



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

April 3, 2003

Mr. Ken Johnson  
Assistant City Attorney  
City of Waco  
P.O. Box 2570  
Waco, Texas 76702-2570

OR2003-2266

Dear Mr. Johnson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 178723.

The City of Waco (the "city") received a request for "all employment records, including termination, for former Waco Police Department Officer Robert Franklin[.]" Although you state that some responsive information has been or will be released, you claim that some of the requested information is excepted from disclosure under sections 552.101, 552.102, 552.117, 552.119, and 552.122 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially we note, and the city acknowledges, that you have not fully complied with section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply not later than the tenth business day after the date of receiving the written request. Further, a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested, or representative samples of the information if a voluminous amount was requested. Gov't Code § 552.301(e). According to the submitted documents, the city received the request for information on October 9, 2002. However, the city did not send its request for a decision, a copy of the request for information, the specific information requested, or its comments stating the reasons why the claimed exceptions should apply until January 28, 2003. Consequently, the city failed to comply with the requirements of sections 552.301(b) and 552.301(e) of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Compelling reasons exist when the information is made confidential by law or affects the interest of a third party. Open Records Decision No. 630 at 3 (1994). You contend that the submitted information is protected under sections 552.101, 552.102, 552.117, 552.119, and 552.122 of the Government Code. However, you have not demonstrated a compelling reason for withholding this information under section 552.122. *See* Open Records Decision Nos. 522 at 4 (1989) (discretionary exceptions in general), 473 at 2 (1987) (discretionary exceptions under the Public Information Act can be waived); *but see* Open Records Decision No. 586 (1991) (when a governmental body fails to timely seek an attorney general decision under the Public Information Act, the need of another governmental body may provide a compelling reason for withholding the requested information). As sections 552.101, 552.102, 552.117, and 552.119 can provide a compelling reason to overcome the presumption of openness, we will address your arguments under those exceptions. *See* Open Records Decision No. 150 (1976) (confidentiality provisions and exceptions designed to protect the interests of third parties can provide compelling reasons for overcoming presumption of openness).

Section 552.101 of the Government Code excepts from disclosure "information deemed confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 143.089 of the Local Government Code contemplates two different types of personnel files: one that the civil service director is required to maintain as part of the officer's civil service file, and one that the police department may maintain for its own internal use. Local Gov't Code § 143.089(a), (g). Section 143.089 provides in pertinent part:

(a) The director [of the fire fighters' or police officers' civil service] or the director's designee shall maintain a personnel file on each fire fighter and police officer. The personnel file must contain any letter, memorandum, or document relating to:

....

(2) any misconduct by the fire fighter or police officer if the letter, memorandum, or document is from the employing department and if the misconduct resulted in disciplinary action by the employing department in accordance with this chapter[.]

....

(g) A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a fire fighter or police officer. The department shall refer to the director or the director's designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file.

Thus, section 143.089 of the Local Government Code provides for the creation of two personnel files for police officers and fire fighters: one that must be maintained by the city's civil service director or his designee and another that may be maintained by the city's fire and police departments. Information contained in personnel files maintained by the civil service director in accordance with chapter 143, including all records from the employing police department relating to misconduct by police officers that resulted in disciplinary action, must be released to the public unless the information comes within one of the Public Information Act's exceptions to required public disclosure. However, information contained in a personnel file held by the police department is confidential pursuant to section 143.089(g) and may not be disclosed under the Act.

We understand that the City of Waco is a civil service city under chapter 143 of the Local Government Code. You indicate that some of the submitted documents are maintained by the city's police department in its personnel files. Based on your statements and our review of the submitted information, we agree that some of the submitted documents, which we have marked, are confidential under section 143.089(g) of the Local Government Code to the extent the information is maintained solely in the city police department's personnel files.

You also claim that some of the submitted information is excepted from disclosure under section 552.101 in conjunction with common-law privacy, and under section 552.102. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information that is protected by the common-law right of 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 Foundation v. Texas Industrial Accident Board*, 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* includes 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.

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.

In Open Records Decision No. 339 (1982), we concluded that a sexual assault victim has a common-law privacy interest that prevents disclosure of information that would identify the victim. See also *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information). Accordingly, we have marked the identity of a sexual assault victim that must be withheld in the submitted documents pursuant to section 552.101 and common-law privacy. See Open Records Decision Nos. 393 (1983), 339(1982).

This office has also found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common law privacy. See Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 545 (1990) (information concerning the intimate relations between individuals and their family members), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). We have marked the medical information that is excepted from disclosure under section 552.101 and common-law privacy.

Further, this office has determined that some personal financial information is highly intimate or embarrassing and thus meets the first part of the *Industrial Foundation* test. See Open Records Decision Nos. 600 (1992) (Employee's Withholding Allowance Certificate; designation of beneficiary of employee's retirement benefits; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history), 523 (1989). However, where a transaction is funded in part by the state, it involves the employee in a transaction with the state and is not protected by privacy. Thus, information about the essential features of an employee's participation in a group insurance program funded in part by the state involves him in a transaction with the state and, therefore, is not excepted from disclosure by a right of privacy. On the other hand, information relating to an employee's choice of insurance carrier and his election of optional coverages is confidential under the right of privacy. *Id.* at 10-11. Similarly, this office has determined that information revealing the personal financial decision to voluntarily have certain deductions made from an employee's paycheck meets the *Industrial Foundation* test. Open Records Decision No. 545 (1990). We have marked the personal financial information that is excepted from disclosure under section 552.101 and common-law privacy.

Upon review, we find that none of the remaining submitted information is protected under common-law privacy. See Open Records Decision No. 438 (1986) (work behavior of a public employee and the conditions for the employee's continued employment are matters of legitimate public interest not protected by the common-law right of privacy); see also

Open Records Decision Nos. 562 at 9, n.2 (1990) (public has interest in preserving the credibility and effectiveness of the police force), 444 (1986) (public has interest in information concerning the qualifications and performances of governmental employees, particularly employees in law enforcement). We therefore conclude that the city may not withhold any of the remaining responsive information from disclosure under section 552.101 and common-law privacy.

You next assert that certain documents among the submitted information are covered by the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides, in relevant part, as follows:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
- (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.004. Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370(1983), 343 (1982). Upon review of the submitted information, we conclude that some of the submitted information, which we have marked, constitutes medical records subject to the MPA.

The city claims protection for some of the submitted information under section 552.117(2) of the Government Code. Section 552.117(2) excepts from disclosure the home addresses and telephone numbers, social security numbers, personal pager numbers, and family member information of peace officers, regardless of whether the officer elected confidentiality under section 552.024 of the Government Code. *See* Gov't Code § 552.117(2). *See also* Open Records Decision No. 670 (2001) (providing that a governmental body may withhold the home address, home telephone number, personal cellular phone number, personal pager number, social security number, and family member information of a peace officer under section 552.117(2)). However, the peace officer 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 city employee 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.

The city also claims that a portion of the submitted information is excepted under section 552.119 of the Government Code. Section 552.119 excepts from public disclosure a photograph of a peace officer that, if released, would endanger the life or physical safety of the officer unless one of three exceptions applies. The three exceptions are: (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. *Open Records Decision No. 502 (1988)*. The submitted information contains a photograph that depicts a peace officer, and there is nothing to indicate that any of the exceptions are applicable. Additionally, it does not appear that the peace officer has executed a written consent to disclosure. Thus, you must withhold under section 552.119 the photograph depicting the peace officer that we have marked unless the photographed individual is no longer a "peace officer," in which case you must release the photograph.

Lastly, we note that some submitted information is protected from disclosure 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[.]

We have marked the driver's license information that must be withheld under section 552.130.

To summarize: The information that we have marked as confidential under section 143.089 (g) of the Local Government Code must be withheld under section 552.101. The city must also withhold the identity of the sexual assault victim, and the medical and personal financial information we have marked that is protected by common-law privacy and therefore excepted from disclosure under section 552.101. We have also marked a medical record that may only be released by the city in accordance with the MPA. 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), however, 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. The city must withhold the photograph that we have marked under section 552.119 unless the photographed individual is no longer a "peace officer," in which case you must release the photograph. Lastly, we have marked the driver's license information that must be withheld under section 552.130. The city must release the remaining 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 Dep't of Pub. 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,



Heather Pendleton Ross  
Assistant Attorney General  
Open Records Division

HPR/sdk

Ref: ID# 178723

Enc: Submitted documents

c: Ms. Camille Wheeler  
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(w/o enclosures)