



August 6, 2001

Mr. J. Robert Giddings  
University of Texas System  
201 West 7<sup>th</sup> Street  
Austin, Texas 78701-2981

OR2001-3417

Dear Mr. Giddings:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 150366.

The University of Texas at Austin (the "university") received a request for eight categories of information related to the University of Texas Police Department and eight named individuals. You inform us that you agree to release records responsive to item 4 of the request; we assume that you have already released those records to the requestor. Your letter to the requestor states that the university is making available to the requestor documents that are responsive to requested items 1, 3 and 4. You also state that you do not have any documents responsive to item 6 of the request.<sup>1</sup> You claim that portions of the requested information are excepted from disclosure under sections 552.101, 552.102, 552.108<sup>2</sup>,

---

<sup>1</sup>The Public Information Act does not ordinarily require a governmental body to obtain information not in its possession. Open Records Decision Nos. 558 (1990), 499 (1988).

<sup>2</sup>Although you claim that section 552.108 applies to portions of the submitted information, you do not explain how and why. Conclusory assertions that a particular exception applies to requested information will not suffice. If the university does not establish how and why an exception applies to the requested information, this office has no basis on which to pronounce it protected. Open Records Decision No. 363 (1983), *see* Gov't Code §552.301(e)(1)(A) (requiring a government body to submit to the attorney general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld.) Therefore, we do not address your section 552.108 claim.

552.115, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.<sup>3</sup>

We first note that some of the submitted records contain information that has been blacked out (Tab 11). Your obliteration of this information has made it difficult for this office to determine whether any exception to disclosure is applicable to this information.

You claim that some of the information contained in the personnel files of the named individuals, which you have submitted as Tabs 3 - 11, is excepted from disclosure under section 552.101 in conjunction with common law privacy and under section 552.102. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information that is 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. *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* includes 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.

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. Accordingly, we will consider your section 552.101 and section 552.102 claims together.

This office has held that personal financial information not related to a financial transaction between an individual and a governmental body is protected by common law privacy. See Open Records Decision Nos. 600 (1992), 545 (1990). On the other hand, a public employee's job performance does not generally constitute his private affairs. Open Records Decision No. 470 (1987). The public has a genuine interest in information concerning a public employee's job performance and the reasons for dismissal, demotion or promotion. Open Records Decision No. 444 at 5-6 (1986). In addition, the public has a legitimate interest in the job qualifications, including college transcripts, of public employees.

---

<sup>3</sup> Since you do not indicate that the information submitted is a representative sample, you must release all records not submitted to this office that are responsive to the request, with the exception of the information about Officer Bailey which this office addresses in another ruling, Open Records Letter No. 2001-####(2001).

ORD 470. We find that a portion of the information within the submitted documents is protected by common law privacy, and must be withheld under section 552.101 of the Government Code in conjunction with common law privacy. We have marked the information that is private.

The information contained in Tabs 12 and 13 relates to a complaint of alleged sexual harassment against an officer. In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the common law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

You indicate that a summary of the investigation, a memorandum from Lt. Ewan to Chief Van Slyke dated December 8, 1999, has been released. Therefore the legitimate public interest in the matter has been satisfied. Therefore, based on *Ellen*, the university must withhold the identities and statements of the victim and witnesses. The university must release the statement of the person under investigation with redaction of information that identifies the victim. We have marked the information that must be withheld in Tabs 12 and 13.

Section 552.101 also excepts information that is made confidential by statute. Criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") must be withheld under section 552.101. 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) of the Government Code 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 that must be withheld under section 552.101 of the Government Code.

The submitted information also contains a declaration of medical condition (Tab 3) and declarations of psychological and emotional health (Tab 4). These declarations are made confidential by section 1701.306 of the Occupations Code,<sup>4</sup> which provides, in relevant part, as follows:

(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. We have marked the information that must be withheld pursuant to section 1701.306 of the Occupations Code.

The Report of Psychological Evaluation included with the submitted information is a mental health record that is protected from disclosure under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code. Chapter 611 of the Health and Safety Code provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) provides:

---

<sup>4</sup>The Seventy-sixth legislature enacted section 1701.306 of the Occupations Code and repealed section 415.057 of the Government Code without substantive change.

Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

Health & Safety Code § 611.002. Section 611.001 defines a "professional" as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See* Health and Safety Code § 611.001. Sections 611.004 and 611.0045 provide for access to mental health records only for certain individuals. *See* Open Records Decision No. 565 (1990). We have marked the mental health record that may only be disclosed as provided by the access provisions of sections 611.004 and 611.0045 of the Health and Safety Code.

We note that the personnel files you submitted to this office for review include an Employment Eligibility Verification, Form I-9 (Tab 10). Form I-9 is governed by title 8, section 1324a 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 Form I-9 is confidential under section 552.101 and may only be released in compliance with the federal laws and regulations governing the employment verification system.

While you make reference to the pending complaint against Officer Sellers Bailey, you do not include those records here. You inform us that those records are the subject of a request to this office in Open Records Letter No. 2001-3416 (2001). To the extent that the elements of law, fact, and circumstances are the same in both cases, you may rely on the ruling in OR2001-3416 regarding the required public disclosure of that information. Open Records Decision No. 673 (2001).

The requested records contain information that is excepted from disclosure under section 552.117 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. Section 552.117(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. If the individual is a peace officer as defined by article 2.12 of the Code of Criminal Procedure, you must withhold the marked information under section 552.117(2). 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 city 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).

Further, you assert that copies of birth certificates in Tab 9 are excepted under section 552.115 of the Government Code. Birth or death records maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official are excepted from required public disclosure under section 552.115 of the Government Code. However, since the birth certificates at issue do not appear to be held by the bureau of vital statistics or local registration officials, section 552.115 is inapplicable. You must, however, withhold the marked information in the birth certificates under section 552.117 of the Government Code.

The submitted documents also contain driver's license numbers, license plate numbers, vehicle identification numbers, and photocopies of officers' driver's licenses. 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[.]

You must withhold the Texas driver's license number, photocopies of drivers' licenses, vehicle information numbers, and license plate numbers under section 552.130.

In summary, CHRI, the I-9 form, the report of psychological evaluation, and the medical and psychological declarations are all made confidential by statute and must be withheld under section 552.101. The identities and statements of the victim and witnesses in the sexual harassment complaint, as well as the marked financial information, must be withheld under common law privacy in conjunction with section 552.101. The university must withhold those portions of the records that reveal an officer's home address, home telephone number, and social security number, and whether the officer has family members, under section 552.117. The university must withhold all Texas driver's license numbers, photocopies of Texas driver's licenses, license plate numbers and vehicle identification

numbers under section 552.130. The remaining information must be released to the requestor.

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 black ink, appearing to read "Cindy Nettles". The signature is fluid and cursive, with the first name "Cindy" written in a larger, more prominent script than the last name "Nettles".

Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/seg

Ref: ID# 150366

Enc. Submitted documents

c: Ms. Kristin Finan  
6812 Terra Oak Circle  
Austin, Texas 78749  
(w/o enclosures)