



April 27, 2001

Mr. Charles M. Allen, II
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P.O. Box 831078
Richardson, Texas 75083-1078

OR2001-1743

Dear Mr. Allen:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 146542.

The Richardson Police Department (the "department") received a request for the personnel records of a particular police officer. You claim that the requested information is excepted from disclosure under sections 552.022, 552.101, 552.102, 552.103, 552.108(a), and 552.130 of the Government Code and 42 U.S.C. § 405(c)(2)(C)(iii)(I). We have considered the exceptions you claim and reviewed the submitted information.

You claim that the requested information is excepted from disclosure because it is not a completed report under section 552.022. Section 552.022, however, does not provide any exceptions to disclosure under the Public Information Act. Section 552.022 provides that certain categories of information are expressly public. It does not, however, limit what information is considered to be public. This is stated explicitly: "*Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from disclosure under this chapter unless they are expressly confidential under other law[.]*" Gov't Code § 552.022(a) (emphasis added). Thus, public information is not limited to those categories listed in section 552.022.¹

¹The Act defines public information broadly as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business . . . (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." Gov't Code § 552.002(a).

Next, you contend that the submitted information is excepted from disclosure under section 552.103 of the Government Code, since it deals with an employee who will be a witness in pending criminal litigation. To secure the protection of section 552.103, a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 at 1 (1991). You do not indicate that the department or any employee of the department is *a party* to the criminal litigation. Thus, you have not demonstrated that the department has a litigation interest in the submitted records. Therefore, we have no basis for concluding that any of the submitted information is excepted from disclosure under section 552.103.

Next, you claim that the requested information is excepted under section 552.108(a). Section 552.108 of the Government Code provides as follows:

(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.

Gov't Code § 552.108. Generally, a governmental body claiming 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(e)(1)(a); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that "the requestor or the requestor's client, has been Indicted for Deadly Conduct and the matter is now pending in the criminal courts of Dallas County." Here, the request asks for the personnel records of a particular police officer. You do not explain, nor is it apparent from the face of the submitted documents, how the officer's personnel file relates to the pending criminal prosecution. *But see Morales v. Ellen*, 840 S.W.2d 519, 526 (Tex. App.--El Paso 1992, writ denied) (section 552.108 applicable where

criminal investigation or prosecution of police officer resulted from internal investigation). Therefore, you may not withhold any of the submitted information under section 552.108.

Next, you claim that certain information within the submitted documents is protected from disclosure by sections 552.101 and 552.102 and the common law right of privacy. 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 for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101 of the Government Code. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), cert. denied, 430 U.S. 931 (1977).

Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," which includes information protected by the common law right of privacy. 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. *Id.* at 685. 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.

You claim that the officer's "psychological history" is protected from disclosure under the common law right of privacy. Within the submitted documents, we do not find any such history. The submitted documents contain job evaluations that pertain to the work behavior and job performance of a city police officer, and as such cannot be deemed outside the realm of public interest. See Open Records Decision Nos. 484 (1987) (public's interest in knowing how police departments resolve complaints against police officer ordinarily outweighs officer's privacy interest), 470 (1987) (public employee's job performance or abilities generally not protected by privacy). Thus, you may not withhold the submitted evaluations under sections 552.102 or 552.101 in conjunction with common law privacy.

On the other hand, we do find that information within some of the other documents that you have submitted is protected under common law privacy. 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. Open Records Decision Nos. 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 the common law right of privacy. Open Records Decision No. 545 (1990) (deferred compensation plan). On the other hand, information revealing that an employee participates in a group insurance plan funded partly or wholly by the governmental body is not excepted from disclosure by the common law right of privacy. Open Records Decision No. 600 at 10 (1992). Some of the submitted documents contain information about payroll deductions made to an investment account. You must withhold any deductions that are voluntary and not funded partly or wholly by the department under section 552.101 in conjunction with common law privacy.

The common law privacy protecting personal financial information also extends to optional benefit choices and beneficiary information. See Open Records Decision No. 600 at 11 (1992). Thus, you must also withhold that information, which we have marked, under section 552.101 in conjunction with common law privacy.

Next, we find that the requested documents contain information that is excepted from disclosure under section 552.117(2). The department must withhold those portions of the records that reveal the officer's home addresses, home telephone numbers, and social security numbers, or whether the officer has family members.² The department must also withhold the officers' former home addresses and telephone information from disclosure. See Open Records Decision No. 622 (1994). We have marked a representative sample of the types of information that must be withheld under section 552.117(2).

We also find that some of the submitted information is excepted from public disclosure by section 552.119 of the Government Code. Section 552.119 excepts from public disclosure a photograph of a peace officer 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. Section 552.119 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). Several photographs within the submitted documents contain the depiction of a peace officer, and none of the exceptions apply. Unless the officer consents to the release of these photographs, they must be withheld under section 552.119 of the Government Code.

Next, we find that some of the submitted documents were prepared by emergency medical service ("EMS") paramedics. Section 773.091 of the Health and Safety Code provides in part:

²Because we conclude that the submitted social security numbers are protected under section 552.117(2) of the Government Code, we need not address whether they are confidential under the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I).

(b) Records of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

Therefore, you must withhold most of the information contained in the EMS records. However, subsection (g) of section 773.091 provides that information as to the "presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient receiving emergency medical services" is not protected by the confidentiality provisions of section 773.091. Thus, this information must be released. We have marked the documents that are subject to section 773.091.

Next, we find that the submitted documents include accident report forms that appear to have been completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer's accident report). The Seventy-fourth Legislature amended section 47 of article 6701d, V.T.C.S. to provide for release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *See* Act of May 27, 1995, 74th Leg., R.S., ch. 894, § 1, 1995 Tex. Gen. Laws 4413. Further, the Seventy-fourth Legislature also repealed and codified article 6701d as section 550.065 of the Transportation Code without substantive change. *See* Act of May 1, 1995, 74th Leg., R.S., ch. 165, §§ 24, 25, 1995 Tex. Gen. Laws 1025, 1870-71.³ In section 13 of Senate Bill 1069, the Seventy-fifth Legislature amended section 550.065 of the Transportation Code to provide for release of accident reports under specific circumstances. *See* Act of May 29, 1997, 75th Leg., R.S., ch. 1187, § 13, 1997 Tex. Gen. Laws 4575, 4582-83 (current version at Transp. Code § 550.065). The Seventy-fifth Legislature also repealed section 47 of article 6701d, V.T.C.S. in section 16 of Senate Bill 1069. *Id.* § 16(b), 1997 Tex. Gen. Laws 4575, 4583.

However, a Travis County district court has issued a permanent injunction enjoining the enforcement of the amendment to section 550.065 of the Transportation Code enacted by section 13 of Senate Bill 1069. *See Texas Daily Newspaper Ass'n v. Cornyn*, No. 97-08930 (345th Dist. Ct., Travis County, Tex., April 26, 2000). The district court has declared that the law in effect prior to the passage of Senate Bill 1069 now governs and remains unaffected

³Because 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 of section 47 of article 6701d, V.T.C.S. is preserved and given effect as part of the code provision. *See* Gov't Code § 311.031(c). In 1997, the Seventy-fifth Legislature enacted Senate Bill 898 and amended section 550.065 of the Transportation Code to conform to section 47 of article 6701d as enacted by the Seventy-fourth Legislature and repealed article 6701d. *See* Act of May 8, 1997, 75th Leg., R.S., ch. 165, § 30.125, 1997 Tex. Gen. Laws 327, 648-49.

by the permanent injunction. We have determined that the law in effect prior to the passage of Senate Bill 1069 was section 47 of article 6701d, V.T.C.S.⁴

Section 47(b)(1) of article 6701d 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:

....

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). *See* Act of May 27, 1995, 74th Leg., R.S., ch. 894, § 1, 1995 Tex. Gen. Laws 4413.⁵ 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. *See id.* Here, the requestor has not provided the department with two of the three pieces of information that are required for release of the submitted accident reports. Thus, you must withhold those reports, which we have marked, under section 47(b)(1) of article 6701d, V.T.C.S.

⁴ Although the Seventy-fifth Legislature enacted Senate Bill 898 prior to the passage of Senate Bill 1069, Senate Bill 898 was not effective until September 1, 1997. *See* Act of May 8, 1997, 75th Leg., R.S., ch. 165, § 33.01, 1997 Tex. Gen. Laws 327, 712. Further, Senate Bill 1069 expressly provides that to the extent of any conflict, Senate Bill 1069 prevails over another Act of the Seventy-fifth Legislature. *See* Act of May 29, 1997, 75th Leg., R.S., ch. 1187, § 16(c), 1997 Tex. Gen. Laws 4575, 4583. If irreconcilable amendments are enacted at the same session of the legislature, the latest in date prevails. *See* Gov’t Code § 311.025(b). Because Senate Bill 898 was never effective and later amendments prevail, we conclude that section 47 of article 6701d, V.T.C.S. was the law in effect prior to the passage of Senate Bill 1069 regarding the availability of accident report information rather than section 550.065 as amended by Senate Bill 898.

⁵ We note that the text of amended section 47 of article 6701d is not found in Vernon’s Revised Civil Statutes or in the Transportation Code. However, section 47 of article 6701d is published in the 1995 General and Special Laws of the 74th Legislature at chapter 894, section 1. *See* 1995 Tex. Gen. Laws 4413.

Finally, we find within the submitted documents information that is protected from disclosure by section 552.130. That section provides 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[.]

You must withhold all of the Texas driver's license numbers, vehicle identification numbers, and license plate numbers under section 552.130.

To summarize: First, you may not withhold any of the submitted information under section 552.022, because that section of the Act does not provide any exceptions to disclosure. Second, you may not withhold any of the submitted information under section 552.103 because you have not demonstrated that the department is a party to the litigation. Third, you may not withhold any of the submitted information under section 552.108(a) because you do not explain how and why the release of the requested information would interfere with law enforcement. Fourth, you may not withhold any of the information in the officer's performance evaluations. You must, however, withhold information about the officer's allocation of his salary to a voluntary investment program and information about the officer's designated beneficiaries under section 552.101 in conjunction with the common law right of privacy. Fifth, you must withhold those portions of the records that reveal the officer's home addresses, home telephone numbers, and social security numbers, and whether the officer has family members, under section 552.117(2). Sixth, you must withhold the photographs within the submitted documents that contain the depiction of a peace officer under section 552.119. Seventh, you must withhold the peace officer accident reports under section 47(b)(1) of article 6701d, V.T.C.S. Eighth, and finally, you must withhold the information that is protected from disclosure by section 552.130. All of the remaining information must be released.

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,



Stephen P. Agan
Assistant Attorney General
Open Records Division

SPA/seg

Ref: ID# 146542

Encl. Submitted documents

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