



August 30, 1999

Mr. Joel E. Geary
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OR99-2435

Dear Mr. Geary:

You have asked 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# 126891.

The City of Cockrell Hill Police Department (the "city"), which your firm represents, received a request for "copies of the personnel and internal-affairs files of two Cockrell Hill police officers, Rene Lozano and Tiffany Hickey." In response to the request, you submit to this office for review the information which you assert is responsive. You assert that a portion of the requested information is excepted from required public disclosure pursuant to sections 552.101, 552.102, 552.108, 552.115, 552.117, and 552.130 of the Government Code.¹ We have considered the arguments and exceptions you raise and reviewed the submitted information.

Section 552.101 of the Government Code excepts from required public disclosure "information that is confidential by law, either constitutional, statutory, or by judicial decision." Under common-law privacy, private facts about an individual are excepted from disclosure. *Industrial Foundation v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992). Section 552.102(a) protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The protection of section 552.102 is the same as that of the common-law right to privacy under section 552.101. *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Consequently, we will consider these two exceptions together for the submitted records.

The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental

¹Accordingly, we assume that you will release other responsive records to the extent they exist, since you have not raised any other exception for the remaining information.

or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. Most of the submitted information does not comport with this standard.

Most of the submitted information at issue relates to the performance and job functions of public employees. There is a legitimate public interest in the work behavior of a public employee and how he or she performs job functions. Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job performance of public employees), 444 (1986) (employee information about qualifications, disciplinary action and background not protected by privacy), 423 at 2 (1984) (scope of public employee privacy is narrow), 405 (1983) (employee performance audit not protected by privacy), 284 (1981) (letters of recommendation not protected by privacy). However, this office has found that the following types of information are excepted from required public disclosure under privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse or the detailed description of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

You represent that the city pays each officer's individual health insurance premiums but does not pay dependents' health insurance premiums, dental and life insurance premiums. After examining the submitted documents, we find that some of them must be withheld as personal financial information and others must be released. Prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). Thus, a public employee's allocation of his salary to a voluntary investment program offered by his employer is a personal investment decision, and information about it is excepted from disclosure by a common-law right of privacy. Open Records Decision Nos. 600 (1992) (TexFlex benefits), 545 (1992) (deferred compensation plan). However, where a transaction is funded in part by the state, it involves the employee in a transaction with the state and is not protected by privacy. Open Records Decision No. 600 (1992). Some of the information at issue appears to involve a financial transaction between an individual and the governmental body, *e.g.*, the employees' health insurance premiums; therefore, such information is not subject to an exception under common-law privacy. However, to the extent the personnel records, concerning officer Lozano, contain personal financial

information not relating to the financial transaction between himself and the city, the information is subject to protection under privacy.

You have also submitted documents revealing the results of drug or alcohol testing. This office has long recognized a privacy interest in the 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 at 5 (1987) (citing *Shoemaker v. Handel*, 619 F. Supp. 1089 (D.N.J. 1985), *aff'd*, 795 F.2d. 1136 (3rd Cir. 1986)). Consequently, you must withhold these test results, concerning officer Lozano, under common-law privacy.

As for the officer who is deceased, we note that because an individual's common-law privacy rights lapse upon the death of the individual, any financial information within the records may not be withheld on the basis of the deceased employee's common-law privacy interests. Open Records Decision No. 272 (1981). However, the beneficiaries of the deceased officer appear to have a common-law right of privacy in the financial information at issue. Open Records Decision No. 373 at 3 (1983) (financial information about an individual may implicate privacy interests). Thus, you must de-identify the requested information, concerning the deceased officer, to remove the names of the beneficiaries and any other identifying information about the beneficiaries. The city may not withhold any portion of the remaining information under sections 552.101 and 552.102 in conjunction with privacy.

Section 552.101 encompasses information protected by other statutes. You argue that the polygraph reports within the submitted records are confidential. Texas law prohibits the public disclosure of the results of polygraph examinations. Section 19A(b) of article 4413(29cc), V.T.C.S., provides as follows:

Except as provided by Subsection (d) of this section, a person for whom a polygraph examination is conducted or an employee of the person may not disclose to another person information acquired from the examination.

The requested information includes polygraph reports that are deemed confidential by section 19A(b). Since the polygraph reports are confidential by law, the city must withhold this information from disclosure pursuant to section 552.101.

Furthermore, some of the information at issue includes medical records, access to which is governed by the Medical Practice Act (the "MPA"), article 4495b of Vernon's Texas Civil Statutes. Section 5.08(b) and (c) of the MPA provide:

(b) 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.

(c) Any person who receives information from confidential communications or records as described in this section other than the persons listed in Subsection (h) of this section who are acting on the patient's behalf may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Section 5.08(j)(1) provides for release of medical records upon the patient's written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Section 5.08(j)(3) requires that any subsequent release of medical records be consistent with the purposes for which the department obtained the records. Open Records Decision No. 565 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991).

Pursuant to section 552.101, we also note that the records you submitted to this office for review includes W-4 forms and two Employment Eligibility Verification Form I-9.² 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 the Public Information Act 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 Public Information Act and may only be released in compliance with the federal laws and regulations governing the employment verification system. We further note that prior decisions of this office have held that title 26, section 6103(a) of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). 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 and must not be released. Open Records Decision No. 600 at 8-9 (1992).

We next address your claim that two documents, numbered 173 and 174, are excepted from disclosure under section 552.108. Section 552.108, the "law enforcement" exception, reads in part as follows:

² Although you did not claim any exception for this document, this office will raise section 552.101 on behalf of a governmental body. Open Records Decision Nos. 481(1987), 480 (1987).

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication; or

(3) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

....

(c) This section does not except from the requirements of Section 552.021 information that is basic information about an arrested person, an arrest, or a crime.

See Gov't Code § 552.108. Generally, a governmental body claiming an exception from disclosure under section 552.108(a)(1) must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You have not stated that the requested information pertains to an ongoing criminal investigation or prosecution, nor have you explained how its release would interfere in some way with the detection, investigation, or prosecution of crime. *See* Gov't Code § 552.108(a)(1). Thus, you have not met your burden under section 552.108(a)(1).

A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. It is not clear to this office, nor have you explained, how or if the investigation has actually concluded. In this instance, because you have provided no specific representation concerning the status of the criminal investigation, we conclude that the city has not met its burden under section 552.108. Therefore, the city may not withhold any of the requested information under section 552.108.

You contend that section 552.115 protects from disclosure the officer's Texas birth certificates in the submitted personnel files. Birth or death records held by the bureau of vital statistics or local registration officials are excepted from required public disclosure under section 552.115 of the Government Code. Since these records are not held by the bureau of vital statistics or local registration officials, section 552.115 is inapplicable.

You also ask whether section 552.117 protects the information at issue from disclosure.³ Section 552.117 provides that a governmental body must keep private peace officers' home addresses, home telephone numbers, social security numbers, or information that reveals that the peace officers have family members. The information at issue includes detailed information about the existence of family members and includes both officers' home addresses, home telephone numbers, and social security numbers. This information, including that of the deceased officer, must all be withheld from disclosure under section 552.117.

Although you did not raise section 552.119, we note that photographs of officers are included with the personnel records submitted to this office for review. Section 552.119 provides an exception from disclosure for photographs of police officers. *See* Open Records Decision No. 502 (1988). However, in Open Records Decision No. 536 (1989), this office reasoned that the exception is inapplicable when the officer in question is deceased. The purpose of the exception is to protect the safety of peace officers, and protecting the photographs of deceased officers would not serve this purpose. *Id.* Thus, the photographs of the deceased officer are not excepted from disclosure pursuant to section 552.119. However, pursuant to section 552.119, you must withhold the photographs of officer Lozano, who is not deceased, unless the officer has given the city written consent to its disclosure.

The submitted records contain Texas drivers' license numbers for the officers whose personnel files are at issue. Section 552.130 of the Government Code provides:

(a) Information is excepted from the requirements of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of the state;

(2) a motor vehicle title or registration issued by an agency of this state; or

³We note that federal law may also prohibit disclosure of the social security numbers included in this request for records. A social security number is excepted from required public disclosure under section 552.101 of the act in conjunction with 1990 amendments to the federal Social Security Act, § 42 U.S.C. § 405(c)(2)(C)(viii)(I), if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994).

(3) a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document.

(b) Information described by Subsection (a) may be released only if, and in the manner, authorized by Chapter 730, Transportation Code.

Based on chapter 730, we do not believe that section 552.130 ceases to be effective upon an individual's death. Accordingly, we conclude that the drivers' license numbers, and copies of the identification cards, within the personnel files must be withheld pursuant to section 552.130 of the Government Code.

In conclusion, we note that all of the requested information not specifically addressed above must be released to the requestor in its entirety. 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 upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



~~Sam Haddad~~
Assistant Attorney General
Open Records Division

SH/nc

Ref.: ID# 126891

Encl. Submitted information

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(w/o enclosures)