



July 3, 2001

Mr. Steven M. Kean
Senior Assistant City Attorney
City of Tyler
P.O. Box 2039
Tyler, Texas 75710

OR2001-2867

Dear Mr. Kean:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 149032.

The Tyler Police Department (the "department") received a request for ten categories of information concerning various peace officers and a department employee. You state that you have spoken with the requestor about narrowing the scope of the request. *See* Gov't Code § 552.222. You state that the department has no information responsive to request numbers 8 and 10. You state that you have released some of the information to the requestor. You also have submitted representative samples of the requested information deemed to be protected from the personnel files maintained by the civil service director.¹ You claim that the submitted information is excepted from disclosure under sections 552.026, 552.101, 552.102, 552.114, 552.115, 552.117, 552.119, and 552.130 of the Government Code. We have considered your claims and reviewed the submitted information.

Initially, we note that you state that there is no document responsive to request item number three. Rather, you state that it is a request for information. The Public Information Act does

¹ 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.

not ordinarily require a governmental body to take affirmative steps to create or obtain information that is not in its possession, Open Records Decision No. 534 (1989). However, a governmental body has a duty to make a good faith effort to relate a request for information to information the governmental body holds. Open Records Decision No. 561 at 8 (1990). Thus, if the department has information responsive to request item number three, it must release the information because it has not asserted an exception to withhold the information.

Next, we turn to your arguments under section 552.101. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 261.201(a) of the Family Code provides as follows:

(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, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Because one of the submitted documents relates to an allegation of sexual assault of a child, the document is within the scope of section 261.201 of the Family Code. You have not indicated that the department has adopted a rule that governs the release of this type of information. Therefore, we assume that no such regulation exists. Given that assumption, the submitted document related to Incident Report No. 1-01-000984 is confidential pursuant to section 261.201 of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute). Accordingly, the department must withhold Incident Report No. 1-01-000984 from disclosure under section 552.101 of the Government Code as information made confidential by law.

You raise section 143.089 of the Local Government Code, which contemplates two different types of personnel files, one that the civil service director or designee is required to maintain as part of the police officer's civil service file, and one that the city's police department may maintain for its own internal use. *See* Local Gov't Code § 143.089(a), (g). Section 143.089 of the Local Government Code provides in pertinent part:

(a) The director [of the police officers' civil service] or the director's designee shall maintain a personnel file on each . . . police officer. The personnel file must contain *any* letter, memorandum, or document relating to:

....

(1) a commendation, congratulation, or honor bestowed on the . . . police officer by a member of the public or by the employing department for an action, duty, or activity that relates to the person's official duties;

(2) any misconduct by the . . . police officer if the letter, memorandum, or document is from the employing department and *if the misconduct resulted in disciplinary action by the employing department in accordance with this chapter.*

....

(g) A . . . police department may maintain a personnel file on a . . . police officer employed by the department for the department's use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a . . . police officer. The department shall refer to the director or the director's designee a person or agency that requests information that is maintained in the . . . police officer's personnel file.

Local Gov't Code § 143.089(a)(2), (g) (emphasis added).

You state that the City of Tyler is a civil service city. You also state the request for the officers' personnel files was "referred to Ray Rose, Civil Service Director, Tyler Staff Services Department." You indicate that for the purpose of this request, the Staff Services Department will release the officers' personnel files as kept by the Staff Services Department maintained under section 143.089(a), subject to the cited exceptions. You also state that the personnel file of a non-officer will be released, subject to the cited exceptions. You have submitted the civil service personnel files to this office. However, you have not submitted the department's internal personnel files responsive to the request.

Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. You did not, however, submit the requested department's internal personnel files. Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the information is public and must be

released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Because you have not submitted the information, we have no basis for finding it confidential. Thus, we have no choice but to order the information released per section 552.302. If you believe the information is confidential and may not lawfully be released, you must challenge the ruling in court as outlined below.

We will consider your claimed exceptions as to the submitted personnel files. The submitted information includes Employment Eligibility Verification Form I-9's. Form I-9 is governed by section 1324a of Title 8 of the United States Code, which provides that the form "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. 8 U.S.C. § 1324a(b)(5); *see* 8 C.F.R. § 274a.2(b)(4). Release of this document under the Public Information Act would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we conclude that the department must withhold the marked Form I-9's.

The submitted documents also contain tax return information. Section 6103(a) of title 26 of the United States Code provides that tax return information is confidential. Therefore, the department must withhold the W-2 and W-4 forms.

The personnel files contain information made confidential under section 552.101 of the Government Code in conjunction with section 855.115 of the Government Code. Section 855.115 provides, in relevant part:

(a) Information contained in records that are in the custody of the retirement system concerning an individual member, retiree, annuitant, or beneficiary is confidential under Section 552.101, and may not be disclosed in a form identifiable with a specific individual unless:

(1) the information is disclosed to:

(A) the individual or the individual's attorney, guardian, executor, administrator, conservator, or other person who the director determines is acting in the interest of the individual or the individual's estate;

(B) a spouse or former spouse of the individual after the director determines that the information is relevant to the spouse's or former spouse's interest in member accounts, benefits, or other amounts payable by the retirement system;

(C) a governmental official or employee after the direct determines that disclosure of the information requested is reasonably necessary to the performance of the duties of the official or employee; or

(D) a person authorized by the individual in writing to receive the information; or

(2) the information is disclosed pursuant to a subpoena and the director determines that the individual will have a reasonable opportunity to contest the subpoena.

(b) This section does not prevent the disclosure of the status or identity of an individual as a member, former member, retiree, deceased member or retiree, or beneficiary of the retirement system.

We have marked the information that must be withheld under section 552.101 in conjunction with section 855.115.

Section 552.101 also includes the doctrine of common law privacy. Common law privacy protects information if it is highly intimate or embarrassing such that its release would be highly objectionable to a reasonable person and the public has no legitimate interest in it. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). This office has determined that some personal financial information is highly intimate or embarrassing and thus meets the first part of the *Industrial Foundation* test. Open Records Decision Nos. 600 (1992) (personal financial choices concerning insurance are generally confidential), 545 (1990) (common law privacy protects personal financial information not relating to the financial transaction between an individual and a governmental body), 523 (1989) (common law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (common law privacy protects assets and income source information). However, information concerning financial transactions between an employee and a public employer is generally of legitimate public interest. *Id.* Therefore, financial information relating to benefits must be disclosed if it reflects the employee's mandatory contributions to the benefits plan. Open Records Decision No. 600 (1992). On the other hand, information is excepted from disclosure if it relates to a voluntary investment that the employee made in an option benefits plan offered by the city. *Id.* The department must withhold information concerning an employee's decision to obtain optional insurance coverages that is not wholly or partly paid for by the department.

You also assert that the submitted transcripts are excepted under sections 552.026 and 552.114 of the Government Code. Section 552.026 provides that the Public Information Act does not require the release of information contained in education records except in conformity with the Federal Educational Rights and Privacy Act (FERPA). *See* 20 U.S.C.

§ 1232(g). Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. Because the department is not an educational agency or institution, the submitted transcripts are not education records to which FERPA or section 552.114 applies. *See* 20 U.S.C. § 1232(g)(a)(3) (defining educational agency or institution under FERPA). Consequently, the submitted transcripts are not excepted under section 552.101 in conjunction with FERPA or sections 552.026 and 552.114 of the Government Code.

We next address your argument under section 552.115. Section 552.115 provides that a birth record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official is excepted from required public disclosure. Since section 552.115 only applies to a birth certificate maintained by the bureau of vital statistics or local registration official, the department may not withhold the certificate of birth registration in the personnel file pursuant to that provision. *See* Open Records Decision No. 338 (1982). However, some of the information in the birth certificate must be withheld under section 552.117 as discussed below.

We next turn to your arguments under section 552.117. Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. 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). Therefore, the department may only withhold information under section 552.117 on behalf of the employee if she made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. The department may not withhold this information under section 552.117 if the employee did not make a timely election to keep the information confidential.

We note that the requested records also contain information that is excepted from disclosure under section 552.117(2). Section 552.117(2) applies to a peace officer as defined under article 2.12 of the Code of Criminal Procedure. The department must withhold those portions of the records that reveal the peace officers' home addresses, home telephone numbers, social security numbers, and family member information regardless of whether the officers made an election under section 552.024. The city must also withhold the officers' *former* home addresses.

We next address your argument under section 552.119. 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.² The three exceptions are: (1) the officer is under indictment or charged with an offense by information; (2) the

²"Peace officer" is defined by article 2.12 of the Code of Criminal Procedure.

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 and it does not appear that any of the exceptions 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 depicting peace officers.

We next address your argument under section 552.130. Section 552.130 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[.]

We have marked the Texas driver's license numbers and other information that you must withhold under section 552.130.

Finally, the department contends that the criminal investigation files involving a specific individual are excepted under section 552.108. As discussed above, because the department has not submitted the information as required by section 552.301(e), the information is presumed public and must be released to the requestor. Gov't Code § 552.302.

In summary, we understand you to state for the purpose of this request, the Staff Services Department will release the non-officer's personnel file, subject to the cited exceptions noted herein. We also understand you state that the officers' personnel files as kept by the Staff Services Department maintained under section 143.089(a), subject to the cited exceptions noted herein.

The department must withhold Incident Report No. 1-01-000984 from disclosure under section 552.101 of the Government Code as information made confidential by section 261.201 of the Family Code. The department must withhold the Form I-9's under section 1324a of Title 8 of the United States Code. The department must withhold tax return information under section 6103(a) of Title 26 of the United States Code.

In addition, for the non-officer employee who timely elected to keep her personal information confidential, the department must withhold her home address and telephone number, social

security number, and any information that reveals whether she has family members. The department may not withhold this information under section 552.117 if she did not make a timely election to keep the information confidential. The department must withhold those portions of the records that reveal an officers' home addresses, home telephone numbers, social security numbers, and family member information under section 552.117(2). The department must withhold the photographs depicting peace officers under section 552.119. Furthermore, the department must withhold the personnel file information we have marked under common law privacy, and personal financial information concerning optional insurance coverages. Finally, the department must withhold the Texas driver's license numbers and information we have marked 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).

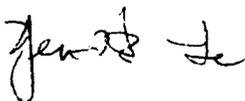
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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).

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,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/DKB/seg

Ref: ID# 149032

Enc. Submitted documents

c: Mr. Erick Platten
Attorney at Law
217 West Houston
Tyler, Texas 75702
(w/o enclosures)