



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

January 22, 2003

Mr. Gordon Bowman
Assistant County Attorney
Travis County Attorney's Office
P.O. Box 1748
Austin, Texas 78767

OR2003-0445

Dear Mr. Bowman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 175324.

The Travis County Sheriff's Office (the "sheriff's office") received a request for all information regarding sheriff's office employee Jamie Page. You state that you are releasing much of the requested information. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.108, 552.114, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

We initially address your assertion that section 552.108 of the Government Code applies to portions of the submitted information, which you have marked tab H. Subsections 552.301(a) and (b) provide:

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

one of the [act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

It appears from the documents submitted to this office, and you state, that the sheriff's office received the request for information on October 25, 2002. You did not raise your section 552.108 assertion until November 18, 2002. Consequently, we find you have waived your claim under section 552.108. *See* Gov't Code § 552.302; Open Records Decision No. 177 (1977) (governmental body may waive statutory predecessor to section 552.108); *but see* Open Records Decision No. 586 at 3 (1991) (need of a governmental body, other than the one that failed to timely request a decision, may in appropriate circumstances be a compelling reason for non-disclosure). Accordingly, the sheriff's office may not withhold the information marked tab H under section 552.108.

We now consider your assertions under section 552.101. Section 552.101 excepts from disclosure "information deemed confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 incorporates confidentiality provisions such as section 58.007 of the Family Code, which you claim is applicable to the information you have marked tab F.² Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential under section 58.007. The relevant language of section 58.007(c) reads as follows:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are

²We note that the sheriff's office argues in the alternative that the submitted information marked tab F is excepted from release under former section 51.14 of the Family Code, which applies only to law enforcement records pertaining to juvenile conduct that occurred before January 1, 1996. As the juvenile conduct in the information at issue occurred after January 1, 1996, we will not consider your assertions made under former section 51.14.

separate and distinct from controls to access electronic data concerning adults; and

(3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

The information marked tab F does not reflect that the juvenile involved in the incident has been accused of any delinquent conduct or conduct indicating a need for supervision. *See* Fam. Code § 51.03(a)(1), (b)(1) (defining delinquent conduct and conduct indicating a need for supervision as specifically excluding traffic offenses). Therefore, the information marked tab F is not confidential under section 58.007(c) of the Family Code. *See also* Fam. Code § 51.04(a) (title 3 of Family Code covers proceedings in all cases involving delinquent conduct or conduct indicating need for supervision engaged in by child).

Section 552.101 also encompasses sections 611.002 and 611.004(d) of the Health and Safety Code. Section 611.002 of the Health and Safety Code provides that “[c]ommunications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.” A “professional” is defined as:

(A) a person authorized to practice medicine in any state or nation;

(B) a person licensed or certified by this state to diagnose, evaluate, or treat any mental or emotional condition or disorder; or

(C) a person the patient reasonably believes is authorized, licensed, or certified as provided by this subsection.

Health & Safety Code § 611.001(2).

Section 611.004(a) provides specific instances in which a professional may disclose information that is confidential under section 611.002. You state that the portion of the submitted information which you have marked tab E consists of records “concerning psychological counseling and other mental health records” subject to section 611.002(a). However, it does not appear that any of the submitted information consists of communications between a professional and a patient or “records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional.” Therefore, we find that you may not withhold any of the requested information under section 611.002 of the Health and Safety Code.

Section 552.101 also encompasses the common-law right to privacy. Information is protected under the common-law right to privacy when (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. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). 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.

You contend that some of the information in tabs A, D, F, G, and J is protected under common-law privacy. Upon review, we agree that some of this information is excepted from release under section 552.101. We have marked this information, along with additional information, that is excepted from release under section 552.101 in conjunction with common-law privacy. However, we find that some of the information that you have marked in tabs A, F, G, and J does not contain highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person. See Open Record Decision Nos. 628 (1994), 611 (1992), 422 (1984), 407 (1984). See also Open Records Decision No. 444 at 3 (1986) (public has obvious interest in information concerning the qualifications and performance of governmental employees, particularly those involved in law enforcement). Accordingly, you may not withhold some of this information, which you have marked as confidential pursuant to common-law privacy, under section 552.101. We further find that some of the information you have marked tab J is of legitimate concern to the public, and thus may not be withheld under section 552.101. Furthermore, you may not withhold the information in tab D that you have marked as excepted under common-law privacy under section 552.101 because there is a legitimate public interest in this information.

You also argue that the information you have marked tab C is excepted from release under section 552.101 in conjunction with common-law privacy as information pertaining to allegations of sexual harassment. In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

Upon review, we find that the information marked tab C contains an adequate summary of an investigation into alleged sexual harassment. Therefore, you must release this summary as well as the accused's own statements according to *Ellen*. We have marked identifying

information of the victim and witnesses in the accused's statements, which must be withheld under section 552.101 and common-law privacy. Furthermore, you must withhold the remaining information we have marked in tab C under section 552.101 in conjunction with common-law privacy.

Next, you argue that social security numbers included in the submitted information are excepted from release under section 552.101 in conjunction with common-law privacy. This office has held that one's social security number is not "intimate" information that must be withheld from disclosure based on a right of privacy. *See* Open Records Decision Nos. 226 (1979) (noting social security numbers not protected under common-law privacy), 169 (1977). Accordingly, you may not withhold the social security numbers included in the submitted information pursuant to section 552.101 in conjunction with common-law privacy.

You next argue that some of the submitted information, which you have marked tab B, is excepted from release under section 552.101 in conjunction with chapter 411 of the Government Code. 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 withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F.

Section 411.082 of the Government Code defines CHRI as:

(2) . . . information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions. The term does not include:

(A) identification information, including fingerprint records, to the extent that the identification information does not indicate involvement of the person in the criminal justice system; or

(B) driving record information maintained by the department under Subchapter C, Chapter 521, Transportation Code.

Gov't Code 411.082(2).

Some of the information that you state is excepted from release pursuant to section 552.101 in conjunction with section 411.083 is CHRI generated by TCIC and NCIC. Accordingly, we have marked the information at tab B that is excepted from required public disclosure by section 552.101 of the Government Code. We have also marked information in tab B which you must withhold pursuant to section 552.101 only in the event the marked pages in fact constitute CHRI generated by TCIC or NCIC. Finally, we have also marked information in tab L that is excepted from required public disclosure by section 552.101 of the Government Code. None of the remaining information in tab B or L consists of CHRI excepted from release pursuant to section 552.101 in conjunction with section 411.083.

You also argue that information in tabs B and L is excepted from release under section 552.101 as it consists of compiled CHRI the release of which is prohibited under common-law privacy and *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*. 489 U.S. 749 (1989) (making individual's criminal history compiled by a governmental entity confidential as such compilation takes on a character that implicates the individual's right to privacy). However, the remaining information in tabs B and L does not consist of a compilation of any individual's criminal history. Accordingly, you may not withhold the remainder of tab B or L under section 552.101.

We now consider your assertions that the information you have marked tab I is excepted from release under section 552.114 of the Government Code. Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. This office generally applies the same analysis under section 552.114 and the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"). 20 U.S.C. § 1232g(b)(1); *see also* Open Records Decision No. 539 (1990). The federal Family Educational Rights and Privacy Act of 1974 ("FERPA") provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). Thus, FERPA and section 552.114 govern the availability of student or education records held by educational

agencies or institutions. *See* 20 U.S.C. § 1232g(b)(1); Gov't Code §§ 552.026, 552.114. FERPA generally does not govern access to records in the custody of governmental bodies that are not educational agencies or institutions. *See* Open Records Decision No. 390 at 3 (1983). An exception to this rule applies if the governmental body received the records from an educational agency under written consent of the student. 20 U.S.C. 1232g(b)(4)(B). You do not indicate, nor does it appear, that the information in tab I was received from an educational agency or institution pursuant to the written consent of the student. Therefore, the sheriff's office may not withhold tab I under section 552.114.

We now consider your assertion that some of the submitted information, which you have marked tab A, is subject to section 552.117(2) of the Government Code. Section 552.117(2) requires the sheriff's office 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). However, the officer's work telephone number is not excepted from disclosure. The submitted information includes the home address, home phone number, social security number, and family member information of peace officers. We have marked this information throughout the submitted information, which must be withheld under section 552.117(2). We note that the pager phone number that we have marked is excepted under section 552.117 only if the pager was purchased and privately owned by the peace officer. *See* Open Records Decision No. 506 at 5 (1988) (one purpose of section 552.117 is to protect public officials and employees from being harassed while at home).

We now consider your assertion that some of the submitted information, which you have marked tab L, is excepted from release under 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 Texas driver's license numbers, vehicle identification numbers, and license plate numbers and expiration dates found in the submitted information, which we have marked, under section 552.130.

In summary, you must withhold the information that we have marked pursuant to section 552.101 in conjunction with common-law privacy. You must withhold the CHRI

that we have marked pursuant to section 552.101 in conjunction with section 411.083. You must withhold the home address, home phone number, social security number, and family member information of a peace officer, which we have marked, pursuant to section 552.117(2). You must withhold the pager phone number that we have marked under section 552.117(2) only if the pager was purchased and privately owned by the peace officer. You must withhold the Texas driver's license numbers, vehicle identification numbers, and license plate numbers and expiration dates, which we have marked, pursuant to section 552.130. You must release the remaining requested information.

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).

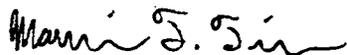
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

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# 175324

Enc: Submitted documents

c: Mr. Michael J. Weeks
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