OFFICE OF THE ATTORNEY GENERAL · STATE OF TEXAS
JOHN CORNYN

September 30, 2002

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

OR2002-5504

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# 169971.

The City of Arlington (the "city") received three written requests for personnel and training records regarding a named former police jailer and two named police officers. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.117, and 552.119 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We note at the outset that the city requested a decision from this office on May 7, 2002, regarding the public availability of personnel information pertaining to one of the officers named in the present requests. We ruled on that request in Open Records Letter No. 2002-3774 (2002), issued July 11, 2002. Subsequently, the City of Arlington filed suit challenging our ruling. The City of Arlington filed Cause No. GV202251, styled *City of Arlington v. John Cornyn, Attorney General, State of Texas*, on July 22, 2002 in the 353rd Judicial District Court of Travis County. To the extent that the present request concerns the availability of information, the required public disclosure of which is before the court in *City of Arlington v. Cornyn*, we do not address such information in the present ruling.

Next, we note that some of the requested 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 you submitted to this office include completed evaluations and a completed background investigation. 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 confidential under other law. You argue that these records are excepted under section 552.103 of the Government Code. Section 552.103 is a discretionary exception to disclosure that protects a 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 information subject to section 522.022 under section 552.103 of the Government Code.

You contend that the information at issue is excepted from disclosure in its entirety pursuant to the attorney work product privilege and 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:
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> . . .
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> (4) it is information that:
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> (A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or
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> (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.

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 any portion of the training and personnel records as attorney work product under section 552.108 of the Government Code.

We next address your claims that the information subject to section 552.022 is confidential under section 552.101 of the Government Code in conjunction with other law. 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. You argue that the records at issue are excepted in their entirety under section 552.101 in conjunction with 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 that discovery privileges do not make information confidential by law under section 552.101. *See* 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. *In Re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Nevertheless, article 39.14 does not make information expressly confidential. Therefore, we find that article 39.14 of the Code of Criminal Procedure does not constitute "other law" for purposes of section 552.022 of the Government Code. Accordingly, the city may not withhold the records at issue under article 39.14 of the Code of Criminal Procedure.

You argue that rule 192.5 of the Texas Rules of Civil Procedure makes the information at issue confidential pursuant to the attorney work product privilege. The Texas Rules of Civil Procedure, however, only apply to "actions of a civil nature." Tex. R. Civ. P. 2. You state that the information at issue relates to criminal prosecutions. 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 under rule 192.5.

Next, with respect to the submitted information not subject to section 552.022, we address your claims under section 552.103 of the Government Code. Section 552.103 protects information related to pending or reasonably anticipated litigation to which the state or a political subdivision is a party. 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. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under 552.103(a).

In this instance, you contend that section 552.103 applies because the city police officer and jailer in question were involved in the arrests and subsequent incarceration of individuals whom the requestor presently represents in pending criminal cases. You state, however, that these cases are pending in Tarrant County courts and that the Tarrant County Criminal District Attorney is the prosecuting entity. Consequently, the city is not a party to the criminal litigation arising out of arrests made by the officer in question. *See* Open Records Decision No. 392 (1983) (statutory predecessor to section 552.103 applies only where the governmental body claiming the exception is a party or expects to be a party to the litigation). In this situation we require an affirmative representation from the prosecuting attorney in the litigation that he or she wants the requested information withheld from disclosure under section 552.103. Based on the language and purpose of section 552.103, it is incumbent upon the prosecuting attorney to specify the particular pending case and the particular information related to that case that the prosecuting attorney seeks to withhold under section 552.103. Here, we note that you state that the city has obtained the prosecuting attorney's affirmative representation. We find, however, that you make reference to several pending criminal cases in which the police officer and former police jailer may testify and you have not identified what specific information the prosecuting attorney in each prosecution wishes to withhold under section 552.103 with respect to that case. Without this representation from the prosecuting attorney in each case, we are unable to determine that any of the personnel and training information at issue is related to any particular pending litigation. Accordingly, we determine that none of the training and personnel records at issue here may be withheld under section 552.103 of the Government Code.

Criminal history record information ("CHRI") obtained from the National Crime Information Center ("NCIC") or the Texas Crime Information Center ("TCIC") is confidential under federal law and subchapter F of chapter 411 of the Government Code. 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.") and (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. *See* Gov't Code §411.083(a); *see also id.* §§ 411.106(b), .082(2) (defining criminal history record information). Similarly, CHRI obtained from the DPS pursuant to statute also is confidential

and may be disclosed only in very limited instances. *See 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). Thus, to the extent that the records at issue contain any criminal history record information obtained from the TCIC or NCIC networks, that information must be withheld under section 552.101 in conjunction with federal law and subchapter F of chapter 411 of the Government Code.

You assert that the personnel records at issue contain some financial information that is also 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) (public employee's decisions regarding personal financial matters such as a voluntary investment program, voluntary benefits programs, and voluntary direct deposit, among others, are protected under common-law privacy), 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 No. 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, which we have marked, contain information that reflects personal financial decisions that are not of legitimate public interest. Accordingly, the city must withhold such information under section 552.101 and common-law privacy.

The submitted documents also contain the individuals' 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 information also contains an L-2 Declaration of Medical Condition and an L-3 Declaration of Psychological and Emotional Health required by the Texas Commission on Law Enforcement Officer Standards and Education that are confidential pursuant to Section 1701.306 of the Occupations Code. Section 1701.306 provides 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
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> (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.
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> (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.

Therefore, the city must withhold the marked declarations under section 552.101 in conjunction with section 1701.306 of the Occupations Code.

Section 1703.306 of the Occupations Code prohibits the public disclosure of the results of polygraph examinations. We agree that the polygraph examination results in the submitted documents must be withheld under section 552.101 in conjunction with section 1703.306 of the Occupations Code.

The records at issue also contain information that is excepted from disclosure under section 552.117 of the Government Code. Section 552.117(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information 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.

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. One of the individuals at issue here is a commissioned peace officer. Accordingly, the city must withhold the marked personal information pertaining to this individual under section 552.117(2) of the Government Code. With respect to the former police jailer, we note that this individual has elected to release his address and phone number. We are unable to determine from the information provided whether this individual has elected to keep his social security number and family member information confidential. We are also unable to determine whether this individual is a "peace officer" as defined in article 2.12. Thus, we have marked a sample of the information the city must withhold pursuant to section 552.117(1) of the Government Code, if this employee is not a peace officer and if this employee timely elected to keep his social security number and family member information confidential pursuant to section 552.024.

The submitted documents contain photographs of the peace officer at issue. A photograph that depicts a peace officer is excepted from public disclosure, unless 1) the officer is under indictment or charged with an offense by information; (2) the officer is a party in a fire or police civil service hearing or a case in arbitration; or (3) the photograph is introduced as evidence in a judicial proceeding. This section also provides that a photograph exempt from disclosure under this section may be made public only if the peace officer gives written consent to the disclosure. It does not appear that any of the exceptions to section 552.119 apply. Furthermore, you have not informed us that the peace officer depicted in the photographs executed a written consent to disclosure of the pictures. Thus, the city must withhold the marked photographs under section 552.119, unless the city obtains written consent from the peace officer for their disclosure.

We also note that the submitted documents contain driver's license and motor vehicle information. Section 552.130 provides for the confidentiality of Texas motor vehicle license and registration information. The city must withhold the information we have marked pursuant to section 552.130.

In summary, to the extent the records at issue contain criminal history record information, the city must withhold such information pursuant to section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. We have marked personal financial information that the city must withhold under section 552.101. The city must withhold I-9 and W-4 forms under section 552.101 in conjunction with federal law. The marked TCLEOSE declarations must be withheld under section 552.101 in conjunction with section 1701.306 of the Occupations Code. The results of a polygraph examination must be withheld under section 552.101 in conjunction with section 1703.306 of the Occupations Code. We have marked the personal information of the named police officer that the city must withhold under section 552.117(2) of the Government Code. If the named former police jailer is not a peace officer, and if the jailer elected to keep his social security number and family member information confidential pursuant to section 552.024, then this information must be withheld under section 552.117(1) of the Government Code. Photographs of the police officer must be withheld under section 552.119 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.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.*

§ 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. 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,

David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 169971

Enc: Submitted documents

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