



January 20, 2000

Mr. Todd A. Blomerth  
Blomerth & Payne  
103 South Main Street  
Lockhart, Texas 78644

OR2000-0183

Dear Mr. Blomerth:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 131291.

The City of Lockhart (the "city") received a request for the personnel file of a city police officer. You argue that the city is not obligated to respond to the public information request pursuant to section 552.028. In the alternative, you claim that the requested information is excepted from disclosure under sections 552.102, 552.103, 552.108 and 552.117 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

Initially, you claim that the requestor may eventually become an incarcerated person depending on the outcome of his appeal. In that event, you argue, the city would not be required to respond to his request pursuant to section 552.028 of the Government Code. We believe that section 552.028 applies to individuals who are incarcerated at the time the request is made. Thus, the city is obligated to respond to the request as section 552.028 is not applicable in this instance. Therefore, we will now consider specific exceptions from disclosure.

We note that the submitted information contains accident reports. The Seventy-fifth Legislature repealed V.T.C.S. article 6701d and amended section 550.065 of the Transportation Code concerning the disclosure of accident report information. Act of May 29, 1997, 75th Leg., R.S. ch. 1187, 1997 Tex. Gen. Laws 4575, 4582-4583 (to be codified at Transp. Code § 550.065). However, a Travis County district court has issued a temporary injunction enjoining the enforcement of the amendment to section 550.065 of the Transportation Code. *Texas Daily Newspaper Ass'n, v. Morales*, No. 97-08930 (345th Dist. Ct., Travis County, Tex., Oct. 24, 1997) (second amended agreed temporary injunction). A

temporary injunction preserves the status quo until the final hearing of a case on its merits. *Janus Films, Inc. v. City of Fort Worth*, 358 S.W.2d 589 (1962). The supreme court has defined the status quo as “the last, actual peaceable, non-contested status that preceded the pending controversy.” *Texas v. Southwestern Bell Tel. Co.* 526 S.W.2d 526, 528 (Tex. 1975). The status quo of accident report information prior to the enactment of S.B. 1069 is governed by section 47 of article 6701d, V.T.C.S.<sup>1</sup>

Section 47(b)(1) provides that:

The Department or a law enforcement agency employing a peace officer who made an accident report *is required to release a copy of the report* on request to:

.....

(D) a person who provides the Department or the law enforcement agency with two or more of the following:

- (i) the date of the accident;
- (ii) the name of any person involved in the accident; or
- (iii) the specific location of the accident

V.T.C.S. art. 6701d, § 47(b)(1) (emphasis added). Under this provision, a law enforcement agency “is required to release” a copy of an accident report to a person who provides the law enforcement agency with two or more pieces of information specified by the statute. *Id.* In the situation at hand, the requestor has not provided the city with any of the required information regarding the accident. Therefore, the city may not release the accident reports to the requestor.

---

<sup>1</sup>Although the Seventy-fourth Legislature repealed and codified article 6701d as part of the Transportation Code, the legislature did not intend a substantive change of the law but merely a recodification of existing law. Act of May 1, 1995, 74th Leg., R.S., ch. 165, §§ 24, 25 1995 Tex. Gen. Laws 1025, 1870-71. Furthermore, the Seventy-fourth Legislature, without reference to the repeal and codification of V.T.C.S. article 6701d, amended section 47 of article 6701d, V.T.C.S., relating to the disclosure of accident reports. Act of May 27, 1995, 74th Leg., R.S., ch. 894, § 1, 1995 Tex. Gen. Laws 4413, 4414. Because the repeal of a statute by a code does not affect an amendment of the statute by the same legislature which enacted the code, the amendment is preserved and given effect as part of the code provision. Gov’t Code § 311.031(c). Thus, the amendment of section 47 of article 6701d, V.T.C.S. is the existing law regarding the availability of accident report information, and may be found following section 550.065 of the Transportation Code. *See also* Act of May 27, 1995, 74th Leg., R.S., ch. 894, § 1, 1995 Tex. Gen. Laws 4413, 4414.

We will now address the exceptions to disclosure which you have asserted. You claim that the information is protected from required disclosure by section 552.103 of the Government Code. Section 552.103(a), as amended by the Seventy-sixth Legislature, reads as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature 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.

(b) For purposes of this section, the state or a political subdivision is considered to be a party to litigation of a criminal nature until the applicable statute of limitations has expired or until the defendant has exhausted all appellate and postconviction remedies in state and federal court.

A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103(a) applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin, 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 588 (1991). You indicate that "the case is still pending because an appeal has been filed and no final disposition as to the appeal has been made as of the date of this letter." You have provided our office with a copy of the notice of appeal filed on August 2, 1999 in the requestor's criminal case. We agree that you have established that litigation is pending. However, absent a letter or other documentation from the District Attorney's Office or the prosecuting attorney with the litigation interest stating that the information should not be released, we conclude that you have not met your section 552.103 burden. See Open Records Decision No. 469 at 2 (1987). From the submitted documentation, the city has not shown that it has a litigation interest. Therefore, the requested documents may not be withheld pursuant to section 552.103.

Next, you claim that the information is excepted from disclosure pursuant to section 552.108 of the Government Code. Section 552.108, the "law enforcement exception," excepts from public disclosure information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime if release of the information would interfere with the detection, investigation or prosecution of crime. Gov't Code § 552.108(a)(1). Generally, a governmental body claiming an exception under section 552.108 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. See Gov't Code §§ 552.108(a)(1), (b)(1), .301(b)(1); see also *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). The requested information consists of the employee file of a

city police officer. You assert that the release of the information “would interfere with the investigation or prosecution of crime, particularly in this case where it appears that Mr. Mojica, on a non-finalized case is attempting to obtain personnel information on one of the investigating officers to his criminal offense.” We do not believe that the exception applies to documents which merely reveal information pertaining to the personnel matters of an individual officer. Such information only indirectly “deals with the detection, investigation, or prosecution of crime” and more directly deals with personnel matters. *See Morales v. Ellen*, 840 S.W.2d 519 (Tex. Civ. App.-- El Paso 1992, writ denied) (where no criminal investigation or prosecution results from investigation of police officer for alleged misconduct, section 552.108 is inapplicable); Open Records Decision No. 350 (1982). Thus, the information may not be withheld under section 552.108.

Additionally, you assert that certain information is excepted from disclosure pursuant to section 552.102 of the Government Code. Section 552.102 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*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref’d n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101 of the Government Code.<sup>2</sup> *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common law privacy excepts from disclosure private facts about an individual. *Id.* Therefore, 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).

This office has found that an individual’s personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990). We agree that the personal auto insurance, personal bank account, and asset and debt information must be withheld under sections 552.101 and 552.102 as confidential information. *See* Open Records Decision Nos. 600 (1992), 545 (1990)(deferred compensation information, mortgage payments, assets, bills, and credit history). The remainder of the submitted information may not be withheld as private information. This office has found that the following types of information are not excepted from required public disclosure under common law privacy: age, salary, title, and date of employment, Open Records Decision Nos. 455 (1987), 373 (1983); licenses, certificates, and

---

<sup>2</sup>Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”

professional awards, Open Records Decision Nos. 444 (1986), 342 (1982); educational background and training, Open Records Decision Nos. 455 (1987), 444 (1986); past work history, Open Records Decision No. 455 (1987), 444 (1986); names, addresses, and telephone numbers of job references, Open Records Decision No. 455 (1987); performance evaluations, Open Records Decision Nos. 470 (1987), 400 (1983); and reasons for a public employee's demotion, dismissal, or resignation, Open Records Decision Nos. 444 (1986), 329 (1982), 278 (1981). We have marked the information which may be withheld pursuant to section 552.102.

You also claim that certain information is excepted from disclosure under section 552.117 of the Government Code. Section 552.117(2) excepts from public disclosure information that reveals a peace officer's home address, home telephone number, social security number, and whether the officer has family members. "Peace officer" is defined by article 2.12 of the Code of Criminal Procedure. The city must withhold the home telephone numbers and family information of its officers under section 552.117(2) regardless of whether those officers elected under section 552.024 to have this information withheld. The city must also withhold an officer's *former* telephone number from disclosure. See Open Records Decision No. 622 (1994). For your convenience, we have marked the type of information which must be withheld pursuant to section 552.117(2).

We note that portions of the submitted information are excepted from disclosure pursuant to section 552.101 of the Government Code.<sup>3</sup> 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. Section 261.201(a) of the Family Code provides that

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

---

<sup>3</sup>The Office of the Attorney General will raise mandatory exceptions like sections 552.101 and 552.117 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

We believe that the information we have marked involves reports, records, and working papers used or developed in an investigation made under chapter 261 of the Family Code. You have not informed this office of any rules the city has adopted that would permit access to the requested records. We, therefore, conclude that the marked information is confidential pursuant to section 261.201 of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (construing predecessor statute). Accordingly, the city must not release the marked information to the requestor under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.

Additionally, among the information submitted for our review is information that appears to contain criminal history record information ("CHRI") generated by the Texas Crime Information Center ("TCIC"), the National Crime Information Center ("NCIC"), or the district attorney. The dissemination of CHRI obtained from the NCIC network is limited by federal law. *See* 28 C.F.R. § 20.1; Open Records Decision No. 565 at 10-12 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. Open Records Decision No. 565 at 10-12 (1990). Sections 411.083(b)(1) and 411.089(a) of the Government Code authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release the information except to another criminal justice agency for a criminal justice purpose, Gov't. Code § 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. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations, *see* Open Records Decision No. 565 (1990), and 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 have marked the information that must be withheld.

Finally, we note that you must also withhold the driver's license number under section 552.130 of the Government Code. Section 552.130 excepts from public disclosure information relating to a driver's license issued by an agency of this state. We have marked the information that must be withheld under section 552.130.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the

full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Carla Gay Dickson  
Assistant Attorney General  
Open Records Division

CGD/ch

Ref: ID# 131291

Encl. Marked documents

cc: Mr. Eric M. Mojica  
1302 Lakeview Drive  
Lockhart, Texas 78644  
(w/o enclosures)