



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 3, 1997

Rachel Lee Ponder
Assistant City Attorney
City of Bryan
P.O. Box 1000
Bryan, Texas 77805

OR97-0709

Dear Ms. Ponder:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 104661.

The City of Bryan (the "city") received a request for information involving an investigation of a certain city police officer including "a statement from the following witnesses: 1) my husband 2) [t]he intake nurse 3) [t]he security guard 4) [a]ll copies of dispatcher tapes 5) Farris's statements and conclusion . . . [the] personnel files for[sic] Hugh Walker." You say that most of the information requested does not exist. However, the city seeks to withhold the responsive portions of located information based on sections 552.101 and 552.117 of the Government Code. You enclose marked representative samples of the information the city seeks to withhold.¹

Section 552.301 of the Government Code provides that a governmental body must ask the attorney general for a decision as to whether requested documents must be disclosed not later than the tenth day after the date of receiving the written request. The city received the written request for information on December 23, 1996. You did not request a decision from this office until January 8, 1997, more than ten days after the requestor's written request. Therefore, we conclude that the department failed to meeting its ten-day deadline for requesting an opinion from this office.

¹In reaching our conclusion here, we assume that 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 that those records contain substantially different types of information than that submitted to this office.

When a governmental body fails to request a decision within ten days of receiving a request for information, the information at issue is presumed public. *Hancock v. State Bd. Of Ins.*, 797 S.W.2d 379 (Tex.App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex.App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982); Gov't Code § 552.302. The governmental body must show a compelling interest to withhold the information to overcome this presumption. *See id.* Normally, a compelling interest is that some other source of law makes the information confidential or that third party interests are at stake. Open Records Decision No. 150 (1977) at 2. As you raise exceptions to disclosure based on some other source of law, we will proceed to review the documents and exceptions you now raise.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You contend that certain records relating to an internal affairs investigation which did not result in any disciplinary action taken is excepted from required public disclosure under section 552.101 under the holding of *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 916 (Tex.App.--Austin 1993, writ denied). You state that the city of Bryan is a "civil service municipality." Therefore, section 143.089 of the Local Government Code is applicable. Section 143.089(g) provides:

A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a firefighter or police officer. The department shall refer to the director or the director's designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file.

Thus, the city must withhold the internal investigation report under section 552.101 in conjunction with § 143.089(g) of the Local Government Code.

Section 552.101 is also applicable in instances where information, if disclosed, results in the common-law tort of invasion of privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); Open Records Decision Nos. 628 (1994) at 4, 579 (1990) at 2, 562 (1990) at 9. Information may be withheld under section 552.101 in conjunction with the common-law right of privacy if: (1) the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and (2) the information is of no legitimate concern to the public. *See* Open Records Decision No. 628 (1994).

Financial information concerning an individual may be protected by a common-law right of privacy. *See* Open Records Decision Nos. 545 (1990), 523 (1989). This office has determined that some personal financial information is highly intimate or embarrassing and thus it meets the first part of the *Industrial Foundation* test. *Id.* You have submitted to this

office documentation regarding retirement fund information, insurance premium and financial history information. Each of these items relates to personal investment decisions and personal financial information which this office has previously held is excepted under a common-law right to privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990). Therefore, these marked items must be withheld under section 552.101 of the Government Code. You also submitted the officer's W-2 form and other marked tax information which are confidential under federal law and, therefore, also must be withheld under section 552.101, 26 U.S.C. § 6103; *see also* Open Records Decision No. 600 (1992) at 8-9.

Additionally, we note that employee education training; names and addresses of former employers; dates of employment; kind of work, salary, and reasons for leaving; names, occupations, addresses and phone numbers of character references; job performances or abilities; birth dates, height and weight, are not protected by privacy. Open Records Decision No. 455 (1987).

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.²

Section 552.117 excepts information if it is information that relates to the home address, home telephone number or social security number or that reveals whether the officer has family members. Consequently, we agree with your marked representative samples of the information which must be withheld under that provision.

We are resolving this matter with this 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 may not be relied upon as a previous

²Although you include the assertion that the drug test results are confidential under the Medical Practice Act (the "MPA"), article 4495b, V.T.C.S. Section 5.08(b) of the MPA provides:

Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

While we agree that medical records created or maintained by a physician may be released only in accordance with the MPA, *see* Open Records Decision No. 598 (1991); MPA § 5.08(e), (j), none of the documents submitted to this office appear to have been created or maintained by a physician. Moreover, the requestor does not appear to be requesting the actual medical records. Consequently, it appears that the MPA is inapplicable to this open records request.

determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Janet I. Monteros
Assistant Attorney General
Open Records Division

JIM/alg

Ref: ID#104661

Enclosures: Submitted marked documents

cc: Ms. Carolyn Jaska
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(w/o enclosures)