



May 8, 2002

Ms. Myrna S. Reingold
Galveston County
4127 Shearn Moody Plaza
123 Rosenberg
Galveston, Texas 77550-1454

OR2002-2447

Dear Ms. Reingold:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 162582.

The Galveston County Sheriff Department (the “department”) received a request for all personnel records of a former sheriff’s deputy. You indicate that the department has released some of the requested information. However, you claim that the remainder of the requested information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.115, 552.117, 552.1175, 552.119, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We begin by addressing your arguments under section 552.108 of the Government Code. Section 552.108 of the Government Code provides, in part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

- (1) release of the information would interfere with the detection, investigation, or prosecution of crime;
- (2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication

(b) An 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 is excepted from the requirements of Section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution

(2) the internal records or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication

Generally, a governmental body claiming section 552.108(a)(1) or (b)(1) must reasonably explain, if the information does not supply the explanation on its face, how and why the 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). On the other hand, a governmental body claiming section 552.108(a)(2) or (b)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication.

You state that the submitted offense report and supplementary information pertain to an investigation that did not result in a conviction or deferred adjudication. Consequently, we agree that section 552.108(a)(2) applies to the offense report and supplemental information. We note, 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 Publishing 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). Thus, with the exception of the basic front page offense and arrest information, you may withhold the submitted offense report and supplemental information from disclosure based on section 552.108(a)(2). We note that you have the discretion to release all or part of the remaining information that is not otherwise confidential by law. Gov't Code § 552.007.

You also contend that the release of certain internal documents, including an internal affairs investigation, daily logs, a map of the jail, and deputy assignment sheets, would interfere with law enforcement efforts. In *Morales v. Ellen*, the El Paso Court of Appeals determined that an internal affairs investigation could not be withheld under section 552.108 unless the internal affairs investigation resulted in a criminal investigation or prosecution. 840 S.W.2d 519, 525-26 (Tex. App.--El Paso 1992, writ denied). Because you do not indicate and it does not appear that the internal affairs investigation at issue resulted in a criminal investigation or prosecution, we find that the department may not withhold the internal affairs investigation under section 552.108. On the other hand, this office has stated that under the statutory predecessor to section 552.108(b), a governmental body may withhold information

that would reveal law enforcement techniques. *See, e.g.*, Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines would unduly interfere with law enforcement), 456 (1987) (release of forms containing information regarding location of off-duty police officers in advance would unduly interfere with law enforcement), 413 (1984) (release of sketch showing security measures to be used at next execution would unduly interfere with law enforcement), 409 (1984) (if information regarding certain burglaries exhibit a pattern that reveals investigative techniques, information is excepted under section 552.108), 341 (1982) (release of certain information from Department of Public Safety would unduly interfere with law enforcement because release would hamper departmental efforts to detect forgeries of drivers' licenses), 252 (1980) (section 552.108 is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). To claim this exception, however, a governmental body must meet its burden of explaining, if the requested information does not supply the explanation on its face, how and why release of the requested information would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). Furthermore, generally known policies and techniques may not be withheld under section 552.108. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common law rules, and constitutional limitations on use of force are not protected under section 552.108), 252 at 3 (1980) (governmental body did not meet burden because it did not indicate why investigative procedures and techniques requested were any different from those commonly known). You indicate that the release of the daily logs, jail map, and deputy assignment sheets could impair security by revealing details that could allow individuals to escape detention. Based on your assertions, we find that the department may withhold the submitted daily logs, jail map, and deputy assignment sheets under section 552.108(b)(1) of the Government Code.

Next, we turn to your arguments under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Employee W-4 forms are confidential under section 6103(a) of title 26 of the United States Code. Open Records Decision No. 600 (1992). Consequently, the department must withhold the submitted W-4 form under section 552.101 of the Government Code and section 6103(a) of title 26 of the United States Code.

Likewise, an Employment Eligibility Verification, 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 the submitted Form I-9 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.

You also contend that the submitted documents contain fingerprint information that is confidential under chapter 559 of the Government Code. Chapter 559 of the Government Code provides, in relevant part:

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
- (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.

You state that none of the circumstances allowing for disclosure of the fingerprints applies here. Therefore, the department must withhold the fingerprints under section 552.101 in conjunction with section 559.003 of the Government Code.

Next, you contend that the submitted information contains confidential medical records. We note that some of the documents you have marked as medical records are confidential under section 1701.306 of the Occupations Code. Section 1701.306 of the Occupations Code 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. The submitted documents contain a “Declaration of Medical Condition” and a “Declaration of Psychological and Emotional Health” that are confidential pursuant to section 1701.306 of the Occupations Code. We have marked these documents, which must be withheld under section 552.101 of the Government Code.

The other document you have marked as a medical record is a record of a clinical psychologist and is governed by chapter 611 of the Health and Safety Code. Section 611.002 of the Health and Safety Code provides that “[c]ommunications 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.” A “professional” is defined as:

(A) a person authorized to practice medicine in any state or nation;

(B) a person licensed or certified by this state to diagnose, evaluate, or treat any mental or emotional condition or disorder; or

(C) a person the patient reasonably believes is authorized, licensed, or certified as provided by this subsection.

Sections 611.004 and 611.0045 of the Health and Safety Code provide for the release of information made confidential under section 611.002(a) in certain circumstances. None of the circumstances provided in either section 611.004 or section 611.0045 appears to apply the mental health record at issue. Therefore, the department must withhold the mental health record, which we have marked, under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code.

The submitted information also contains an "F-5" notice of termination form. An F-5 form is made confidential by section 1701.454 of the Occupations Code. Section 1701.452 of the Occupations Code requires that a law enforcement agency submit a report to the Commission on Law Enforcement Officer Standards and Education regarding an officer licensed under chapter 1701 whose appointment with the law enforcement agency is terminated. *See Occ. Code § 1701.452.* Section 1701.454(a) provides, "A report or statement submitted to the commission under this subchapter is confidential and is not subject to disclosure under Chapter 552 of the Government Code." Occ. Code § 1701.454. Therefore, the department must withhold the F-5 form pursuant to section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

You also argue that some of the submitted information is confidential under common-law privacy. Section 552.101 encompasses the doctrines of common-law and constitutional 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* 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. 540 S.W.2d at 683. Likewise, prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy. However, there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). Thus, a public employee's allocation of his salary to a voluntary investment program offered by his employer is a personal investment decision, and information about it is excepted from disclosure by a common law right of privacy. ORD 600 (TexFlex benefits), 545 (deferred compensation plan). However,

the salary of a public employee and an employee's participation in an insurance program funded wholly or partially by the state are not excepted from disclosure. Open Records Decision Nos. 600 (1992), 342 (1982). We have marked the personal financial information in the submitted documents that is confidential under common-law privacy. We note that you have marked other information in the submitted documents concerning alleged sexual misconduct involving the former deputy that you apparently seek to withhold as private information. We find that the information concerning the alleged sexual misconduct is of legitimate public concern and is not protected under common-law privacy. See Open Records Decision Nos. 444 at 5-6 (1986) (public has interest in public employee's qualifications and performance and the circumstances of his resignation or termination), 405 at 2-3 (1983) (public has interest in manner in which public employee performs his job), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former section 552.101 or 552.102), 208 at 2 (1978) (information relating to complaint against public employee and disposition of the complaint is not protected under either the constitutional or common law right of privacy).

You contend that information revealing the names of individuals who made deposits into an inmate's commissary account is confidential under constitutional privacy. Constitutional privacy protects two kinds of interests. See Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987); see also *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). The first is the interest in independence in making certain important decisions related to the "zones of privacy," pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. See Open Records Decision No. 455 at 3-7 (1987); see also *Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981). The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. See Open Records Decision No. 455 at 6-7 (1987); see also *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985), *reh'g denied*, 770 F.2d 1081 (1985), cert. denied, 474 U.S. 1062 (1986). This type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). We have previously found that lists of inmate visitors and correspondents are confidential under the second type of constitutional privacy. See Open Records Decision Nos. 430 (1985), 428 (1985), 185 (1978). While most of the information you seek to withhold under constitutional privacy is already protected under common-law privacy as personal financial information, one record is not confidential under common-law privacy because it relates to alleged employee misconduct and is of legitimate interest to the public. Similarly, we find under the constitutional privacy analysis that any privacy interest the interested parties may have in keeping the record of the commissary deposit private is outweighed by the legitimate public interest in the record. See Open Records Decision Nos. 444 at 5-6, 405 at 2-3, 329 at 2, 208 at 2. Thus, while the

department must withhold most of the commissary deposit records under common-law privacy, the commissary deposit record relating to the alleged employee misconduct is not protected under either common-law or constitutional privacy and must be released.

Next, you contend that the submitted information contains criminal history record information ("CHRI") that is confidential under both common-law privacy and statute. Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given."), (2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Section 411.083 of the Government Code provides that any CHRI maintained by the Department of Public Safety ("DPS") is confidential. Gov't Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *Id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Furthermore, where an individual's criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual's right to privacy. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). Some of the information submitted for our review is CHRI generated by TCIC and NCIC and therefore must be withheld from disclosure under section 552.101 of the Government Code. The remainder of the information you have marked as CHRI was not generated by TCIC, NCIC, or another criminal justice agency, nor was it compiled by the department. Therefore, the remainder of the information you have marked as CHRI is not protected under the federal regulations, section 411.084, or common-law privacy.

Next, you contend that some of the submitted information is excepted from disclosure under section 552.117 of the Government Code. Section 552.117(2) provides:

Information is excepted from [required public disclosure] if it is information that relates to the home address, home telephone number, or social security number, or that reveals whether the following person has family members:

...

- (2) a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under Section 51.212, Education Code, regardless of whether the officer complies with Section 552.024.

Thus, the department must withhold those portions of the submitted documents that reveal a licensed peace officer's home address, home telephone number, social security number, and family member information. *See* Open Records Decision No. 670 at 5-6 (2001) (A governmental body "may withhold home addresses and home telephone numbers of peace officers, in addition to social security numbers and information that reveals whether the peace officer or security officer has family members, without the necessity of requesting an Attorney General decision as to whether the exception under section 552.117(2) applies"). We have marked the information that must be withheld under section 552.117(2).

You also argue that some of the submitted information is excepted from disclosure under section 552.130 of the Government Code. 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[.]

Therefore, the department must withhold the Texas driver's license number information contained in the submitted information, which we have marked, under section 552.130.

You next claim that a birth certificate contained in the submitted information is excepted from disclosure under section 552.115 of the Government Code. Section 552.115 excepts from public disclosure birth or death records maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official. Since the birth certificate at issue is held by the department and not the bureau of vital statistics or local registration officials, section 552.115 is inapplicable.

In summary, the department may withhold the submitted offense report and supplemental information under section 552.108(a)(2), with the exception of basic information. The department may also withhold the submitted daily logs, jail map, and deputy assignment sheets under section 552.108(b)(1). The department must withhold the submitted W-4 form under section 552.101 of the Government Code and section 6103(a) of title 26 of the United States Code. Likewise, the department must withhold the submitted Form I-9 under section 552.101 and section 1324a of title 8 of the United States Code. The marked fingerprints must be withheld under sections 552.101 and 559.003 of the Government Code. Furthermore, the "Declaration of Medical Condition" and "Declaration of Psychological and Emotional Health" must be withheld under section 552.101 and section 1701.306 of the Occupations Code. We have also marked a page that must be withheld under

section 552.101 in conjunction with section 611.002 of the Health and Safety Code. The submitted F-5 notice of termination form must be withheld under section 552.101 and section 1701.454 of the Occupations Code. The department must withhold all of the personal financial information that we have marked under section 552.101 and common-law privacy. The department must also withhold the home address, home telephone number, social security number, and family member information of a peace officer under section 552.117(2) of the Government Code. Finally, the department must withhold the marked driver's-license information under section 552.130 of the Government Code. The department must release the remainder of the submitted information.¹

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).

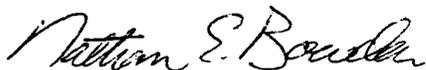
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

¹ Based on our findings, we need not reach the remainder of your arguments.

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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/sdk

Ref: ID# 162582

Enc: Submitted documents

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