



October 17, 2002

Mr. Charles E. Zech
City Attorney
City of New Braunfels
P.O. Box 311747
New Braunfels, Texas 78131-1747

OR2002-5899

Dear Mr. Zech:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 170840.

The City of New Braunfels (the "city") received a request for any documents regarding the previous firing and subsequent rehiring of Officer Richard Benitez. You ask whether any of the requested information is excepted from disclosure under sections 552.101, 552.108, and 552.117 of the Government Code. We have considered the exceptions you raise and reviewed the submitted information.

Initially, we note that the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides 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). In this instance, the submitted information pertains to a completed investigation. Thus, this information must be released under section 552.022(a)(1) unless it is expressly confidential under other law or excepted from disclosure under section 552.108.

You ask this office to determine whether the submitted information is excepted under sections 552.108(a)(2) or (b)(2). Section 552.108 of the Government Code, the "law enforcement exception," provides in relevant part:

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

...

(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 [public disclosure] if:

...

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

You indicate that the submitted information relates to an internal affairs investigation of employee misconduct that did not result in a criminal investigation. Therefore, based on your arguments, we conclude that the submitted information may not be withheld under section 552.108. *See Morales v. Ellen*, 840 S.W.2d 519, 526 (Tex. App.—El Paso 1992, writ denied) (section 552.108 not applicable where no criminal investigation or prosecution of police officer resulted from investigation of allegation of sexual harassment); Open Records Decision No. 350 (1982) (predecessor provision of section 552.108 not applicable to IAD investigation file when no criminal charge against officer results from investigation of complaint against police officer).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and incorporates the doctrine of common-law privacy. For information to be protected from public disclosure under common-law privacy, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information must be withheld from the public when (1) it is highly intimate or embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its

disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992). 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. *Id.* at 683. We note, however, that the work behavior of a public employee and the conditions for his or her continued employment are matters of legitimate public interest not protected by the common-law right of privacy. Open Records Decision No. 438 (1986). Similarly, information about a public employee's qualifications, disciplinary action and background is not protected by common-law privacy. Open Records Decision No. 444 (1986) (public has obvious interest in having access to information concerning the qualifications and performances of governmental employees, particularly employees who hold positions as sensitive as those held by members of a sheriff's department); *see also* Open Records Decision No. 562 at 9, n.2 (1990) (public has interest in preserving the credibility and effectiveness of the police force). Further, a governmental entity is not prevented from acquiring information about an employee's personal affairs when the information is gathered by the governmental agency in pursuit of a compelling governmental objective. *Id.* at 8-9. We have marked a small portion of information pertaining to an individual who is not a public employee that is confidential under common-law privacy and must therefore be withheld under section 552.101. None of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.101 also encompasses information protected by statutes. Section 1703.306 of the Occupations Code provides as follows:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

Occ. Code § 1703.306. We find that certain information in the submitted records was acquired from polygraph examinations. It does not appear that any of the exceptions in section 1703.306 apply in this case. *See* Open Records Decision 565 (1990) (construing predecessor statute). Accordingly, we have marked the submitted information that is confidential pursuant to section 1703.306 of the Occupations Code and must therefore be withheld pursuant to section 552.101 of the Government Code.

Section 552.117(2) excepts from public disclosure a peace officer's home address, home telephone number, social security number, and information indicating whether the peace officer has family members regardless of whether the peace officer made an election under section 552.024 of the Government Code. Section 552.117(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Thus, we have marked the information in the submitted documents that must be withheld under section 552.117(2). We also note that if the submitted telephone billing statements include the home telephone number or private cellular telephone number of any peace officer, or the telephone numbers of any such officer's family members, such information must be withheld under section 552.117(2).

However, one of the peace officers whose personal information is at issue is no longer employed by the city. Furthermore, we are uncertain whether this individual is still a peace officer. If this individual remains a licensed peace officer as defined by article 2.12 of the Code of Criminal Procedure, then his information must not be released by the city pursuant to section 552.117(2) of the Government Code. However, if the former peace officer is no longer a licensed peace officer, 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. *See* Gov't Code § 552.117(1). Information that is responsive to a request may not be withheld from disclosure under section 552.117(1) if the employee did not request confidentiality in accordance with section 552.024 or if the request for confidentiality under section 552.024 was not made until after the request for information at issue was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Accordingly, we conclude that the city must withhold the marked information regarding the former peace officer pursuant to section 552.117(1), if he made a request for confidentiality under section 552.024 of the Government Code prior to the date on which the present request was received by the city, regardless of the fact that he may not currently be a peace officer.

Finally, we note that the submitted documents contain account numbers that are subject to section 552.136 of the Government Code. Section 552.136 makes certain access device numbers confidential and provides in pertinent part:

(a) In this section, “access device” means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value;
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov’t Code § 552.136. Accordingly, the city must withhold the account numbers that we have marked pursuant to section 552.136 of the Government Code.

To summarize: (1) we have marked the submitted information that must be withheld under section 552.101 of the Government Code and common-law privacy; (2) we have marked the submitted information that is confidential pursuant to section 1703.306 of the Occupations Code and must therefore be withheld pursuant to section 552.101; (3) the city must withhold the personal information pertaining to licensed peace officers that we have marked pursuant to section 552.117(2) of the Government Code; (4) if the submitted telephone billing statements include the home telephone number or private cellular telephone number of any peace officer, or the telephone numbers of any such officer’s family members, such information must be withheld under section 552.117(2); (5) if the former city employee remains a licensed peace officer, then the personal information pertaining to this individual that we have marked must be withheld pursuant to section 552.117(2); (6) if the former employee is no longer a licensed peace officer, and the employee made a timely request for confidentiality under section 552.024, the city must withhold his information pursuant to section 552.117(1) of the Government Code; and (7) the city must withhold the account numbers that we have marked pursuant to section 552.136 of the Government Code. The remaining submitted information 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,



Karen A. Eckerle
Assistant Attorney General
Open Records Division

KAE/sdk

Ref: ID# 170840

Enc: Submitted documents

c: Mr. Ron Maloney
Staff Writer
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(w/o enclosures)