



November 9, 2001

Mr. G. Chadwick Weaver
First Assistant City Attorney
City of Midland
P.O. Box 1152
Midland, Texas 79702-1152

OR2001-5182

Dear Mr. Weaver:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 154597.

On August 21, 2001, the City of Midland (the "city") received a request for numerous categories of information regarding city policies, specific police officers, and particular events involving those officers. On August 29, 2001, the city received a modified request from the requestor informing the city that the requestor no longer needed access to many of the categories of information. The categories of information still being sought include the following: (a) personnel files for two police officers, (b) an audio tape recording of dispatch transmissions for a given date and time, (c) cellular phone numbers and the name of service providers for the communication devices issued to two police officers, (d) internal affairs files on two police officers, (e) files concerning the discharge of a particular officer's weapon. You claim that some of the requested information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.117, and 552.130 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

First, we consider your claim that the information in Exhibits B-1 at page 4, B-3 at tab IA01-010, B-4, and B-5 is excepted from disclosure under section 552.108(a)(1). Section 552.108(a) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime." 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

¹ We assume you have released the remaining requested information to the requestor. See Gov't Code §§ 552.301, .302.

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 requested information relates to an on-going criminal investigation and that the submitted information has been forwarded to the district attorney's office for presentation to a grand jury. Based on your representations and our review of the documents, we agree that the submitted internal affairs records are excepted from disclosure under section 552.108. *But see Morales v. Ellen*, 840 S.W.2d 519, 526 (Tex. App.--El Paso 1992, writ denied) (section 552.108 not applicable where no criminal investigation or prosecution of police officer resulted from investigation of allegation of sexual harassment); *see also* Open Records Decision No. 350 (1982) (predecessor provision of section 552.108 not applicable to Internal Affairs Division investigation file when no criminal charge against officer results from investigation of complaint against police officer).

Section 552.108, however, is inapplicable to basic information about an arrested person, an arrest, or a crime. *See* Gov't Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle Publishing Company 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). Thus, with the exception of basic information, you may withhold the information in Exhibits B-1 at page 4, B-3 at tab IA01-010, B-4, and B-5 from disclosure based on section 552.108(a)(1). We note that you have the discretion to release all or part of the remaining information that is not otherwise confidential by law. *See* Gov't Code § 552.007.

Second, we consider your claim that information concerning several internal affairs investigations in Exhibit B-3 at tabs IA01-06-9, IA98-09-02, IA99-09-02, and IA97-10-06 is excepted from disclosure under sections 552.101 and 552.102 because there is no legitimate public interest in the information. 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 as incorporated by section 552.101 of the Government Code.² *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy excepts from disclosure private facts about an individual. *See id.* Therefore, information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *See id.* at 685; Open Records Decision No. 611 at 1 (1992). The type of information considered intimate

² Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

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. *Id.* at 683.

This office has stated in numerous formal decisions that there is a legitimate public interest in how a public employee conducts himself while on-duty and how he performs his job functions. *See* Open Records Decision Nos. 484 (1987) (public's interest in knowing how police departments resolve complaints against police officers ordinarily outweighs officers' privacy interest), 470 at 4 (1987) (public has legitimate interest in job performance of public employees), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 423 at 2 (1984) (scope of public employee privacy is narrow), 329 (1982) (reasons for an employee's resignation are not ordinarily excepted by constitutional or common-law privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees). After reviewing the submitted information, we conclude that the submitted investigations may not be withheld in their entirety under common-law privacy. However, some portions of the investigations are confidential under common-law privacy, and we have marked them accordingly.

Section 552.101 also encompasses information protected by other statutes. The submitted information contains police reports involving juvenile conduct that occurred before and after January 1, 1996. 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. *See* Act of May 22, 1993, 73rd Leg., R.S. ch. 461, § 3, 1993 Tex. Gen. Laws 1850, 1852, *repealed by* Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 100, 1995 Tex. Gen. Laws 2517, 2590. 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. *See* Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 106, 1995 Tex. Gen. Laws 2517, 2591. Therefore, the police reports pertaining to juvenile conduct that occurred before January 1, 1996 must be withheld. Likewise, juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential under 58.007 of the Family Code, as amended by the Seventy-sixth Legislature. Thus, the police reports pertaining to juvenile conduct that occurred after September 1, 1997 must be withheld. Accordingly, we have marked the information that you must withhold under sections 51.14(d) and 58.007 of the Family Code in conjunction with section 552.101.

Third, you claim that certain pages of Exhibits B-1 and B-2 are excluded from disclosure under section 552.111. Section 552.111 excepts from required public disclosure interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policymaking process. *See Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ); Open Records Decision No. 615 at 5 (1993). The purpose of this section is "to protect from public disclosure advice and opinions *on policy matters* and to encourage frank and open

discussion within the agency in connection with its decision-making processes.” *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref’d n.r.e.) (emphasis added). However, an agency’s policymaking functions do not encompass internal administrative or personnel matters, for disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000); *Lett v. Klein Indep. Sch. Dist.*, 917 S.W.2d 455 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (records relating to problems with specific employee do not relate to making of new policy but merely implement existing policy); Open Records Decision No. 615 at 5-6 (1993). *But see* Open Records Decision No. 631 (1995) (finding personnel matters of a broader scope were excepted from disclosure under section 552.111). After reviewing the submitted information in Exhibits B-1 and B-2, we believe that it relates to internal personnel matters rather than policy matters of the city. Accordingly, you may not withhold the submitted information under section 552.111.

Fourth, you claim that the home addresses, telephone numbers, and social security numbers of police officers referenced in Exhibit B are excepted under section 552.117. Section 552.117(2) excepts from public disclosure information that reveals a peace officer’s home address, home telephone number, social security number, and whether the officer has family members. “Peace officer” is defined by article 2.12 of the Code of Criminal Procedure. We therefore agree that the city must withhold the officers’ social security numbers, home addresses, and telephone numbers. We have marked the information you must withhold accordingly.

We note that the investigations contain social security numbers that are not excepted from disclosure under section 552.117. Those additional social security numbers may, however, be withheld in some circumstances under section 552.101. 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 investigations 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 city pursuant to any provision of law, enacted on or after October 1, 1990.

Fifth, we consider your claims under section 552.130. Section 552.130 excepts 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 have marked the driver's license and vehicle registration numbers you must withhold.

Sixth, you assert that section 552.108(b) of the Government Code excepts the cellular phone numbers of police officers. Section 552.108(b) excepts from disclosure "[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution[.]" This section excepts from disclosure the internal records and notations of law enforcement agencies and prosecutors when their release would interfere with law enforcement and crime prevention. *See* Open Records Decision No. 531 at 2 (1989) (quoting *Ex parte Pruitt*, 551 S.W.2d 706, 710 (Tex. 1977)). When section 552.108(b) is claimed, the agency claiming it must reasonably explain, if the information does not supply the explanation on its face, how releasing the information would interfere with law enforcement. *See* Open Records Decision No. 434 at 3 (1986).

In Open Records Decision No. 506 (1988), this office held that the predecessor to section 552.108(b) "protects the cellular mobile phone numbers assigned to county officials and employees with specific law enforcement responsibilities." Open Records Decision No. 506 at 2 (1988). As you represent that cellular phone numbers in question are those of law enforcement officers, we agree that release of the cellular mobile phone numbers would interfere with law enforcement. Accordingly, the city may withhold the cellular numbers in Exhibit C.

In sum, you may not withhold Exhibits B-1 and B-2 under section 552.111 because those exhibits pertain to internal personnel matters, not city policy matters. However, you may withhold Exhibits B-1 at page 4, B-3 at tab IA01-010, B-4, and B-5 under section 552.108(a)(1), with the exception of basic information. Furthermore, we marked the portions of Exhibit B-3 at tabs IA01-06-9, IA98-09-02, IA99-09-02, and IA97-10-06 that you must withhold under common-law privacy. We also marked the police reports involving juvenile conduct that must be withheld under section 552.101 in conjunction with sections 51.14(d) and 58.007 of the Family Code. In addition, we marked the information about peace officers in Exhibit B that must be withheld pursuant to section 552.117. In that regard, we have noted that some social security numbers in Exhibit B are not covered by section 552.117 but may nevertheless be confidential under federal law. We also marked the information in Exhibit B that is confidential under section 552.130. Finally, pursuant to section 552.108(b), you may withhold the cellular phone numbers in Exhibit C.

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).

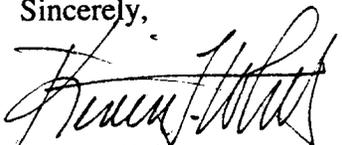
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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



Kevin White

Assistant Attorney General
Open Records Division

KJW/seg

Ref: ID# 154597

Enc. Submitted documents

c: Mr. D. Lance Lunsford
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