



November 29, 2001

Mr. James A. Farren
Criminal District Attorney
County of Randall
501 16th Street
Canyon, Texas 79015

OR2001-5538

Dear Mr. Farren:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 154816.

The Randall County Sheriff's Department (the "department") received a written request for, among other things, the entire personnel file of a named departmental employee, who, you advise, is a licensed peace officer.¹ You contend that portions of the requested personnel file are excepted from required public disclosure pursuant to sections 552.101, 552.108, 552.114, 552.115, 552.117, and 552.119 of the Government Code. We will discuss the applicability of these exceptions in turn.

Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." We first note that some of the information at issue is made confidential by statutes found outside the Public Information Act and thus must be withheld from the public pursuant to section 552.101. Among the documents at issue is criminal history record information ("CHRI") obtained from the National Crime Information Center ("NCIC") and the Texas Crime Information Center ("TCIC"). The dissemination of CHRI obtained from the NCIC network is limited by federal law. *See* 28 C.F.R. § 20.1; Open Records Decision No. 565 at 10-12 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. Open Records Decision No. 565 at 10-12 (1990). 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 the CHRI except to another criminal justice agency for a criminal justice purpose. Gov't Code § 411.089(b)(1). Thus, any CHRI generated by the federal government or another state may not be made available to the

¹You inform us that other requested records have been released to the requestor.

requestor except in accordance with federal regulations. Furthermore, any CHRI obtained from the Texas Department of Public Safety or any other criminal justice agency must be withheld as provided by Government Code chapter 411, subchapter F.

However, driving records are not criminal history record information. Gov't Code § 411.082(2)(B). Consequently, although the department must withhold all CHRI obtained from the TCIC and NCIC, the department must release the employee's driving record information to the requestor. We have marked the CHRI that the department must withhold pursuant to section 552.101 of the Government Code.

We additionally note that fingerprints are specifically excluded from the definition of CHRI. Gov't Code § 411.082(2)(A). However, the Seventy-seventh Legislature recently added sections 559.001, 559.002, and 559.003 to the Government Code, effective September 1, 2001.² These new statutes provide as follows:

Sec. 559.001. DEFINITIONS. In this chapter:

- (1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.
- (2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 559.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

- (1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:
 - (A) the individual consents to the disclosure;
 - (B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or
 - (C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and

²See Act of May 24, 2001, 77th Leg., R.S., H.B. 678, § 2 (to be codified as Gov't Code §§ 559.001, .002, and .003).

(2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 559.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

The submitted documents include fingerprint information that is governed by these statutes. It does not appear to this office that section 559.002 permits the disclosure of this information to the requestor. Therefore, the department must withhold the fingerprint information we have marked pursuant to section 559.003 of the Government Code.

The requested personnel file also contains the employee's medical records. Section 159.002 of the Medical Practice Act (the "MPA"), which is codified at subtitle B of title 3 of the Occupations Code, provides in pertinent part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

The MPA includes provisions that govern the disclosure of information that it encompasses. *See* Occ. Code §§ 159.003, 159.004, 159.005, 159.006. The department therefore may release the medical records, which we have marked, only in accordance with the MPA.

The submitted information also contains a declaration of medical condition and a declaration of psychological and emotional health, which are both made confidential by section 1701.306 of the Occupations Code,³ 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

³The Seventy-sixth legislature enacted section 1701.306 of the Occupations Code and repealed section 415.057 of the Government Code without substantive change.

(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.

Finally, we note that some of the documents at issue contain the social security numbers of individuals other than the employee. Social security numbers are excepted from required public disclosure under section 552.101 of the Government Code 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 numbers were obtained or are 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). It is not apparent to us that the social security numbers were obtained or are 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 numbers were obtained or are maintained pursuant to such a statute and are therefore confidential under section 405(c)(2)(C)(viii)(I). We caution, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing the social security numbers, the department should ensure that these numbers were not obtained and are not maintained by the department pursuant to any provision of law enacted on or after October 1, 1990.

You also contend that certain information contained in the personnel file is excepted from public disclosure pursuant to section 552.101 of the Government Code in conjunction with the common law right of privacy. Although you have raised section 552.101, in this instance we believe the more appropriate exception to be raised is section 552.102(a), which protects “information in a *personnel file*, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy . . .” (Emphasis added.) *See also* Open Records Decision No. 327 (1982) (anything relating to employment relationship is part of personnel file).

Section 552.102(a) is designed to protect public employees' personal privacy. The scope of section 552.102(a) protection, however, is very narrow. *See* Open Records Decision No. 336 (1982); *see also* Attorney General Opinion JM-36 (1983). The test for section 552.102(a) protection of common law privacy is the same as that for section 552.101: the information must contain 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. *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e.).

Some of the submitted information reveals the employee's credit history. In Open Records Decision No. 373 (1983), this office addressed the availability of personal financial information submitted to a city by an applicant for a housing rehabilitation grant. In that decision, this office concluded:

all financial information relating to an individual -- including sources of income, salary, mortgage payments, assets, medical and utility bills, social security and veterans benefits, retirement and state assistance benefits, and credit history -- ordinarily satisfies the first requirement of common law privacy, in that it constitutes highly intimate or embarrassing facts about the individual, such that its public disclosure would be highly objectionable to a person of ordinary sensibilities.

Open Records Decision No. 373 at 3. Whether the public has a legitimate interest in such information, however, must be determined on a case-by-case basis. *Id.* at 4; *see also* Open Records Decision Nos. 600 (1992); 545 (1990). For example, in Open Records Decision No. 545, this office applied a similar presumption to personal financial information of public employees and held that, absent "special circumstances," information concerning a public employee's participation in a deferred compensation plan is protected from disclosure by common law privacy. Open Records Decision No. 545 at 4-5.

We conclude that information reflecting the employee's credit history is highly intimate or embarrassing. Moreover, the information you have provided does not indicate any special circumstances that would make the applicant's personal financial information a matter of legitimate public concern. Accordingly, the department must withhold the financial information, as well as other private information, we have marked pursuant to section 552.102 of the Government Code.

We now address the applicability of the other exceptions to public disclosure that you have raised. You contend that the documents you submitted as Exhibit L are excepted from public disclosure pursuant to the "law-enforcement exception," section 552.108 of the Government Code, because these documents contain "the TCLEOSE agency number." You contend that the disclosure of this number "could possibly endanger the security of the database." Section 552.108 protects information the disclosure of which would interfere with law enforcement

or prosecution. To prevail on a claim that section 552.108 excepts information from disclosure, a governmental body must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement; the governmental body must demonstrate how release of the information would interfere with law enforcement and crime prevention unless the information supplies this explanation on its face. *See* Open Records Decision No. 508 at 2 (1988). You have not met your burden of demonstrating the applicability of this exception to the TCLEOSE agency number. Accordingly, the department may not withhold this information from the requestor pursuant to section 552.108 of the Government Code.

You next contend that the employee's high school diploma is excepted from public disclosure under section 552.114 of the Government Code. This exception applies to "information in a student record at an educational institution funded wholly or partly by state revenue." The department is not an "educational institution" for purposes of section 552.114. Accordingly, this exception is inapplicable here, and thus the diploma is not protected by section 552.114.

You next contend that the employee's birth certificate is excepted from public disclosure pursuant to section 552.115 of the Government Code. Birth or death records held by the bureau of vital statistics or local registration officials are excepted from required public disclosure under section 552.115 of the Government Code. However, because the birth certificate in this case is not held by the bureau of vital statistics or local registration officials, section 552.115 is inapplicable. Accordingly, the department may not withhold the officer's birth certificate pursuant to section 552.115.

We note, however, that the birth certificate, as well as other documents, contain information that the department must withhold pursuant to section 552.117(2) of the Government Code. Section 552.117(2) of the Government Code requires the department to withhold the following categories of information pertaining to a peace officer, as defined by article 2.12, Code of Criminal Procedure: the officer's current and former home addresses, home telephone number, social security number, and information revealing whether the officer has family members. Open Records Decision No. 622 (1994). Unlike other public employees, a peace officer need not affirmatively claim confidentiality for this information. Open Records Decision No. 488 (1988); *see also* Open Records Decision No. 506 (1988). We agree that the department must withhold all section 552.117(2) information from the public.⁴

You also contend that photographs of the employee are excepted from public disclosure. Section 552.119 of the Government Code excepts from public disclosure a photograph of a peace officer which, 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

⁴We have marked the "family member" information the department must withhold under section 552.117(2).

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 if the peace officer gives written consent to the disclosure. Open Records Decision No. 502 (1988). Assuming that none of the exceptions is applicable in this instance, we conclude that unless the employee consents to the release, the department must withhold the employee's photographs pursuant to section 552.119 of the Government Code.

Finally, we note that the records at issue contain information that must be withheld pursuant to section 552.130(a)(1) of the Government Code, which requires the department to withhold "information [that] relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state." Also, section 552.130(a)(2) of the Government Code requires the withholding of information relating to "a motor vehicle title or registration issued by an agency of this state." Consequently, the department must withhold all Texas driver's licenses, driver's license numbers, and all Texas license plate numbers and registration information contained in the records at issue pursuant to section 552.130 of the Government Code.

In summary, the department must withhold the following information: the employee's CHRI (but not driving record information) pursuant to section 411.089 of the Government Code, all fingerprints pursuant to section 559.003 of the Government Code, and medical declarations pursuant to section 1701.306 of the Occupations Code. Furthermore, the medical records we have marked may be released only in accordance with the MPA. The department must also withhold pursuant to section 552.102 of the Government Code the information we have marked as coming within the common law right of privacy. All of the employee's section 552.117(2) information must be withheld, as well as the employee's photographs. Finally, the department must withhold all Texas driver's licenses, driver's license numbers, and all Texas license plate numbers and registration information contained in the records at issue pursuant to section 552.130 of the Government Code. The remaining information in the personnel file 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).

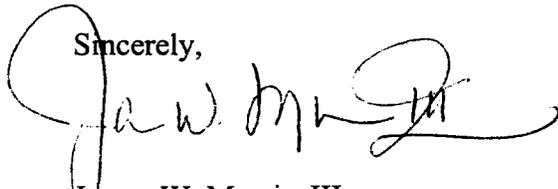
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/RWP/sdk

Ref: ID# 154816

Enc. Submitted documents

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(w/o enclosures)