



May 15, 2001

Ms. Paige D. Scherr
Hayes, Coffey & Berry, P.C.
P.O. Box 50149
Denton, Texas 76205

OR2001-1996

Dear Ms. Scherr:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 147243.

The Town of Trophy Club Police Department (the “department”) received a request for the personnel file, incident report, and internal affairs report regarding a specified officer. You state that you are making responsive documents available to the requestor. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative samples of information.¹

Initially, we note that the submitted investigation report in Exhibit E-1 is subject to section 552.022(a)(1) of the Government Code. Section 552.022(a) provides in pertinent part:

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 required disclosure under this chapter unless they are expressly confidential under other law:

¹In reaching our conclusion here, we 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.

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Section 552.103 is a discretionary exception under the Public Information Act and is, therefore, not "other law" that makes the submitted information confidential. *See* Open Records Decision No. 551 (1990) (statutory predecessor to section 552.103 serves only to protect a governmental body's position in litigation and does not itself make information confidential): However, you also claim section 552.108 for the submitted investigation report. Accordingly, we will address the applicability of section 552.108 of the Government Code to the investigation report.

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 explain that the Texas Rangers investigated a sexual assault allegation against a department police officer at the request of the department's director. The Texas Rangers drafted the submitted report and provided a copy to the department as well as to the Denton County District Attorney's Office. You inform us that the criminal trial of the officer is currently scheduled for March 12, 2001. Based on your representations and our review of the submitted information, we find that release of the investigation report in Exhibit E-1 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); *see also* Open Records Decision No. 474 (1987) (where incident is still under active investigation, section 552.108 may be invoked by any proper custodian of information which relates to incident).

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. Section 552.101 of the Government Code, however, protects the identity of sexual assault victims. Section 552.101 protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information protected by the common law right of privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

The doctrine of common law privacy protects information that contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and the information must be of no legitimate concern to the public. *Id.* Any information tending to identify sexual assault victims must be withheld pursuant to common law privacy. *See* Open Records Decision No. 393 (1983). Thus, any information tending to identify the sexual assault victim must not be disclosed as basic

information. Thus, with the exception of the basic front page offense and arrest information, you may withhold the investigation report in Exhibit E-1 from required disclosure under section 552.108(a)(1) of the Government Code. We note that you have the discretion to release all or part of the remaining investigation report that is not otherwise confidential by law. Gov't Code § 552.007.

You also assert that information that you have marked in Exhibits E-5, E-6, and E-8 is excepted under 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 for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101 of the Government Code. *See Industrial Found.*, 540 S.W.2d at 683-85 (providing that the doctrine of common law privacy protects information that contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and the information must be of no legitimate concern to the public).

This office has found that the following types of information are excepted from required public disclosure under 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), and 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). After reviewing the submitted information, we agree that the financial information you marked in Exhibit E-8 must be withheld under sections 552.101 and 552.102 in conjunction with common law privacy. We have also marked an insurance policy number in Exhibit E-8 which must be withheld under sections 552.101 and 552.102 in conjunction with common law privacy. However, we do not agree that the medical information you marked in Exhibits E-5 and E-6 is excepted under sections 552.101 and 552.102 in conjunction with common law privacy. Accordingly, you must release this medical information.

You also assert that information in Exhibits E-2, E-3, E-4, E-5, E-7, E-8, and E-9 is excepted under section 552.117(2) of the Government Code. Section 552.117(2) excepts 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, regardless of whether the peace officer made an election under section 552.024 of the Government Code. *See also* Open Records Decision No. 670 (2001) (providing that a governmental body may withhold information under section 552.117(2) without requesting a decision from this

office). Section 552.117(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. If the individual is currently a peace officer as defined by article 2.12 of the Code of Criminal Procedure, we agree that you must withhold most of the information you have marked under section 552.117(2). We note that Exhibit E-9 should be withheld in its entirety. We have also marked additional information in Exhibits E-3 and E-6 and have marked less information to be withheld in Exhibits E-5 and E-7. However, if the individual is not a peace officer as defined by article 2.12 of the Code of Criminal Procedure, then section 552.117(2) is not applicable.

However, we note that section 552.117(1) makes confidential the same types of information covered by section 552.117(2) but for current and former employees of governmental bodies who request that this information be kept confidential under section 552.024. Therefore, section 552.117(1) requires the department to withhold the home address, home telephone number, social security number, and family member information of any former employee who has submitted a timely election under section 552.024. *See* Open Records Decision Nos. 622 (1994), 455 (1987).

Moreover, the social security number of a former employee who has not submitted a timely election under section 552.024 may be nevertheless confidential under section 552.101 in conjunction with federal law. Social security numbers and related records are excepted from disclosure under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), *if the social security number information was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990.* *See* Open Records Decision No. 622 (1994). However, it is not apparent to us that the social security number was obtained or is maintained by the department 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 department to obtain or maintain a social security number. Therefore, we have no basis for concluding that the social security number at issue was obtained or is maintained pursuant to such a statute and is, therefore, confidential under section 405(c)(2)(C)(viii)(I). We caution the department, 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 number, the department should ensure that this number was not obtained or is maintained by the city pursuant to any provision of law enacted on or after October 1, 1990.

You also claim that driver's license numbers in Exhibits E-5 and E-8 are excepted under section 552.130 of the Government Code. Section 552.130(a) of the Government Code excepts 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 agree that you must withhold the information that you marked under section 552.130. We have also marked additional information in Exhibit E-8, including VIN numbers and license plate numbers, which you must withhold under section 552.130(a) of the Government Code.

In conclusion, you may withhold the submitted investigation report in Exhibit E-1 under section 552.108(a)(1), but you must release basic information, except for the identity of the sexual assault victim which you must withhold under section 552.101 in conjunction with common law privacy. With regard to the remaining exhibits, you must withhold the financial information under sections 552.101 and 552.102 of the Government Code. You must also withhold the marked information under section 552.130 of the Government Code. You must withhold the marked information under section 552.117(2) if the individual to whom the information relates is a peace officer as defined by section 2.12 of the Code of Criminal Procedure. If the individual is not a peace officer, then you must withhold the marked information under section 552.117(1) if the employee made a timely section 552.024 election. If no election was made, then you must release the information marked to be withheld under section 552.117 with the exception of the social security number if it is made confidential under federal law. You 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).

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,



Jennifer H. Bialek
Assistant Attorney General
Open Records Division

JHB/sdk

Ref: ID# 147243

Encl: Submitted documents

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(w/o enclosures)