



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

December 10, 2002

Ms. Rebecca Brewer
Abernathy, Roeder, Boyd & Joplin, P.C.
P.O. Box 1210
McKinney, Texas 75070-1210

OR2002-7018

Dear Ms. Brewer:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 173406.

The Town of Prosper (the "town"), which you represent, received a request for the job posting and job description of an employment opening for the position of police officer and for information regarding the qualifications of the two individuals hired for the post. You state that you have released the responsive information regarding the job posting and the job description. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.102, 552.108, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.102(a) of the Government Code protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" The standard of privacy under section 552.102 is the same as the test under section 552.101 of the Government Code in conjunction with the common-law right of privacy.¹ Information must be withheld from the public under section 552.101 in conjunction with common-law privacy when it is (1) highly intimate or embarrassing, such that release of the information would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. See *Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). Because of the greater legitimate public

¹Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

interest in matters involving governmental employees, privacy under section 552.102 is confined to information that reveals "intimate details of a highly personal nature." *See Hubert v. Harte- Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.--Austin 1983, writ ref'd n.r.e.); Open Records Decision Nos. 473 at 3 (1987), 444 at 3-4 (1986), 423 at 2 (1984). Thus, public employee privacy under section 552.102 is "very narrow." *See* Open Records Decision No. 400 at 5 (1983).

You argue that the submitted information contains personal financial information of the two hired officers that is excepted from release under common-law privacy. This office has held that personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from release under common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990). However, we have held that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). We have marked the personal financial information that you must withhold under common-law privacy.

Section 552.101 encompasses statutes that render information confidential such as section 411.083 of the Government Code.² Criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083.

Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be

²We note that you have improperly raised section 411.083 under section 552.108 of the Government Code. Nonetheless, we will consider whether section 411.083 applies to the submitted information because the Office of the Attorney General will raise mandatory exceptions such as section 552.101 on behalf of a governmental body even though it ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. The information submitted includes CHRI generated by TCIC and NCIC. Accordingly, the information that we have marked is excepted from required public disclosure by section 552.101 of the Government Code.

The submitted materials include fingerprint information that is subject to sections 559.001, 559.002, and 559.003 of the Government Code. These sections provide as follows:

Sec. 559.001. DEFINITIONS. In this chapter:

- (1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.
- (2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 559.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

- (1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:
 - (A) the individual consents to the disclosure;
 - (B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or
 - (C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and
- (2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 559.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

It does not appear to this office that section 559.002 permits the disclosure of the submitted fingerprint information. Therefore, the town must withhold the fingerprints we have marked under section 552.101 in conjunction with section 559.003 of the Government Code.

Section 1701.306 of the Occupations Code provides, in relevant part, 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

(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.

(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.

Occ. Code § 1701.306. The submitted information contains declarations of medical condition and declarations of psychological and emotional health, which are both made confidential by section 1701.306 of the Occupations Code. We have marked the information that must be withheld pursuant to section 552.101 in conjunction with 1701.306 of the Occupations Code.

Furthermore, 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 the two submitted Form I-9's 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. Therefore, the town must withhold the marked Form I-9's under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code.

Finally, we note that some of the submitted information is subject to the Americans with Disabilities Act of 1990 (the "ADA"). The ADA, 42 U.S.C. §§ 12101 *et seq.*, provides that

a covered entity may require a medical examination after an employee has been made a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination provided that information about the medical conditions and medical histories of applicants or employees must be 1) collected and maintained on separate forms, 2) kept in separate medical files, and 3) treated as a confidential medical record. 42 U.S.C. § 12112(d)(3)(B); *see also* 29 C.F.R. § 1630.14(b); Open Records Decision No. 641 (1996). The submitted information contains two "Post Offer-Employment Evaluation Summaries" of physical examinations conducted upon candidates for the position of police officer. Accordingly, you must withhold these evaluations, which we have marked, pursuant to section 552.101 in conjunction with the ADA.

We also note that the submitted information contains motor vehicle information subject to section 552.130 of the Government Code. 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[.]

You must withhold the vehicle identification numbers, Texas driver's license numbers, expiration dates, and information relating to driver's license class and restrictions, which we have marked, pursuant to section 552.130.

Finally, we address your arguments concerning the applicability of section 552.117 of the Government Code to the submitted information. Section 552.117(2) requires the town to withhold the following categories of information pertaining to a peace officer, as defined by article 2.12 of the Code of Criminal Procedure: the officer's current and former home address and home telephone number, social security number, and information revealing whether the officer has family members. Open Records Decision No. 622 (1994). The submitted information includes the current and former home addresses, home phone numbers, social security numbers, and family member information of peace officers. Accordingly, we have marked this information, which must be withheld under section 552.117(2).

Social security numbers may be withheld in some circumstances under section 552.101 of the Government Code. A social security number or "related record" may be excepted from disclosure 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 numbers and related records

that are obtained and 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 number in the file is confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 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 the included social security number, you should ensure that it was not obtained and maintained by the town pursuant to any provision of law, enacted on or after October 1, 1990.

In summary, you must withhold the personal financial information that does not relate to a transaction between an individual and a governmental body that we have marked pursuant to common-law privacy. You must withhold the CHRI generated by TCIC and NCIC, the fingerprints, the declarations of medical condition and declarations of psychological and emotional health, the Form I-9's, and the employment evaluation summaries subject to the ADA that we have marked under section 552.101. You must withhold the motor vehicle information we have marked under section 552.130. You must withhold the current and former home addresses, home phone numbers, social security numbers, and family member information of peace officers that we have marked under section 552.117(2). Finally, you may need to withhold an included social security number pursuant to the federal Social Security Act.

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

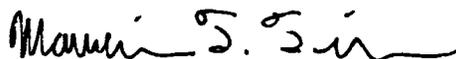
governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The 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,



Maverick F. Fisher
Assistant Attorney General
Open Records Division

MFF/seg

Ref: ID# 173406

Enc: Submitted documents

c: Mr. Bruce Walters
109 Collin Green Drive
Prosper, Texas 75078
(w/o enclosures)