



February 27, 2001

Ms. J. Middlebrooks
Assistant City Attorney
City of Dallas
2014 Main, Room 501
Dallas, Texas 75201

OR2001-0735

Dear Ms. Middlebrooks:

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# 144500.

The City of Dallas Police Department (the "department") received a request for a specified Internal Affairs investigation file, and "all documents and records" pertaining to the criminal investigation by the department's Public Integrity Unit of two named officers. You claim that a portion of the requested information is excepted from disclosure under sections 552.101, 552.117, 552.130, and 552.119 of the Government Code. You have submitted for our review samples of the information at issue, contained in exhibits marked by you as "1" through "11".¹ We assume you have released to the requestor the remaining information. We have considered the exceptions you claim and reviewed the submitted information.

You acknowledge that the department did not timely request a decision of this office as required by section 552.301 of the Government Code. *See* Gov't Code § 552.301(b), (d), (e).

¹We 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.

Accordingly, the requested information "is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information." Gov't Code § 552.302. Generally, a compelling reason under section 552.302 exists only where the information is confidential by law or affects third party interests. *See, e.g.,* Open Records Decision No. 150 (1977). You contend a compelling reason exists for the department to withhold the information at issue.

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This provision encompasses information made confidential by statute, and also encompasses the doctrines of common law and constitutional privacy.

You assert section 552.101 in conjunction with an individual's right to privacy for the information you have marked in exhibit "1." Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental 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.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

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), 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, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). We agree that some of the information in exhibit "1" that you have highlighted must be withheld under section 552.101 in

conjunction with the common law right to privacy. We conclude the remaining information in the exhibit is not excepted by section 552.101 in conjunction with common law or constitutional privacy and it must be released. We have marked the documents in the exhibit accordingly.

You assert that the information in exhibit "2" is also protected by section 552.101 in conjunction with common law privacy. Prior decisions of this office have also 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). 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 if the transactions are not funded in whole or in part with public monies. Open Records Decision Nos. 600 (1992) (TexFlex benefits), 545 (1992) (deferred compensation plan). Where a transaction is funded in part by the state, however, it involves the expenditure of public monies in which there exists a legitimate public interest and the transaction therefore is not protected by privacy. Open Records Decision No. 600 (1992). We agree that much of the information you have marked in exhibit "2" constitutes personal financial information, and we have marked in some of the documents additional information that, if released, reveals a personal financial decision. Assuming all of the information at issue pertains to voluntary decisions made by the individual and the transactions are not funded in whole or in part with public monies, we find the financial information must be withheld under section 552.101 in conjunction with the common law right to privacy.

We note that exhibit "2" also includes copies of employee W-2 forms, which we advise are excepted from disclosure in their entirety by section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code. Open Records Decision Nos. 600 (1992); 226 (1979). We have marked the information you must withhold.²

Exhibit "3" consists of an offense report pertaining to a juvenile suspect. 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. 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. Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 100, 1995 Tex. Gen. Laws 2517, 2591 (Vernon). The records at issue concern juvenile conduct that occurred prior to January 1, 1996. Therefore, exhibit "3" is confidential in its

²For your convenience, we have marked with green flags the documents in exhibit 2 that contain information that is not excepted from disclosure and must be released, and we have marked for redaction the information in these documents that must be withheld in accordance with this decision. The documents in exhibit 2 that are not marked with a green flag contain no information that is subject to release and must be withheld in their entirety in accordance with this decision.

entirety under the former section 51.14(d) of the Family Code and must be withheld from disclosure pursuant to section 552.101 of the Government Code.

You have marked information in exhibit "4" for which you assert section 552.117 of the Government Code. Section 552.117 provides in relevant part:

Information is excepted from [required public disclosure] if it is information that relates to the home address, home telephone number, or social security number, or that reveals whether the following person has family members:

...

- (2) a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under Section 51.212, Education Code, regardless of whether the officer complies with Section 552.024;

Gov't Code § 552.117(2). Based on our understanding that the information you have marked is that of peace officers as defined in Article 2.12, Code of Criminal Procedure, we agree that you must withhold the highlighted information in exhibit "4" pursuant to section 552.117(2). If the individual was not a peace officer at the time the department received the present request, we note that the information at issue is subject to required withholding under section 552.117(1) *only if* the individual elected confidentiality for the information prior to the department's receipt of the present request. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989).

You have marked information in exhibit "5" which pertains to polygraph results. The release of the information pertaining to polygraph results is governed by section 1703.306 of the Occupations Code which provides:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;

(3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;

(4) another polygraph examiner in private consultation; or

(5) any other person required by due process of law.

(b) The board or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

Occ. Code § 1703.306. This provision prohibits the release of polygraph information to anyone other than those individuals listed in subsection (a). We have no indication that the requestor in this instance is among those so listed, and we therefore conclude you must withhold the marked information in exhibit "5" pursuant to section 552.101 in conjunction with section 1703.306 of the Occupations Code.

You assert the information you have marked in exhibit "6" must be withheld under section 552.101 in conjunction with section 1702.284 of the Occupation Code. This provision governs information contained in alarm systems records, and provides:

Information contained in alarm systems records maintained by a governmental body that concerns the location of an alarm system, the name of the occupant of an alarm system location, or the type of alarm system used is confidential and may be disclosed only to the board or as otherwise required by state law or court order.

Occ. Code § 1702.284 (emphasis added). The information you have marked, if released, reveals the location of alarm systems. However, none of this information is "contained in alarm systems records" maintained by the department. We therefore do not agree that this information must be withheld under section 1702.284 of the Occupations Code in conjunction with section 552.101 of the Government Code. The department must release the highlighted information in exhibit "6."

You assert the information in exhibit "7" must be withheld pursuant to section 552.130 of the Government Code. This provision states in relevant part:

(a) Information is excepted from the requirement 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 this state; [or]

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

We agree that the Texas driver's license numbers and license plate numbers contained in the exhibit and marked by you must be withheld under section 552.130.

You assert that the information you have marked in exhibit "8" is confidential pursuant to section 772.318 of the Health and Safety Code. Sections 772.118, 772.218, and 772.318 of the Health and Safety Code make confidential the originating telephone numbers and addresses of 911 callers furnished by a service supplier. *See* Open Records Decision No. 649 (1996). Sections 772.118, 772.218, and 772.318 apply only to an emergency 911 district established in accordance with chapter 772 of the Health and Safety Code, which authorizes the development of local emergency communications districts. *Id.* Section 772.118 applies to an emergency communication district for a county with a population of more than two million. Section 772.218 applies to an emergency communication district for a county with a population of more than 860,000. Section 772.318 applies to an emergency communication district for a county with a population of more than 20,000. Assuming that the information you have marked is from an emergency communication district that is subject to section 772.118, 772.218, or 772.318, the originating telephone numbers and addresses of 911 callers are confidential and must be withheld from disclosure under section 552.101 of the Government Code.

You assert that the documents and information you have marked in exhibit "9" consist of criminal history record information ("CHRI") that must be withheld. Criminal history record information generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential. 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 agree that some of the documents and information you

have marked in exhibit "9" must be withheld as CHRI. In addition, we note that 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). The information in exhibit "9" that does not comprise CHRI nevertheless constitutes a compilation by the department of a named individual's criminal history, and therefore must be withheld under section 552.101 in conjunction with the individual's right to privacy.

In exhibit "10," you have marked for redaction an individual's social security number. Social security numbers may be withheld in some circumstances under section 552.101 of the Government Code. A social security number or "related record" 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.* We have no basis for concluding that any of the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the department pursuant to any provision of law, enacted on or after October 1, 1990.

Finally, you assert section 552.119 of the Government Code for the copies of photographs you have marked in exhibit "11." Section 552.119 excepts from public disclosure a photograph of a peace officer³ that, if released, would endanger the life or physical safety of the officer unless one of three exceptions applies. The three exceptions are: (1) the officer is under indictment or charged with an offense by information; (2) the officer is a party in a fire or police civil service hearing or a case in arbitration; or (3) the photograph is introduced as evidence in a judicial proceeding. This section also provides that a photograph exempt from disclosure under this section may be made public only if the peace officer gives written consent to the disclosure. *Open Records Decision No. 502* (1988). The submitted copies of photographs depict peace officers. For those you assert are excepted under section 552.119, it does not appear that any of the exceptions to the provision are applicable. You have not informed us that the peace officers have executed any written consents to disclosure. Thus, we agree that you must withhold the photographs you have marked depicting peace officers.

³"Peace officer" is defined by article 2.12 of the Code of Criminal Procedure.

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).

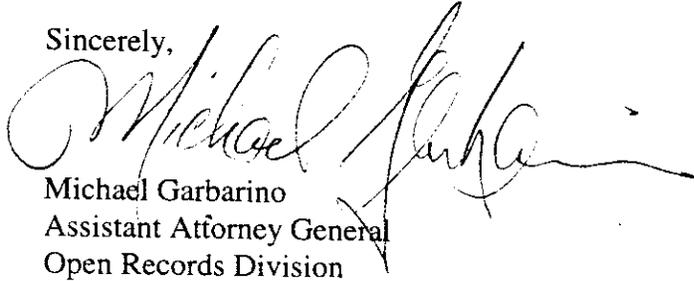
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

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,

A handwritten signature in cursive script, appearing to read "Michael Garbarino". The signature is written in black ink and is positioned above the typed name and title.

Michael Garbarino
Assistant Attorney General
Open Records Division

MG/seg

Ref: ID# 144500

Encl. Submitted documents .

cc: Mr. Dave Michaels
Staff Writer
The Dallas Morning News
P.O. Box 655237
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(w/o enclosures)