



August 6, 2002

Ms. Linda Jackson
City Secretary
City of Maypearl
P.O. Box 400
Maypearl, Texas 76064

OR2002-4321

Dear Ms. Jackson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 166852.

The City of Maypearl (the "city") received a written request for the personnel records of two city employees. You state that some responsive information has been released to the requestor. You contend, however, that certain other information contained in the personnel file of one of the city employees is excepted from required public disclosure pursuant to sections 552.101 and 552.117 of the Government Code.¹

We note at the outset your assertion that you signed a letter with the city that certain information would be kept confidential by the city. Information is not confidential under the Public Information Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied* 430 U.S. 931 (1977). In other words, a governmental body cannot, through a contract, overrule or repeal provisions of the Public Information Act. Attorney General Opinion JM-672 (1987). Consequently, unless the requested information falls within one of the act's exceptions to disclosure, it must be released, notwithstanding any agreement specifying otherwise.

We next note, and you acknowledge, that you did not make a timely request for a decision from this office. Section 552.301(a) of the Government Code requires a governmental body to request a decision from the attorney general within ten business days after receiving a request for information that the governmental body wishes to withhold, unless there has been

¹Because you do not contend that any of the information contained in the other requested personnel file is excepted from public disclosure, we assume that personnel file has been released in its entirety. If it has not, the city must do so at this time. See Gov't Code §§ 552.301, .302.

a previous determination that the requested information is excepted from required public disclosure. You state that the city received the records request on May 2, 2002. However, you did not request a decision from this office until June 4, 2002. When a governmental body fails to comply with the requirements of section 552.301, the information at issue is presumed public. Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). To overcome this presumption, the governmental body must show a compelling reason to withhold the information. Gov't Code § 552.302; *see also Hancock*, 797 S.W.2d at 381.

A compelling reason for withholding information is demonstrated where information is made confidential by other law or where third party interests are at issue. Open Records Decision No. 150 (1977). Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). 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* it is of no legitimate concern to the public. *Id.* at 683-85.

In *Industrial Foundation*, the Texas Supreme Court considered intimate and embarrassing information that relates 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. This office has also determined that common-law privacy protects the following information: the kinds of prescription drugs a person is taking, Open Records Decision No. 455 (1987); the results of mandatory urine testing, *id.*; illnesses, operations, and physical handicaps of applicants, *id.*; the fact that a person attempted suicide, Open Records Decision No. 422 (1984); the names of parents of victims of sudden infant death syndrome, Attorney General Opinion JM-81; and information regarding drug overdoses, acute alcohol intoxication, obstetrical/gynecological illnesses, convulsions/seizures, or emotional/mental distress. Open Records Decision No. 343 (1982).

Additionally, information regarding a financial transaction between an individual and a governmental body is a matter of legitimate public interest; thus, the doctrine of common-law privacy does not generally protect from required public disclosure information regarding such a transaction. *See* Open Records Decision Nos. 590 at 3 (1991), 523 at 3-4 (1989). In contrast, a public employee's participation in a voluntary investment program or deferred compensation plan that his or her employer offers (but does not fund) is not considered a financial transaction between the individual and the governmental body; information regarding such participation is considered intimate and of no legitimate public interest. *See* Open Records Decision No. 545 at 3-5 (1990). Consequently, the doctrine of common-law privacy generally excepts such financial information from required public disclosure.

Upon review, we conclude that none of the information you submitted to this office is highly intimate or embarrassing. You state, however, that you have withheld from the requestor "personnel and financial information such as social security numbers, drivers license numbers, dates of birth and personal references" from the personnel file at issue out of concern for the employee's "personal and financial safety." This office has previously determined that identifying information about public employees may be withheld pursuant to common-law privacy only upon a demonstration of "truly exceptional circumstances such as, for instance, an imminent threat of physical danger." Open Records Decision No. 169 at 6 (1977). You have made no such showing in this particular instance. We therefore conclude that the city may not withhold any of the submitted information on privacy grounds.

As noted above, section 552.101 also requires the withholding of information made confidential under statutory law. Social security numbers are excepted from required public disclosure under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), but only 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 contained in the records at issue were obtained or are maintained by the city 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 city to obtain or maintain a social security number. Therefore, we have no basis for concluding that the social security numbers at issue were obtained or are maintained pursuant to such a statute and are, therefore, confidential under the Social Security Act. 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 city should ensure that these numbers were not obtained or maintained by the city pursuant to any provision of law enacted on or after October 1, 1990.

Contained among the submitted records is a record that has been filed with the Texas Municipal Retirement System. Section 855.115(a) of the Government Code provides that, with certain exceptions not applicable here, "[i]nformation 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." We therefore conclude that the city must withhold the employee's retirement record pursuant to section 855.115(a) in conjunction with section 552.101.

You also raise section 552.117 of the Government Code. Section 552.117(1) of the Government Code requires that the city withhold a city employee's home address, home telephone number, and social security number, as well as information revealing whether the employee has family members, but only if the employee has elected to keep this information confidential in accordance with section 552.024 of the Government Code. Consequently, if the employee made such an election prior to the city's receipt of the open records request,

we conclude that these types of information must be withheld.² *See* Open Records Decision No. 530 (1989). We additionally note, however, that although you seek to withhold other information pursuant to section 552.117(2), which makes confidential the same categories of information pertaining to “a peace officer,” none of the information you submitted to this office consists of the types of information protected by section 552.117(2). Consequently, none of the submitted information may be withheld pursuant to section 552.117(2).

Finally, we note that the submitted records contain the city employee’s driver’s license number. Section 552.130(a)(1) of the Government Code requires the city to withhold “information [that] relates to . . . a motor vehicle operator’s or driver’s license or permit issued by an agency of this state.” Accordingly, the city must withhold all Texas driver’s license numbers pursuant to section 552.130(a)(1) of the Government Code. However, if the driver’s license number was issued by another state, section 552.130(a)(1) would be inapplicable, and the number would have to be released.

In summary, the city is required to withhold from the records at issue any social security number made confidential under the federal Social Security Act, the Texas Municipal Retirement System record, and the city employee’s driver’s license number, if that number was issued in Texas. All of the remaining information at issue 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

²We note, however, that the records you submitted to this office do not contain a section 552.117(1) election that comports with the requirements of section 552.024.

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. 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,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/RWP/sdk

Ref: ID# 166852

Enc: Submitted documents

c: Mr. Darwin Dale Bible
2200 Country Club Drive
Ennis, Texas 75119
(w/o enclosures)