



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 6, 1997

Mr. Rusty Renfroe, CLA
City Attorney's Office
City of Longview
P.O. Box 1952
Longview, Texas 75606-1952

OR97-0010

Dear Mr. Renfroe:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 102686.

The City of Longview (the "city") received a request for the personnel file of a particular police officer. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.108 and 552.117 of the Government Code.

You assert that the information contained in the personnel file is excepted from disclosure under section 552.103. Section 552.103(a) applies to information:

- (1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and
- (2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To show that section 552.103(a) is applicable, the department must demonstrate that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. You assert that charges have been filed against the requestor in the Gregg County District Attorney's Office for "Third Degree Retaliation." We have reviewed the documents at issue and we agree that some of the documents are related to the anticipated litigation. We have marked the documents that may be withheld under section 552.103(a). However, the applicability of

section 552.103(a) ends if the other parties to the litigation obtain the information or when the litigation is concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decisions Nos. 350 (1982) at 3, 349 at 2 (1982).

We note that since the section 552.103(a) exception is discretionary, Open Records Decision No. 542 (1990) at 4, the city may choose to release any information that is not otherwise confidential by law. Gov't Code § 552.007.

Next, you claim that the requested information is excepted under section 552.101. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.102(a) is designed to protect public employees' personal privacy. The scope of section 552.102(a) protection, however, is very narrow. See Open Records Decision No. 336 (1982); see also Attorney General Opinion JM-36 (1983). The test for section 552.102(a) protection of common-law privacy is the same as that for section 552.101: the information must contain highly intimate and embarrassing facts about a person's *private* affairs such that its release would be highly objectionable to a reasonable person *and* the information must be of no legitimate concern to the public. *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d. 546,550 (Tex. App.--Austin 1983, writ ref'd n.r.e.).

The information at issue pertains to the personnel file of a particular police officer. You state that the information contained in the personnel file is confidential by law and, thus, should be withheld from public disclosure. Because there is a legitimate public interest in the activities of public employees in the workplace, information about public employees is commonly held not to be excepted from required public disclosure under common-law privacy. For example, information about public employees' job performance or the reasons for their dismissal, demotion, promotion, or resignation is not excepted from public disclosure.

On the other hand, information commonly found in public employee personnel files that reveals personal financial information generally is excepted from public disclosure under the common-law privacy test, except to the extent the information reflects a transaction between the employee and the public. Open Records Decision Nos. 600 (1992) (information about public employee's participation in a group insurance program, retirement benefits beneficiaries, tax exempt reimbursement accounts, and direct deposit), 545 (1990) (information about a public employee's participation in a deferred compensation plan). Therefore, financial information relating to retirement benefits must be disclosed if it reflects the employee's mandatory contributions to the city retirement system. Open Records Decision No. 600 (1992). On the other hand, information is excepted from disclosure if it relates to a voluntary investment that the employee made in an option benefits plan offered by the city. *Id.* It is not apparent from the submitted documents whether the retirement plan is mandatory or voluntary and we would caution you to evaluate the data before releasing it. See Gov't Code § 552.352.

Another type of information protected by common-law privacy is information revealing results of drug or alcohol testing. This office has long recognized a privacy interest in drug test results of public employees. See Open Records Decision Nos. 594 (1991) (suggesting identification of individual as having tested positive for use of illegal drug may raise privacy issues), 455 (1987) at 5 (citing *Shoemaker v. Handel*, 619 F. Supp. 1089 (D.N.J. 1985), *aff'd*, 795 F.2d. 1136 (3rd Cir. 1986)). Some of the documents in the file contain the kinds of personal information as described above and, thus, must be withheld by common-law privacy.

We note that one of the files you submitted to this office for review includes an Employment Eligibility Verification, Form I-9. Form I-9 is governed by title 8, section 1324a of the United States Code, which provides that the 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. 8 U.S.C. § 1324a(b)(5); see 8 C.F.R. § 274a.2(b)(4). Release of this document under chapter 552 of the Government Code would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we conclude that Form I-9 is confidential under section 552.101 of the Government Code and may only be released in compliance with the federal laws and regulations governing employment verification system. Other information must also be withheld under federal law. Form W-4, the Employee's Withholding Allowance Certificate, is confidential as tax return information under title 26, section 6103(a) of the United States Code. Open Records Decision No. 600 (1992) at 8-9. We have marked the documents accordingly.

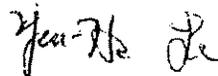
You also assert that certain information is excepted from disclosure under section 552.117. Section 552.117 protects from required public disclosure information relating to a peace officer's home address, home telephone number, or social security number, as well as names of family members. Open Records Decision Nos. 622 (1994), 455 (1987). The information at issue here contains the peace officer's home address, telephone numbers, social security number, and names of family members. This section also excepts from disclosure the former home addresses and telephone numbers of peace officers. Open Records Decision No. 622 (1994) at 7. Therefore, the city must not release information that discloses the officer's home address, social security number, home telephone number, and names of family members. We have marked the documents accordingly.

You further claim that the personnel file is excepted from disclosure under section 552.108 because of pending prosecution. Section 552.108 excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime," and "[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." Gov't Code § 552.108; see *Holmes v. Morales*, 924 S.W.2d 920 (Tex. 1996). Some of the records you have submitted are internal records relating to law enforcement. Thus, we have marked the documents accordingly.

We note that a photograph of the officer is included with one of the sample applications submitted to this office for review.¹ Pursuant to section 552.119 of the Government Code, you must withhold the photograph of the officer unless the officer has given the city written consent to its disclosure.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/SAB/rho

Ref.: ID# 102686

Enclosures: Marked documents

cc: Mr. Johnny Michael Stafford
P.O. Box 1108
Tatum, Texas 75691
(w/o enclosures)

¹We note that you did not claim any exception for this photograph. However, this office will raise mandatory exceptions like sections 552.119 and 552.101 on behalf of a governmental body. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).