



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 18, 2014

Ms. Debra A. Drayovitch
Counsel for the City of Corinth
Drayovitch P.C.
620 West Hickory Street
Denton, Texas 76201

OR2014-10478

Dear Ms. Drayovitch:

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# 529438.

The City of Corinth (the "city") which you represent, received a request for the personnel file of a former employee, the reason for his separation from employment, and whether or not he is eligible for rehire. You state you have provided some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.119, and 552.139 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the submitted information contains a peace officer's Texas Commission on Law Enforcement ("TCOLE") identification number. In Open Records Decision No. 581 (1990), this office determined certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. We

¹ We note that although you did not timely raise sections 552.119 and 552.139 of the Government Code, these sections can provide compelling reasons to withhold information, and we will consider your arguments under sections 552.119 and 552.139 for the submitted information. See Gov't Code §§ 552.301, .302.

understand an officer's TCOLE identification number is a unique computer-generated number assigned to peace officers for identification in TCOLE's electronic database, and may be used as an access device number on the TCOLE website. Accordingly, we find the officer's TCOLE identification number in the submitted information does not constitute public information under section 552.002 of the Government Code. Therefore, the TCOLE identification number is not subject to the Act and need not be released to the requestor.

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 of the Government Code encompasses laws that make criminal history record information ("CHRI") confidential. CHRI generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center is confidential under federal and state law. CHRI means "information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions." *Id.* § 411.082(2). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI obtained from the NCIC network or other states. *See* 28 C.F.R. § 20.21. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. Open Records Decision No. 565 at 7 (1990). 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. Section 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). Thus, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. We note the term CHRI does not include driving record information. *See id.* § 411.082(2)(B). Upon review, we conclude the city must withhold Exhibit 3 under section 552.101 in conjunction with federal law and chapter 411 of the Government Code.

Section 552.101 of the Government Code also encompasses section 1701.454 of the Occupations Code, which governs the public availability of information submitted to TCOLE under subchapter J of chapter 1701 of the Occupations Code. Section 1701.454 provides as follows:

- (a) All information submitted to [TCOLE] under this subchapter is confidential and is not subject to disclosure under Chapter 552, Government Code, unless the person resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses.

(b) Except as provided by this subchapter, a [TCOLE] member or other person may not release information submitted under this subchapter.

Occ. Code § 1701.454. The information in Exhibit 5 was submitted to TCOLE pursuant to subchapter J of chapter 1701 of the Occupations Code. You state the named former employee did not resign nor was he terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses. Therefore, the city must withhold Exhibit 5 under section 552.101 in conjunction with section 1701.454 of the Occupations Code.

Section 552.101 also encompasses section 301.081 of the Labor Code, which governs the release of employment information held by the Texas Workforce Commission (the "commission").² Section 301.081 provides in pertinent part as follows:

(a) Each employing unit shall keep employment records containing information as prescribed by the commission and as necessary for the proper administration of this title. The records are open to inspection and may be copied by the commission or an authorized representative of the commission at any reasonable time and as often as necessary.

(b) The commission may require from an employing unit sworn or unsworn reports regarding persons employed by the employing unit as necessary for the effective administration of this title.

(c) Employment information obtained or otherwise secured under this section may not be published and is not open to public inspection, other than to a public employee in the performance of public duties, except as the commission considers necessary for the proper administration of this title or as provided by commission rule and consistent with federal law.

Labor Code § 301.081(a)-(c). The documents in Exhibit 6 reflect that the city obtained certain employment information from the commission. Records that are confidential in the hands of the originating governmental body remain confidential when transferred to another governmental body. *See* Open Records Decision Nos. 674 at 4 (2001), 667 at 4 (2000); *see also* Attorney General Opinion H-836 (1976) (governmental bodies have need to maintain unrestricted flow of information, to effectuate state policy that governmental bodies cooperate in the efficient and economical administration of statutory duties). Accordingly, the documents in Exhibit 6 are confidential under section 301.081 of the Labor Code while in the custody of the commission. Section 301.081 does not prevent transfer of the

² Although you raise section 202.091 of the Labor Code, we note the 74th Texas Legislature renumbered section 202.091 to section 301.081 of the Labor Code. *See* Act of May 28, 1995, 74th Leg., R.S., H.B. 1863, ch 655, § 11.02(b), 1995 Tex. Gen. Laws 767, 809.

information to the city. Thus, pursuant to the intergovernmental transfer doctrine, we conclude the documents contained in Exhibit 6 must be withheld under section 552.101 of the Government Code in conjunction with section 301.081 of the Labor Code.³

Section 552.101 also encompasses common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) 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. *See id.* at 681–82. The types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office has found personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from disclosure under common-law privacy. *See* Open Records Decision No. 600 (1992) (public employee’s withholding allowance certificate, designation of beneficiary of employee’s retirement benefits, direct deposit authorization, and employee’s decisions regarding voluntary benefit programs, among others, protected under common-law privacy). However, this office has also noted the public has a legitimate interest in information that relates to public employees and their conduct in the workplace. *See, e.g.*, Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs but in fact touches on matters of legitimate public concern), 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 government employees), 405 at 2 (1983) (manner in which public employee’s job was performed cannot be said to be of minimal public interest). Upon review, we find the information in Exhibit 2 satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the city must withhold Exhibit 2 under section 552.101 of the Government Code in conjunction with common-law privacy. We find the remaining information you marked is not highly intimate or embarrassing information of no legitimate public concern. Therefore, the information you marked in Exhibit 1 may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

Next, we address your argument under section 552.102 of the Government Code. 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). We understand you to assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 of the Government Code. As previously mentioned, common-law privacy 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

³ As our ruling is dispositive, we need not address your remaining arguments against the disclosure of this information.

concern to the public. *Indus. Found.*, 540 S.W.2d at 685. 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 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 has expressly disagreed with *Hubert's* interpretation of section 552.102(a) and held the privacy standard under section 552.102(a) 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 also considered the applicability of section 552.102(a) and held it excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. See *id.* at 348. We find none of the remaining information is subject to section 552.102(a) of the Government Code, and the city may not withhold any of the remaining information on that basis.

Section 552.117(a)(2) of the Government Code excepts from public disclosure a peace officer's home address and telephone number, social security number, emergency contact information, and family member information regardless of whether the peace officer made an election under section 552.024 of the Government Code.⁴ Gov't Code § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. To the extent the individual at issue is currently a licensed peace officer as defined by article 2.12, the city must withhold the information we have marked under section 552.117(a)(2) of the Government Code.

If the individual is not currently a licensed peace officer, section 552.117(a)(1) of the Government Code may apply to the information at issue. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, emergency contact information, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. *Id.* § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. See Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request under section 552.024 the information be kept confidential. Accordingly, if the employee whose personal information we marked in Exhibit 1 timely requested it be kept confidential, the city must withhold that information under section 552.117(a)(1) of the Government Code.

⁴ The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

You assert Exhibit 4 should be withheld from disclosure under section 552.119 of the Government Code. Section 552.119 provides as follows:

(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:

- (1) the officer is under indictment or charged with an offense by information;
- (2) the officer is a party in a civil service hearing or a case in arbitration; or
- (3) the photograph is introduced as evidence in a judicial proceeding.

(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, release of the photograph would endanger the life or physical safety of a peace officer. Upon review, we find you have failed to demonstrate release of the photograph would endanger the officer's life or physical safety. Accordingly, we find the city may not withhold the photograph at issue under section 552.119 of the Government Code.

In summary, the TCOLE identification number is not subject to the Act and need not be released to the requestor. The city must withhold Exhibit 3 under section 552.101 of the Government Code in conjunction with federal law and chapter 411 of the Government Code. The city must withhold Exhibit 5 under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code. The city must withhold Exhibit 6 under section 552.101 of the Government Code in conjunction with section 301.081 of the Labor Code. The city must withhold in Exhibit 2 under section 552.101 of the Government Code in conjunction with common-law privacy. The city must withhold the information we have marked in Exhibit 1 under section 552.117(a)(2) of the Government Code, to the extent this information pertains to a licensed peace officer. To the extent the information we have marked does not pertain to a licensed peace officer, and to the extent the employee at issue timely elected to keep such information confidential under section 552.024, the city must withhold the information we have marked in Exhibit 1 under section 552.117(a)(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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink that reads "Rustam Abedinzadeh". The signature is written in a cursive, flowing style.

Rustam Abedinzadeh
Assistant Attorney General
Open Records Division

RA/eb

Ref: ID# 529438

Enc. Submitted documents

c: Requestor
(w/o enclosures)