



September 16, 2002

Mr. Sim W. Goodall
Police Legal Advisor
Arlington Police Department
P.O. Box 1065
Arlington, Texas 70064-1065

OR2002-5178

Dear Mr. Goodall:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 168602.

The City of Arlington (the "city") received two written requests for personnel and training records regarding a named police officer and a detention officer. You contend that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108, 552.117, 552.119, and 552.122 of the Government Code.¹

Although you also contend that the requested information is excepted from public disclosure pursuant to article 39.14 of the Code of Criminal Procedure and Rule 192.56 of the Texas Rules of Civil Procedure, we note that you did not raise these provisions within the initial ten business days following the city's receipt of the current records requests. Normally, a governmental body must raise an argument for withholding requested information within the ten business days following the governmental body's receipt of an open records request. *See Gov't Code § 552.301(a)*. This office will not consider arguments raised after the initial ten days unless there exists a compelling reason for doing so. Open Records Decision No. 515 at 6 (1988).

¹ In your initial request for a decision from this office, dated July 12, 2002, you raise section 1703.306 of the Occupations Code with regard to the results of polygraph examinations and section 159.002 of the Occupations Code with regard to medical records. Upon review of the submitted records, however, we find you have not submitted any polygraph results or medical records. Accordingly, we do not further address your claims under sections 1703.306 or 159.002 of the Occupations Code.

A compelling reason for withholding information is shown where that information is made confidential by another source of law or that the release of the information would affect a third party's privacy or property interests. *See* Open Records Decision No. 150 (1977). You argue that the records at issue are excepted from disclosure in their entirety pursuant to article 39.14 of the Code of Criminal Procedure. Article 39.14 governs the discovery of information and the testimony of witnesses in criminal proceedings. This office has determined, however, that discovery privileges generally do not make information confidential by law. *See, e.g.*, Open Records Decision Nos. 575 (1990), 574 (1990) (attorney work-product not protected as information deemed confidential by law under statutory predecessor to section 552.101). We note that the Texas Supreme Court recently held that rules under the Texas Rules of Civil Procedure and Texas Rules of Evidence that expressly make information confidential are "other law" within the meaning of section 552.022 of the Government Code. *In Re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Nevertheless, article 39.14 does not make information expressly confidential. We therefore find that your arguments regarding the applicability of article 39.14 of the Code of Criminal Procedure do not constitute a compelling reason for withholding the requested information. Accordingly, the city may not withhold any of the records at issue under article 39.14 of the Code of Criminal Procedure.

You also raise the attorney work-product privilege under rule 192.5 of the Texas Rules of Civil Procedure. The Texas Rules of Civil Procedure, however, only apply to "actions of a civil nature." Tex. R. Civ. P. 2. Accordingly, the attorney work-product privilege found in rule 192.5 does not apply to the information at issue here. Consequently, we do not further consider your arguments regarding rule 192.5.

We next note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides in part that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, *evaluation*, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1) (emphasis added). The training and personnel records you submitted to this office include completed evaluations. The city must release information subject to section 552.022 unless it is excepted from disclosure under section 552.108 of the Government Code, or is expressly made confidential under other law. Section 552.103 of the Government Code is a discretionary exception to disclosure that protects the governmental body's interests and is therefore not "other law" that makes information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit*

v. Dallas Morning News, 4 S.W.3d 469 (Tex. App.— Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Consequently, the city may not withhold the evaluation records pursuant to section 552.103 of the Government Code.

Although you raise section 552.108, you provide no arguments explaining why section 552.108 applies to the evaluation records. *See Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977) (governmental body claiming section 552.108 must explain, if information does not supply the explanation on its face, how and why release of information would interfere with law enforcement). Consequently, the city may not withhold the evaluation records pursuant to section 552.108 of the Government Code. The evaluation records must therefore be released in their entirety, with the following exceptions.

The submitted evaluation records contain the two city employees' social security numbers. Section 552.117(1) makes confidential, among other things, the social security numbers of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. In this regard, we note that the detention officer has elected to keep his social security number confidential in accordance with section 552.024. Section 552.117(2) requires the city to withhold, among other things, the social security numbers of peace officers as defined by article 2.12 of the Code of Criminal Procedure.² Accordingly, the city must withhold from the evaluation records the two city employees' social security numbers pursuant to section 552.117 of the Government Code. The remaining portions of these records must be released to the requestor.

We now address your claims regarding the remaining training and personnel records. Because sections 552.103 and 552.108 are the more inclusive exceptions that you raise, we will address them first. Section 552.103 of the Government Code is generally referred to as the "litigation exception." To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 (1991) at 1. A governmental body has the burden of providing relevant facts and documents to show that the section 552.103 exception applies in a particular situation. In this instance, you contend that section 552.103 applies because the city employees in question were involved in the arrest and subsequent incarceration of an individual whom the requestor presently represents in a pending criminal case. You state, however, that this case is pending in a Tarrant County court and that the Tarrant County Criminal District Attorney is the prosecuting entity. Consequently, the city has no section 552.103 interest with respect to the pending criminal prosecution. *See* Open Records Decision No. 392 (1983).

²Unlike civilian 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).

Consequently, none of the remaining training and personnel records may be withheld under section 552.103 of the Government Code.

You also contend that the remaining training and personnel records constitute “work product” under section 552.108 of the Government Code. Section 552.108 provides in pertinent part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime [is excepted from required public disclosure] if:

...

(3) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state [and]

(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 required public disclosure] if:

...

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a)(3), (b)(3). The personnel and training records you submitted to this office were neither “prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation” nor reflect “the mental impressions or legal reasoning of an attorney representing the state.” Consequently, the city may not withhold the training and personnel records as “work product” under section 552.108 of the Government Code.

Because the records at issue are not excepted from public disclosure pursuant to either section 552.103 or 552.108, we must address the applicability of the other exceptions you raised. Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that other statutes make confidential. The submitted documents contain the city employees' I-9 and W-4 forms. Section 1324a of title 8 of the United States Code provides that an Employment Eligibility Verification Form I-9 "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. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). The release of submitted I-9 forms in response to this request for information would be "for purposes other than for enforcement" of the referenced federal statutes. A Form I-9 may be released only for purposes of compliance with the federal laws and regulations governing the employment verification system. A W-4 form is confidential under section 6103 of title 26 of the United States Code. Therefore, the city must withhold the I-9 forms and attachments and W-4 forms under section 552.101 of the Government Code in conjunction with federal law.

The submitted records include accident report forms that appear to have been completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (Texas Peace Officer's Accident Report form). Section 550.065(b) of the Transportation Code states that except as provided by subsection (c), accident reports are privileged and confidential. Section 550.065(c)(4) provides for the release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. Transp. Code § 550.065(c)(4). Under this provision, the Department of Public Safety or another governmental body is required to release a copy of an accident report to a person who provides the governmental body with two or more pieces of information specified by the statute. *Id.* Here, because the requestor has not provided two or more of the specified pieces of information, the accident reports are confidential under section 550.065(b). Thus, the city must withhold these documents pursuant to section 552.101 of the Government Code in conjunction with section 550.065 of the Transportation Code.

We next note that the some of the submitted records contain social security numbers of members of the public which may be confidential under federal law. A social security number may be withheld in some circumstances 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 number and related records that are obtained or 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 the social security numbers are confidential under the Social Security Act, and therefore excepted from public disclosure under section 552.101 of the Government Code 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.

Section 552.101 also protects information coming within the common-law right of privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). 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. *Id.*

In *Industrial Foundation*, the Texas Supreme Court considered intimate and embarrassing information such as that 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 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). Some of the submitted records contain information that implicates the privacy interests of members of the public. We have marked the information that the city must withhold on privacy grounds.

Section 552.102(a) of the Government Code excepts from public disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy . . ." Section 552.102(a) is designed to protect public employees' personal privacy. The test for section 552.102(a) protection is the same as that for information protected by common-law privacy under section 552.101. *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App. - Austin 1983, writ ref'd n.r.e.). 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). Employee privacy under section 552.102(a) is less broad than common-law privacy under section 552.101 because of the greater public interest in disclosure of information regarding public employees. Open Records Decision Nos. 269 (1981); 169 (1977). This office has held that section 552.102(a) may be invoked only when information reveals "intimate details of a highly personal nature." Open Records Decision Nos. 315 (1982); 298, 284, 269 (1981); 224 (1979); 169 (1977).

You assert that the personnel records at issue contain some financial information that is protected by common-law privacy. This office has found that personal financial information is generally excepted from required public disclosure under common-law privacy. Open Records Decision Nos. 600 (1992), 545 (1990). This office has also ruled, however, that the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 (1992) (information revealing that employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure). Upon review, we find that portions of the personnel records at issue contain information that reflects personal financial decisions, including designations of beneficiaries. Accordingly, the city must withhold such information, which we have marked, pursuant to section 552.102(a) of the Government Code.

The training and personnel records also contain the home address, home telephone number, and social security numbers of the two city employees, as well as information revealing whether the employees have family members. In this instance, we conclude that the city must withhold all of these categories of information pertaining to the two city employees.³ *See* section 552.117 discussion *supra*.

You argue that several tests contained in the requested training files are excepted from disclosure under section 552.122 of the Government Code. Section 552.122(b) excepts from disclosure test items developed by a licensing agency or governmental body. In Open Records Decision No. 626 (1994), this office determined that the term "test item" in section 552.122 includes any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated, but does not encompass evaluations of an employee's overall job performance or suitability. Whether information falls within the section 552.122 exception must be determined on a case-by-case basis. Open Records Decision No. 626 at 6 (1994). Traditionally, this office has applied section 552.122 where release of "test items" might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). We have marked the documents that the city may withhold under section 552.122 of the Government Code.

Finally, we note that the submitted documents contain driver's license and motor vehicle registration information. 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 the Texas driver's license and driver's license numbers contained in the documents at issue pursuant to section 552.130(a)(1) of the Government Code. 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 city must withhold the

³We have marked some of the information that must be withheld under this exception.

license plate and vehicle identification numbers contained in the submitted records pursuant to section 552.130(a)(2). The remaining submitted information must be released to the requestor, except as discussed above.

In summary, the city must withhold the submitted I-9 and W-4 forms and any confidential social security numbers of members of the public pursuant to section 552.101 of the Government Code in conjunction with federal law. The marked accident report forms must be withheld in accordance with section 550.065 of the Transportation Code. We have marked the information that the city must withhold pursuant to section 552.101 of the Government Code in conjunction with the common-law right of privacy. The city must withhold pursuant to section 552.102(a) the information we have marked that reflects the personal financial decisions of the two city employees. All information revealing the home address, home telephone number, and social security numbers of the two city employees, as well as information revealing whether the employees have family members, must be withheld pursuant to section 552.117. The marked test items may be withheld under section 552.122 of the Government Code. Motor vehicle information must be withheld under section 552.130 of the Government Code. The remainder of the records must be released to the requestor.⁴

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

⁴As our ruling is dispositive as to the submitted officer photographs, we do not address your section 552.119 argument.

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,



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Assistant Attorney General
Open Records Division

CN/RWP/sdk

Ref: ID# 168602

Enc: Submitted documents

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