested the examination;
> >
> > (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;

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[2]Because our ruling is dispositive, we do not address your remaining arguments against disclosure of portions of this information.

(4) another polygraph examiner in private consultation; or

(5) any other person required by due process of law.

(b) The [Texas Department of Licensing and Regulation] or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

Occ. Code § 1703.306(a)-(b). You assert, and we agree, Exhibit H consists of polygraph examination reports and information acquired from such reports. It does not appear the requestor falls into any of the categories of individuals authorized to receive the polygraph information under section 1703.306(a). Therefore, the city must withhold Exhibit H under section 552.101 in conjunction with section 1703.306.

Section 552.101 of the Government Code also encompasses the common-law right to 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 met. *Id.* at 681-82. Common-law privacy protects the types of information held to be intimate or embarrassing in *Industrial Foundation*. *See id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). Additionally, this office has found some kinds of medical information or information indicating disabilities or specific illnesses are generally highly intimate or embarrassing. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). This office has also found that personal financial information not related to a financial transaction between an individual and a governmental body ordinarily satisfies the first element of the common-law privacy test. *See* Open Records Decision Nos. 545 at 4 (1990) (attorney general has found information regarding receipt of governmental funds or debts owed to governmental entities is not excepted from public disclosure by common-law privacy), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body). Whether the public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis. *See* Open Records Decision No. 373 at 4 (1983). This office has found, however, the public has a legitimate interest in information relating to applicants and employees of governmental bodies and their employment qualifications and job performance, especially where the applicant was seeking a position in law enforcement. *See* Open Records Decision Nos. 562 at 10 (1990), 470 at 4 (public has legitimate interest in job qualifications and performance of public employees), 444 (1986), 423 at 2 (1984) (scope of public employee privacy is narrow). Upon

review, we find the information we have marked is highly intimate or embarrassing and of no legitimate public interest. The city must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. However, we find the remaining information you have marked on that basis is not private and may not be withheld under section 552.101.

Section 552.102(a) 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, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the Third Court of Appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court expressly disagreed with *Hubert*'s interpretation of section 552.102(a) and held its privacy standard differs from the *Industrial Foundation* test under section 552.101. *See Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The supreme court then considered the applicability of section 552.102, and 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. *See id.* at 347-48. With the exception of the information we have marked for release, the city must withhold the information you have marked, and the additional information we have marked, under section 552.102(a). The information we have marked for release is not excepted under section 552.102(a) and may not be withheld on that basis.

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* Gov't Code § 552.137(a)-(c). The e-mail addresses you have marked, and the additional e-mail addresses we have marked, are not of a type specifically excluded by section 552.137(c). Accordingly, the city must withhold the marked e-mail addresses under section 552.137, unless their owners affirmatively consent to disclosure.[3]

Section 552.1175 of the Government Code protects the home address, home telephone number, emergency contact information, social security number, and family member information of certain individuals, when that information is held by a governmental body other than the one that employs the individual and the individual elects to keep the

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[3]Because our ruling is dispositive, we do not address your remaining argument against disclosure of portions of this information. We also note Open Records Decision No. 684 (2009) authorizes all governmental bodies to withhold specific categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without requesting a ruling from this office.

information confidential.[4] *See id.* § 552.1175. Section 552.1175 applies, in part, to "peace officers as defined by Article 2.12, Code of Criminal Procedure." *Id.* § 552.1175(a)(1). Section 552.1175 encompasses a peace officer's personal cellular telephone number, provided the cellular telephone service is not paid for by a governmental body. We have marked information of peace officers not employed by the city that is subject to section 552.1175. If the peace officers elect to restrict access to the information pertaining to them in accordance with section 552.1175(b), the city must withhold the marked information under section 552.1175 of the Government Code; however, the city may withhold the marked cellular telephone number only if the cellular service is not paid for by a governmental body.[5]

Section 552.117(a)(2) of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of a peace officer, regardless of whether the peace officer made an election under sections 552.024 or 552.1175 of the Government Code to keep such information confidential. *Id.* § 552.117(a); *see also id.* § 552.024. Section 552.117 encompasses personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to Gov't Code § 552.117 not applicable to numbers for cellular mobile telephones installed in county officials' and employees' private vehicles and intended for official business). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. With the exception of information we have marked for release, the city must generally withhold the remaining information you have marked, and the additional information we have marked, under section 552.117(a)(2); however, the cellular telephone numbers may be withheld only if the cellular service is not paid for by a governmental body.[6]

Section 552.119 of the Government Code provides:

> (a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, the release of which would endanger the life or physical safety of the officer, is excepted from [required public disclosure] unless:

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[4]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.

[5]Because our ruling is dispositive, we do not address your remaining argument against disclosure of this information.

[6]Because our ruling is dispositive, we do not address your remaining argument against disclosure of a portion of this information.

> (1) the officer is under indictment or charged with an offense by information;
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> (2) the officer is a party in a civil service hearing or a case in arbitration; or
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> (3) the photograph is introduced as evidence in a judicial proceeding.
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> (b) A photograph excepted from disclosure under Subsection (a) may be made public only if the peace officer gives written consent to the disclosure.

Gov't Code § 552.119. Under section 552.119, a governmental body must demonstrate, if the documents do not demonstrate on their face, that release of the photograph would endanger the life or physical safety of a peace officer. Upon review, we find that you have failed to establish that release of the photograph you have marked would endanger the life or physical safety of the peace officer depicted. Therefore the city may not withhold any of the remaining information under section 552.119.

Section 552.122 of the Government Code excepts from disclosure "a test item developed by a . . . governmental body[.]" *Id.* § 552.122(b). In Open Records Decision No. 626 (1994), this office determined 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). Section 552.122 also protects the answers to test questions when the answers might reveal the questions themselves. *See* Attorney General Opinion JM-640 at 3 (1987); ORD 626 at 8.

You seek to withhold the remaining information in Exhibit I, which consists of interview questions and the results of weapon qualification tests, under section 552.122 of the Government Code. You assert this information evaluates an individual's knowledge or ability in particular areas. We understand the city anticipates using these questions in future interviews and release would compromise the effectiveness of these interviews. Having considered your arguments and reviewed the information at issue, we conclude the information we have marked qualifies as test items for the purposes of section 552.122(b). Accordingly, the city may withhold the marked information under section 552.122(b). We find, however, the remaining interview questions evaluate an applicant's general workplace skills and overall suitability for employment, and do not test any specific knowledge of an applicant. In addition, we find you have not established how the weapon qualification tests evaluate an individual's knowledge or ability in a specific area or how release of this

information would compromise the effectiveness of future tests. Accordingly, the remaining information does not constitute test items under section 552.122(b) and may not be withheld on this basis.

Section 552.130 of the Government Code excepts from disclosure information that relates to a (1) motor vehicle operator's or driver's license, (2) a motor vehicle title or registration or (3) a personal identification document, issued by an agency of this state or another state or country. Gov't Code § 552.130(a). Therefore, with the exception of the information we have marked for release, the city must withhold the information you have marked, and the additional information we have marked, under section 552.130. The Texas Commission on Law Enforcement Officer Standards and Education identification numbers you have marked, which we have marked for release, are not protected by section 552.130 and may not be withheld on that basis.

Section 552.136 of the Government Code provides 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(b); *see also* § 552.136(a) (defining "access device number"). This office has determined an insurance policy number is an access device for purposes of section 552.136. The city must withhold the insurance policy numbers we have marked under section 552.136.

Section 552.108(b)(1) of the Government Code 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 . . . release of the internal record or notation would interfere with law enforcement or prosecution[.]" *Id.* § 552.108(b)(1). 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 (Tex. App.—Austin 2002, no writ). To demonstrate the applicability of this exception, a governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. ORD 562 at 10. This office has concluded section 552.108(b) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (section 552.108 designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). Section 552.108(b)(1) is not applicable, however, to generally known policies and procedures. *See, e.g.*, ORDs 531 at 2-3 (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

You state the remaining information you have marked under section 552.108 consists of physical descriptions of the officer and a user name and password for the city police department's computer system. You argue release of the physical description could interfere with law enforcement "[i]f this officer was ever placed in undercover assignments" or if individuals wished to use this information "to their advantage in avoiding detection or in targeting this police officer[.]" You argue release of the user name and password would allow individuals access to the department's computer system. Based on your arguments and our review of the information at issue, we find release of the user name and password would interfere with law enforcement. The city may withhold this information under section 552.108(b)(1). However, we find the city has not established release of the remaining information, which we have marked for released, would interfere with law enforcement; therefore, the city may not withhold the remaining information under section 552.108(b)(1).

In summary, the city must contact the educational institution from which it directly obtained any of the submitted student records, as well as the DOE, regarding the applicability of FERPA to those documents. The city must withhold the CHRI we marked in Exhibit G under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. The city must withhold Exhibit H under section 552.101 in conjunction with section 1703.306 of the Occupations Code. The city must withhold the information we marked under section 552.101 in conjunction with common-law privacy. With the exception of the information we marked for release, the city must withhold the information you marked, and the additional information we marked, under section 552.102 of the Government Code. The city must withhold the e-mail addresses you marked, and the additional addresses we marked, under section 552.137 of the Government Code unless their owners affirmatively consent to disclosure. If the individuals at issue elect to restrict access to their information, the city must withhold the information we marked under section 552.1175 of the Government Code; however, the marked cellular telephone number may be withheld only if a governmental body does not pay for the cellular service. With the exception of information we marked for release, the city must withhold the information you marked, and the additional information we marked, under section 552.117(a)(2) of the Government Code; however, the cellular telephone number may be withheld only if a governmental body does not pay for the cellular service. The city may withhold the information we marked in Exhibit I under section 552.122 of the Government Code. With the exception of the information we have marked for release, the city must withhold the information you have marked, and the additional information we have marked, under section 552.130 of the Government Code. The city must withhold the insurance policy numbers we marked under section 552.136 of the Government Code. With the exception of information we have marked for release, the city may withhold the information you marked under section 552.108(b)(1) 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.

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, 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,

Misty H Barham

Misty Haberer Barham
Assistant Attorney General
Open Records Division

MHB/som

Ref: ID# 473272

Enc. Submitted documents

c: Requestor
(w/o enclosures)