



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

July 29, 2003

Ms. Susan Camp-Lee
Sheets & Crossfield, P.C.
309 East Main Street
Round Rock, Texas 78664-5246

OR2003-5201

Dear Ms. Camp-Lee:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 184948.

The City of Hutto (the "city"), which you represent, received a request for the personnel file of a named individual. You state that some of the requested information has been released to the requestor. However, you claim that a portion of the requested information is excepted from disclosure under sections 552.101, 552.103, 552.111, 552.117, 552.122, 552.130, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

First, you assert section 552.103 of the Government Code in regard to the submitted information in Exhibit C. This section provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure

under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is 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 section 552.103(a).

You have submitted to this office a copy of the plaintiff's original petition and jury demand filed in the District Court of Travis County, Texas 98th Judicial District in which the city is named as a defendant. Based on the information you provided, we agree that litigation involving the city was pending at the time it received the instant request for information. In addition, we find that the submitted information in Exhibit C is related to the pending litigation for purposes of section 552.103(a).

However, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Upon review of the information in Exhibit C, we note that most of the information has either been obtained from or provided to the opposing party in the pending litigation. Therefore, this information is not excepted from disclosure under section 552.103(a). Thus, you may only withhold the information in Exhibit C that we have marked pursuant to section 552.103 of the Government Code.¹ Additionally, we note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In regard to the remaining information in Exhibit C and the submitted information in Exhibit D, you contend that a portion of the information is excepted from disclosure under section 552.101 of the Government Code in conjunction with the common-law right of privacy.² When a law enforcement agency is asked to compile a particular individual's

¹As we are able to make this determination, we need not address your remaining arguments under sections 552.111 and 411.083 of the Government Code.

²Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses the doctrine of common-law privacy.

criminal history information, the compiled information takes on a character that implicates the individual's right to privacy in a manner that the same information in an uncompiled state does not. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); *see also* Open Records Decision No. 616 at 2-3 (1993). In this instance, you assert that the remaining information highlighted in red consists of compiled criminal histories. Upon review, however, we find that none of this information is a compilation of an individual's criminal history. Furthermore, we note that the request does not ask for a compilation of a named individual's criminal history, but rather for the individual's personnel file. Therefore, we determine that the present request does not implicate an individual's common-law right of privacy as contemplated in *Reporters Committee*.

Additionally, 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). Prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See, e.g.*, 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). In addition, this office has found that the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 545 (1990), 523 (1989) (individual's mortgage payments, assets, bills, and credit history), certain personal choices relating to financial transactions between the individual and the governmental body, *see* Open Records Decision No. 600 (1992) (designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). Having reviewed the information you have highlighted, we conclude that portions of the information, which we have marked, are protected by common-law privacy and must be withheld under section 552.101. However, the remainder of the information you have highlighted is not intimate or embarrassing. Therefore, this information is not protected by common-law privacy, and it may not be withheld under section 552.101.

The submitted documents also contain a W-4 form. A W-4 form is confidential under section 6103(a) of title 26 of the United States Code. Therefore, the city must withhold the submitted W-4 form under section 552.101 of the Government Code in conjunction with federal law.³

You also contend that the yellow highlighted information is excepted under section 552.117(a)(2) of the Government Code. This section excepts from disclosure “information that relates to the home address, home telephone number, or social security number” of a peace officer, or that reveals whether the peace officer has family members. You indicate that the individual in question was a licensed peace officer when the city received the instant request for information. Therefore, the city must withhold most of the information you have highlighted in yellow under section 552.117(a)(2) of the Government Code. However, we have marked a portion of the highlighted information to which section 552.117(a)(2) is inapplicable, and it must be released.

Further, we note that the submitted information contains information pertaining to peace officers that are not employed by the city. The protections of section 552.117 only apply to information that the city holds in its capacity as an employer. Section 552.1175, which also applies to current peace officers,⁴ is the applicable exception under these circumstances and provides in part that

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

- (1) chooses to restrict public access to the information; and
- (2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(b). However, you do not inform this office, nor does any of the submitted information indicate, whether any of these current peace officers has notified the city of his election of confidentiality for this information in accordance with the above-cited subsections 552.1175(b)(1) and (2). *See, e.g.*, Open Records Decision No. 678 (2003) (concluding that county voter registrar was authorized to release voter information made confidential under section 552.1175 of Government Code to another governmental entity,

³Section 552.101 encompasses information made confidential by other statutes.

⁴A peace officer is defined by Article 2.12, Code of Criminal Procedure.

but that transferred information would not be confidential in possession of transferee until that governmental entity receives a section 552.1175 notification). If the active peace officers comply with section 552.1175(b), the city must withhold their home addresses and home telephone numbers. If not, the city must release this information.

Also, the remaining social security numbers must be withheld in some circumstances 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 remaining social security numbers in the responsive information are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 of the Public Information Act ("Act") on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, the city should ensure that no such information was obtained or is maintained by the city pursuant to any provision of law enacted on or after October 1, 1990.

Section 552.122(b) of the Government Code excepts from disclosure test items developed by a licensing agency or governmental body. In Open Records Decision No. 626 (1994), this office determined that the term "test item" in section 552.122 includes any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated, but does not encompass evaluations of an employee's overall job performance or suitability. Whether information falls within the section 552.122 exception must be determined on a case-by-case basis. Open Records Decision No. 626 at 6 (1994). Traditionally, this office has applied section 552.122 where release of "test items" might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Additionally, when answers to test questions might reveal the questions themselves, the answers may be withheld under section 552.122(b). *See* Open Records Decision No. 626 at 8 (1994).

You contend that the test questions you have highlighted in blue are excepted from disclosure under section 552.122(b). Having considered your arguments and reviewed the submitted information, we agree that the highlighted questions constitute "test items" as contemplated by section 552.122(b). We also find that the preferred and actual responses to these questions may reveal the questions themselves. Accordingly, the city may withhold the highlighted questions and their respective preferred and actual answers pursuant to section 552.122(b) of the Government Code.

You also assert section 552.130 of the Government Code. This section prohibits the release of information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this

state. *See* Gov't Code § 552.130. Accordingly, the city must withhold all Texas driver's license, license plate, and motor vehicle information pursuant to section 552.130 of the Government Code.

Finally, the submitted information contains e-mail addresses obtained from members of the public. Section 552.137 of the Government Code makes certain e-mail addresses confidential and provides:

(a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

However, we note that section 552.137 does not apply to a general e-mail address or website address of a business, to a governmental entity's e-mail address, or to a governmental employee's work e-mail address. Accordingly, unless consent to release has been granted, you must withhold the submitted e-mail addresses obtained from members of the public under section 552.137 of the Government Code.

In summary, we conclude that you must withhold the following information under section 552.101 of the Government Code: 1) the information we have marked under common-law privacy; 2) the submitted W-4 form under federal law; and 3) social security numbers that may be confidential under federal law. Additionally, we conclude that: 4) you may withhold the information we have marked in Exhibit C under section 552.103 of the Government Code; 5) you may withhold the highlighted test questions and their respective preferred and actual answers pursuant to section 552.122(b) of the Government Code; 6) you must withhold the section 552.117(a)(2), 552.130, and 552.137 information; and 7) you may not release the home addresses and home telephone numbers of active peace officers if they elect pursuant to section 552.1175(b) of the Government Code. All remaining information must be released.

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,



W. Montgomery Meitler
Assistant Attorney General
Open Records Division

WMM/lmt

Ref: ID# 184948

Enc: Submitted documents

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