



April 17, 2000

Mr. Miles K. Risley
Senior Assistant City Attorney
City of Victoria
P.O. Box 1758
Victoria, Texas 77902-1758

OR2000-1508

Dear Mr. Risley:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 135628.

The City of Victoria (the "city") received a request for the personnel files of three police officers including any internal affairs files, complaints, grievances, reprimands, and suspensions. You claim that portions of the requested information are excepted from disclosure under sections 552.101, 552.102, 552.108, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You have submitted internal investigation documents pertaining to citizen complaints regarding the three officers which you assert are excepted by section 552.108 of the Government Code. You assert that internal investigation documents pertaining to Sabrina Bartosch and an alleged assault are excepted by section 552.108(a)(1). Section 552.108(a)(1) excepts from 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. You assert that the internal investigation documents relate to a pending criminal investigation for presentation to the district attorney. Accordingly, we find that release of the requested information would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Therefore, we conclude that the department may withhold the information under section 552.108(a)(1). We have marked the documents which you may withhold under section 552.108(a)(1).

However, section 552.108 is inapplicable to basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle*. 531 S.W.2d at 177. Thus, with the exception of the basic front page offense and arrest information, you may withhold the requested information from disclosure based on section 552.108(a)(1).

You also assert that section 552.108(b)(2) excepts the internal investigation documents pertaining to non-pending cases. Section 552.108(b)(2) provides the following:

(b) An 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 is excepted from the requirements of section 552.021 if:

...

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication . . .

We note, however, that where no criminal investigation or prosecution results from a police department's internal investigation of a police officer for alleged misconduct, section 552.108 is inapplicable to the internal investigation documents. *See Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied); Open Records Decision No. 350 (1982). You have not demonstrated that the police department's internal investigations resulted in the criminal investigation or prosecution of the officers at issue. Thus, the internal investigation documents may not be withheld under section 552.108(b)(2). You have also submitted offense reports which appear to be the underlying basis for the internal investigations. You do not explain whether these reports relate to ongoing investigations or prosecutions so as to demonstrate that their release would interfere with the detection, investigation, or prosecution of crime. Furthermore, you have not demonstrated that the submitted offense reports relate to criminal investigations that *concluded in results* other than convictions or deferred adjudications. *See* Gov't Code § 552.108(a)(2), (b)(2). Therefore, you may not withhold the offense reports under section 552.108(b)(2). Thus, you must release the internal investigation documents pertaining to non-pending cases.

You have also submitted documents from the officer's personnel files which you claim are excepted from disclosure by sections 552.101 and 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 act. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, we will address whether section 552.101 applies to the requested information.

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Section 552.101 encompasses common law and constitutional privacy. Common law privacy excepts from disclosure private facts about an individual. *Id.* 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).

The constitutional right to privacy protects two interests. Open Records Decision No. 600 at 4 (1992) (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)). The first is the interest in independence in making certain important decisions related to the “zones of privacy” recognized by the United States Supreme Court. *Id.* The zones of privacy recognized by the United States Supreme Court are matters pertaining to marriage, procreation, contraception, family relationships, child rearing, and education. *See id.*

The second interest is the interest in avoiding disclosure of personal matters. The test for whether information may be publicly disclosed without violating constitutional privacy rights involves a balancing of the individual’s privacy interests against the public’s need to know information of public concern. *See* Open Records Decision No. 455 at 5-7 (1987) (citing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981)). The scope of information considered private under the constitutional doctrine is far narrower than that under the common law; the material must concern the “most intimate aspects of human affairs.” *See* Open Records Decision No. 455 at 5 (1987) (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)).

This office has found that the following types of information are excepted from required public disclosure under constitutional or common law 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), and information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987).

Upon review, we have found that some of the submitted information contains personal financial information. In Open Records Decision No. 373 (1983), this office concluded that

all financial information relating to an individual — including sources of income, salary, mortgage payments, assets, medical and utility bills, social security and veterans benefits, retirement and state assistance benefits, and credit history — ordinarily satisfies the first requirement of common law privacy, in that it constitutes highly intimate or embarrassing facts about the individual, such that its public disclosure would be highly objectionable to a person of ordinary sensibilities.

Further, the public has no legitimate interest in personal financial information not involving a financial transaction between an individual and a governmental body. *See* Open Records Decision No. 545 (1990). We have marked the personal financial information which you must withhold under section 552.101 and common law privacy.

The submitted information also contains insurance enrollment forms. Prior decisions of this office have found that financial information relating 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. *Id.*, Open Records Decision No. 373 (1983). 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 No. 545 (deferred compensation plan). However, information revealing that an employee participates in a group insurance plan funded partly or wholly by the governmental body is not excepted from disclosure. Open Records Decision No. 600 at 10 (1992). For example, this office has held that an employee's participation in the Texas Municipal Retirement System or in a group insurance plan funded by the governmental body is not excepted from disclosure under common law privacy. *Id.*, Open Records Decision No. 480 (1987).

However, the employee's optional coverages will generally be funded by the employee and not the state. An employee's decision to enroll for optional coverages is a personal financial decision to allocate part of his compensation to optional benefits, and, therefore, the related information is excepted from disclosure by a right of privacy. Further, the submitted information contains a refund application for the distribution of retirement funds. Because the application provides alternatives for distribution of the funds, we conclude that the election portion of the application constitutes personal financial information and is protected under common law privacy. We also note that the designation of a retirement beneficiary is protected from disclosure under section 552.101. Open Records Decision No. 600 (1992). The internal investigation documents also contain credit card and checking account numbers which are protected by common law privacy. We have marked the personal financial information which must be withheld under sections 552.101 and 552.102.

The submitted information also contains medical information such as prescriptions and medical conditions. We have marked the medical information which is protected by common law privacy and must be withheld under section 552.101.

The submitted information also includes criminal history record information ("CHRI"). Where an individual's criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual's right to privacy. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). Thus, you must withhold the locally compiled CHRI under the right of privacy and section 552.101 of the Government Code.

The submitted information also contains CHRI generated by the National Crime Information Center ("NCIC") and the Texas Crime Information Center ("TCIC") which is confidential by federal statute. Along with the right of privacy, section 552.101 also encompasses information protected by statute. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. *Open Records Decision No. 565* (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See Gov't Code § 411.083.*

Sections 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). 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). Furthermore, 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 CHRI which must be withheld.

You also assert that portions of the submitted information are confidential medical records. Section 159.002(b) of the Occupations Code provides the following:

A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

Occ. Code § 159.002(b). We have marked the documents which constitute records of the diagnosis, evaluation, or treatment of a patient by a physician and, therefore, are confidential under section 159.002(b) of the Occupations Code. Thus, the medical records must be withheld under section 552.101.

Further, the submitted information contains declarations of psychological and emotional health and medical condition from the Texas Commission on Law Enforcement Officer Standards and Education. Section 1701.306 of the Occupations Code provides the following:¹

(a) The commission may not issue a license to a person as an officer or county jailer unless the person is examined by:

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test.

(b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to the commission. *A declaration is not public information.*

Occ. Code § 1701.306(a)-(b) (emphasis added). We have marked the information that is subject to section 1701.306 of the Occupations Code and must be withheld under section 552.101 of the Government Code.

We note that the submitted information contains W-4 forms. Section 6103(a) of title 26 of the United States Code renders tax return information confidential. The term "return information" includes "the nature, source, or amount of income" of a taxpayer. 26 U.S.C. § 6103(b)(2). This term has been interpreted by federal courts to include any information

¹The Seventy-sixth legislature enacted section 1701.306 of the Occupations Code and repealed section 415.057 of the Government Code without substantive change.

gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *Mallas v. Kolak*, 721 F. Supp 748 (M.D.N.C. 1989). Our office has specifically held that W-4 forms must be withheld in their entirety. Open Records Decision No. 600 at 9 (1992). Therefore, you must withhold the submitted W-4 forms under section 552.101 of the Government Code.

The submitted information contains police reports involving juvenile conduct that occurred before and after January 1, 1996. Prior to its repeal by the Seventy-fourth Legislature, section 51.14(d) of the Family Code provided for the confidentiality of juvenile law enforcement records. See Act of May 22, 1993, 73rd Leg., R.S., ch. 461, § 3, 1993 Tex. Gen. Laws 1850, 1852, repealed by Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 100, 1995 Tex. Gen. Laws 2517, 2590. Law enforcement records pertaining to conduct occurring before January 1, 1996 are governed by the former section 51.14(d), which was continued in effect for that purpose. See Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 106, 1995 Tex. Gen. Laws 2517, 2591. Therefore, the police reports pertaining to juvenile conduct that occurred before January 1, 1996 must be withheld. Accordingly, we have marked the information that you must withhold under section 51.14(d) of the Family Code in conjunction with section 552.101.

However, this office has concluded that section 58.007(c) of the Family Code, as enacted by the Seventy-fourth Legislature, does not make juvenile law enforcement records relating to conduct that occurred on or after January 1, 1996 confidential. Open Records Decision No. 644 (1996). The Seventy-fifth Legislature amended section 58.007 to make juvenile law enforcement records confidential, effective September 1, 1997. However, the Legislature chose not to make this most recent amendment retroactive in application. Consequently, law enforcement records pertaining to juvenile conduct that occurred between January 1, 1996 and September 1, 1997 are not subject to the confidentiality provisions of either the former section 51.14(d) or the current section 58.007 of the Family Code. Therefore, we conclude that the police report which concerns delinquent conduct that occurred on July 26, 1996, is not confidential under section 58.007(c) of the Family Code.

You also assert that information is protected by section 552.117(2). Section 552.117(2) exempts from public disclosure a peace officer's home address, home telephone number, social security number, and information indicating whether the peace officer has family members. We have marked the information which you must withhold under section 552.117(2) of the Government Code.

We note that the submitted information contains driver's license numbers, license plate numbers, and vehicle identification numbers. Section 552.130(a) of the Government Code exempts from disclosure information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. We have marked the information that you must withhold under section 552.130(a) of the Government Code.

We also note that the internal investigation documents contain social security numbers.² Social security numbers may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* However, it is not apparent to us that the social security numbers were obtained or maintained by the city pursuant to any provision of law enacted on or after October 1, 1990. You have cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes the city to obtain or maintain a social security number. Therefore, we have no basis for concluding that the social security numbers at issue were obtained or maintained pursuant to such a statute and are, therefore, confidential under section 405(c)(2)(C)(viii)(I). We caution the city, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Gov't Code § 552.352. Prior to releasing the social security numbers, the city should ensure that these numbers were not obtained or maintained by the city pursuant to any provision of law enacted on or after October 1, 1990.

We note that some of the submitted documents, such as court pleadings and a traffic citation, appear to have been filed with a court. Documents filed with the court are public documents and must be released. *See* Gov't Code § 552.002(a)(17) (providing that information contained in a public court record is public information); *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57-58 (Tex. 1992). If the traffic citations have not been filed with a court, portions of it must be withheld under section 552.130 of the Government Code.

The submitted documents also contain a peace officer's accident report that appears to have been completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer's accident report). We believe access to this information is governed by provisions outside the Public Information Act.

The Seventy-fifth Legislature repealed article 6701d and amended section 550.065 of the Transportation Code concerning the disclosure of accident report information. *See* 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

²The social security numbers in the internal investigation documents belong to individuals other than peace officers whose social security numbers are excepted from disclosure under section 552.117(2) of the Government Code.

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.³ 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 employing a peace officer who made an accident report “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 two pieces of information specified by the above statute. Therefore, the city must withhold the peace officer’s accident report. V.T.C.S. art. 6701d, § 47(a) (accident reports shall be privileged and for the confidential use of governmental bodies except as provided for by section (b)).

In conclusion, the city may withhold the internal investigation documents pertaining to Sabrina Bartosch under section 552.108(a)(1). However, the remaining internal investigation documents may not be withheld under section 552.108(b)(2). We have marked the personal financial and medical information which must be withheld under common law privacy and

³Although 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.

section 552.101. We have also marked information, including medical records, declarations of emotional and mental condition, W-4 forms, and CHRI, which must be withheld pursuant to section 552.101 in conjunction with confidentiality statutes. The submitted information contains police reports pertaining to juvenile conduct which you must withhold pursuant to section 51.14(d) of the Family Code. However, you must release the police report concerning juvenile conduct which occurred in 1996. Further, we have marked information excepted by disclosure by sections 552.117(2) and 552.130. We have also discussed the confidentiality of social security numbers. We noted that the submitted information contained documents which appeared to have been filed with a court and, therefore, public under section 552.022(a)(17), as well as a peace officer's accident report which you must withhold. The city must release the remaining information.

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.

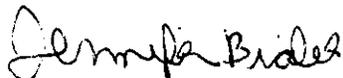
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge 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,



Jennifer Bialek
Assistant Attorney General
Open Records Division

JHB/ch

Ref: ID# 135628

Encl. Marked documents

cc: Mr. Sean Belleville
Law Offices of Ernest Gamez, Jr., P.C.
777 E. Harrison
Brownsville, Texas 78520-7118
(w/o enclosures)