



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

July 30, 2003

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

OR2003-5259

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# 185117.

The City of Hutto (the "city"), which you represent, received a request for: 1) documents pertaining to the employment, training, performance, or dismissal of a specified former city police officer; 2) documents pertaining to the acquisition, use, and maintenance of a white Ford Explorer owned by the city; and 3) the personnel policy or policies in place for the city's police department during December 2002. You state that the city will release some responsive information to the requestor. You claim, however, that the remaining requested information, or portions thereof, is excepted from disclosure pursuant to 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 have reviewed the submitted information.

Initially, we note that portions of the submitted information are subject to section 552.022 of the Government Code. Section 552.022 makes certain information public, unless it is expressly confidential under other law. *See* Gov't Code § 552.022(a). One category of public information under section 552.022 is "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]" *Id.* § 552.022(a)(1). Another category of public information under section 552.022 is "information that is also contained in a public court record." *Id.* § 552.022(a)(17). One of the submitted documents, which we have marked, constitutes a completed report for purposes of section 552.022(a)(1). Consequently, unless any portion of this report is expressly confidential under other law or is excepted from disclosure

pursuant to section 552.108 of the Government Code, it must be released to the requestor.¹ Another document, that we have marked, constitutes information that is also contained in a public court record for purposes of section 552.022(a)(17). Consequently, unless any portion of this court record is expressly confidential under other law, it must be released to the requestor. Although the city claims that the completed report and court record are excepted from disclosure pursuant to section 552.103 of the Government Code, we note that this exception to disclosure is a discretionary exception to disclosure under the Public Information Act and, as such, does not constitute "other law" that makes information confidential.² Accordingly, we conclude that the city may not withhold any portion of these two documents under section 552.103 of the Government Code. However, since the city also claims that portions of the completed report are excepted from disclosure pursuant to section 552.130 of the Government Code, we will address the city's claim with respect to that particular information.

You claim that the remaining submitted information is excepted from disclosure pursuant to section 552.103 of the Government Code. Section 552.103 provides in pertinent part:

(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.

¹ We note that the city does not claim that any portion of the submitted information is excepted from disclosure under section 552.108 of the Government Code.

² Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general); *see also Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

Gov't Code, § 552.103(a), (c). The city maintains 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 that the governmental body receives the request for information, and (2) the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *see also 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). The city must meet both prongs of this test for information to be excepted under section 552.103(a).

You state, and provide documentation showing, that the submitted information relates to litigation between the city and the former city police officer to whom this request pertains that was pending at the time that the city received this request for information. Based on our review of your arguments, the documentation that supports these arguments, and the remaining submitted information, we agree that the city has demonstrated that litigation is pending and that the remaining submitted information is related to that pending litigation for purposes of section 552.103. Accordingly, we conclude that the city may withhold portions of the remaining submitted information, which we have marked, pursuant to section 552.103 of the Government Code.

However, we note that 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. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the pending litigation is not excepted from disclosure under section 552.103(a) and may not be withheld from disclosure on that basis.³ We note that portions of the remaining submitted information have been seen by the opposing party in this matter. Accordingly, we conclude that the city may not withhold this particular information under section 552.103 of the Government Code.

However, you also claim that portions of this particular information are excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy.⁴ Information must be withheld from disclosure under the common-law right to privacy when it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) 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

³ Further, the applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

⁴ Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by the common-law right to privacy.

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. *See id.* at 683.

This office has long held that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from disclosure pursuant to the common-law right to privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 at 5 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Prior decisions of this office have also 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* Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). For example, a public employee's allocation of his salary to a voluntary investment program or to optional insurance coverage that is offered by his employer is a personal investment decision and information about it is excepted from disclosure under the common-law right of privacy. *See* Open Records Decision Nos. 600 (1992) (finding 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 related to personal financial decisions), 545 (1990) (finding information relating to deferred compensation plan, an individual's mortgage payments, assets, bills, and credit history excepted from disclosure under common-law privacy), 523 (1989). However, information revealing that an employee participates in a group insurance plan funded partly or wholly by the governmental body is not excepted from disclosure. *See* Open Records Decision No. 600 at 10 (1992). Furthermore, where an individual's criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual's right to privacy. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). We have marked the portions of the submitted information which are protected from disclosure by the common-law right to privacy. Accordingly, we conclude that the city must withhold this information pursuant to section 552.101 of the Government Code.

You also claim that portions of the submitted information which are not excepted from disclosure under section 552.103 are excepted from disclosure pursuant to section 552.117 of the Government Code. Section 552.117(a)(2) excepts from 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(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. We are uncertain whether the former city police officer to whom this request pertains remains a licensed peace officer. If he remains a licensed peace officer, the city must withhold the information that we have marked pursuant to section 552.117(a)(2) of the Government Code. We note that the documents include personal post office box numbers. Because such

addresses are not "home addresses," this information is not made confidential by section 552.117 and may not be withheld on that basis. *See generally* Gov't Code § 552.117; *see also* Open Records Decision No. 622 at 4 (1994) ("The legislative history of section 552.117(1)(A) makes clear that its purpose is to protect public employees from being harassed *at home*. *See* House Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985); Senate Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985)." (Emphasis added)). However, if the former city police officer is no longer a licensed peace officer, such marked information relating to him may still be excepted from disclosure under section 552.117(a)(1) of the Government Code. Accordingly, we will address whether section 552.117(a)(1) excepts from disclosure any of this type of information regarding this individual.

Section 552.117(a)(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 timely request that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(1). However, information that is responsive to a request may not be withheld from disclosure under section 552.117(a)(1) if the employee did not request confidentiality for this information 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 to the extent that the former city police officer timely elected confidentiality for this marked information prior to the date that the city received this request, the city must withhold the information pursuant to section 552.117(a)(1) of the Government Code.

Nevertheless, we note that the former city police officer's social security number, as well as other social security numbers that are contained within the information which is not excepted from disclosure under section 552.103, may be confidential under federal law. Section 552.101 of the Government Code also encompasses information that is protected from disclosure by other statutes. The 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), make confidential social security numbers and related records that are obtained or 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* Open Records Decision No. 622 (1994). The city has cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes it to obtain or maintain social security numbers. Therefore, we have no basis for concluding that these social security numbers are confidential under section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. We caution the city, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing these social security numbers, the city should ensure that they were not obtained and are not maintained by the city pursuant to any provision of law enacted on or after October 1, 1990.

You also claim that portions of the remaining submitted information which are not excepted from disclosure under section 552.103 are excepted from disclosure pursuant to section 552.122 of the Government Code. Section 552.122(b) excepts from disclosure test items developed by a licensing agency or governmental body. *See Gov't Code § 552.122(b)*. 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. *See 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. *See id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Additionally, when answers to test questions might reveal the substance of the questions themselves, the answers may be withheld from disclosure under section 552.122(b). *See Open Records Decision No. 626 at 8 (1994)*. Based on our review of your arguments and the remaining submitted information, we agree that portions of this information constitute "test items" as contemplated by section 552.122(b). Accordingly, we conclude that the city may withhold the information that we have marked pursuant to section 552.122(b) of the Government Code.

In addition, you claim that portions of the remaining submitted information which are not excepted from disclosure under section 552.103, as well as portions of the marked completed report that is subject to section 552.022, are excepted from disclosure pursuant to section 552.130 of the Government Code. Section 552.130 excepts from disclosure 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, we conclude that the city must withhold the Texas motor vehicle information that we have marked within this information pursuant to section 552.130 of the Government Code.

Finally, you claim that a portion of the information which is not excepted from disclosure under section 552.103 is excepted from disclosure pursuant to section 552.137 of the Government Code. Section 552.137 protects certain e-mail addresses from disclosure and provides in relevant part:

- (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.

Gov't Code § 552.137. Section 552.137 requires the city to withhold e-mail addresses of members of the public that are provided for the purpose of communicating electronically with the city, unless the members of the public with whom they are associated have affirmatively consented to their release. Section 552.137 does not apply to a government employee's work e-mail address or a business's general e-mail address or website address. We have marked a portion of this information which is subject to section 552.137. You state that the individual to whom this e-mail address belongs has not affirmatively consented to its release. Accordingly, we conclude that the city must withhold this marked e-mail address pursuant to section 552.137 of the Government Code.⁵

In summary, the city may withhold the portions of the submitted information that we have marked pursuant to section 552.103 of the Government Code. The city must withhold the portions of the remaining submitted information that we have marked pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy. If the former city police officer to whom this request pertains remains a licensed peace officer, the city must withhold the remaining submitted information that we have marked pursuant to section 552.117(a)(2) of the Government Code. If he is no longer a licensed peace officer, the city must withhold the information that we have marked pursuant to section 552.117(a)(1), if he timely elected confidentiality for this information prior to the date that the city received this request. Nevertheless, his social security number, as well as the social security numbers of other individuals noted in the remaining submitted information, may be confidential under federal law. The city may withhold the portions of the remaining submitted information that we have marked pursuant to section 552.122(b) of the Government Code. The city must withhold the Texas motor vehicle information that we have marked within the remaining submitted information pursuant to section 552.130 of the Government Code. The city must withhold an e-mail address that we have marked within the remaining submitted information pursuant to section 552.137 of the Government Code. The city must release the remaining submitted information 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.

⁵ Because we base our ruling on the above-noted exceptions to disclosure, we need not address your remaining claims.

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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/lmt

Ref: ID# 185117

Enc. Marked documents

c: Mr. Aaron Reed
Staff Writer
Taylor Daily Press
P.O. Box 1040
Taylor, Texas 76574
(w/o enclosures)