



September 20, 2002

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

OR2002-5303

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# 168936.

The City of Arlington (the "city") received three requests for personnel and training records regarding three named police officers. You claim 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.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

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

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<sup>1</sup> In your initial request for a decision from this office, dated July 18, 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 any medical records. Accordingly, we do not further address your claims under sections 159.002 and 1703.306 of the Occupations Code.

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).

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 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[.]

The training and personnel records at issue include completed evaluations, completed reports, and completed internal affairs investigations. 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 expressly 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). Thus, the city may not withhold information subject to section 552.022 under section 552.103 of the Government Code.

As sections 552.101, 552.117, and 552.130 may protect information deemed confidential by law or the interests of third parties, we will consider the application of those sections both to the information subject to the purview of section 552.022 and to the remaining submitted information. We will also consider your argument under section 552.108 with respect to all of the submitted information.

You contend that the submitted 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:

...

(4) 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)(4), (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." As you provide no other arguments explaining why section 552.108 applies to the submitted information, the city may not withhold the submitted training and personnel records under section 552.108 of the Government Code. *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); *see also Morales v. Ellen*, 840 S.W.2d 519, 526 (Tex. App.—El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable when internal affairs investigation did not result in criminal investigation or prosecution).

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that other statutes make confidential. 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. 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. Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 100, 1995 Tex. Gen. Laws 2517, 2591 (Vernon).

This office has concluded that section 58.007 of the Family Code, as enacted by the Seventy-fourth Legislature, does not make confidential juvenile law enforcement records relating to conduct that occurred on or after January 1, 1996. Open Records Decision No. 644 (1996). The Seventy-fifth Legislature, however, amended section 58.007 to once again make juvenile law enforcement records confidential effective September 1, 1997. Act of June 2, 1997, 75th Leg., R.S., ch. 1086, 1997 Tex. Sess. Law Serv. 4179, 4187 (Vernon). It chose not to make this most recent amendment retroactive in application. Consequently, law enforcement records pertaining to juvenile conduct that occurred between January 1, 1996 and September 1, 1997, are not subject to the confidentiality provisions of either the former section 51.14(d) or the current section 58.007 of the Family Code.

The submitted information contains records that concern juvenile conduct that occurred prior to January 1, 1996. Therefore, the records that we have marked are confidential under the

former section 51.14(d) of the Family Code and must be withheld from disclosure pursuant to section 552.101 of the Government Code.

The submitted documents also contain the officers' 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.

We note that the documents at issue 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, as 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 of the Government Code also encompasses the doctrine of common-law 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).

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 act. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Accordingly, we will consider your section 552.101 and section 552.102 claims together.

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. 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). 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). 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). Upon review, we find that portions of the records at issue, which we have marked, contain information that

must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

The requested records also contain information that is excepted from disclosure under section 552.117(2). Section 552.117(2) excepts from required public disclosure the home address, home telephone number, social security number, and the family member information of peace officers as defined by article 2.12 of the Code of Criminal Procedure. The city must also withhold the officers' *former* home addresses and telephone information from disclosure. *See* Open Records Decision No. 622 (1994). We have marked some of the information that must be withheld under this exception.

We note that the submitted documents contain driver's license and motor vehicle registration information. 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; or
- (3) a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document.

You must withhold Texas driver's license, identification document, vehicle identification, and license plate numbers under section 552.130.

We now address your claims regarding the remaining training and personnel records. 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 officers 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). In this type of situation, we require an affirmative representation from the governmental body that would be a party to the litigation that it wants the requested information withheld from disclosure under section

552.103. You have failed to provide this office with an affirmative representation from the prosecuting entity that it wants the submitted information withheld from public disclosure. Thus, none of the remaining training and personnel records may be withheld under section 552.103 of the Government Code.

Finally, 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). Additionally, when answers to test questions might reveal the questions themselves, the answers may be withheld under section 552.122(b). *See* Open Records Decision No. 626 at 8 (1994). We have marked the documents that the city may withhold under section 552.122 of the Government Code.

In summary, the city must withhold 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. All information revealing the home address, home telephone number, and social security numbers of 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.<sup>2</sup>

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

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<sup>2</sup>As our ruling is dispositive as to the submitted officer photographs, we do not address your section 552.119 argument.

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. 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,

A handwritten signature in cursive script, appearing to read "Cindy Nettles".

Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/jh

Ref: ID# 168936

Enc. Submitted documents

c: Ms. Mimi Coffey  
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(w/o enclosures)