



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 16, 2003

Mr. Randall C. Stump
Stump, Stump & Stump
803 Main Street
Georgetown, Texas 78626

OR2003-6482

Dear Mr. Stump:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 187721.

The City of Florence (the "city") received a request for personnel information maintained by the city regarding a reserve police officer formerly employed by the city. You state that some responsive information is being made available to the requestor. You claim, however, that portions of the remaining responsive information are excepted from disclosure under sections 552.101, 552.102, 552.111, 552.117, 552.1175, 552.122, and 552.137 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the city's obligations under section 552.301 of the Government Code. Under section 552.301(e), a governmental body receiving an open records request for information that it wishes to withhold pursuant to one of the exceptions to public

¹ We note that you raise section 552.305 of the Government Code as an exception to disclosure. Section 552.305 states in relevant part that "[i]n a case in which information is requested under this chapter and a person's privacy or property interests may be involved . . . a governmental body may decline to release the information *for the purpose of requesting an attorney general decision.*" Gov't Code § 552.305 (emphasis added). Thus, section 552.305 is not an exception to disclosure under the Public Information Act (the "Act"). Rather, section 552.305 is a procedural provision permitting a governmental body to withhold information that may be private while the governmental body is seeking an attorney general's decision under the Act. Because you believe the present request implicates the privacy interests of third parties, we consider your privacy arguments pursuant to section 552.101 of the Government Code.

disclosure is required to submit to this office within fifteen business days of receiving the 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, labeled to indicate which exceptions apply to which parts of the documents. You have not submitted a copy of the written request for information to this office. Consequently, we find that the city has failed to comply with section 552.301(e) in this instance.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit the information required under section 552.301(e) within the fifteen-business-day time period results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See Gov't Code § 552.302; 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).

Generally, a governmental body may demonstrate a compelling reason to withhold information by a showing that the information is made confidential by another source of law or affects third party interests. *See Open Records Decision No. 630 (1994)*. Sections 552.111 and 552.122 of the Government Code are discretionary exceptions to disclosure that protects the governmental body's interests and may be waived by the governmental body. Thus, neither section 552.111 nor section 552.122 provides a compelling reason to withhold information from the public. *See Open Records Decision No. 473 (1987)* (governmental body may waive statutory predecessor to section 552.111); *see also Open Records Decision No. 665 at 2 n.5 (2000)* (discretionary exceptions generally). We find that the city has waived its claims under sections 552.111 and 552.122 of the Government Code and may not withhold any portion of the submitted information pursuant to these exceptions. However, because your other claimed exceptions can provide a compelling reason to overcome the presumption of openness, we will address the applicability of these exceptions to the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. The submitted information contains an L-2 Declaration of Medical Condition and an L-3 Declaration of Psychological and Emotional Health required by the Texas Commission on Law Enforcement Officer Standards and Education ("TCLEOSE") that are confidential pursuant to section 1701.306 of the Occupations Code. Section 1701.306 provides 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.

The city must withhold the L-2 form submitted as Exhibit D and the L-3 form submitted as Exhibit E pursuant to section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.

You contend that the internal memorandum submitted as Exhibit K is excepted from disclosure under section 552.102 of the Government Code. 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 Government Code. 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 552.102 claim in the context of the doctrine of common-law privacy under section 552.101 of the Government Code.

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 Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). Upon review of the information in Exhibit K, we find you have not established that the information is protected by common-law privacy. See Open Records Decision Nos. 470 (1987) (information relating to job performance of public employee does not generally constitute private affairs of employee), 455 (1987) (information bearing on public

employee's suitability for public employment generally not protected by privacy), 423 at 2 (1984) (scope of public employee privacy is narrow). We therefore determine that the city may not withhold any of the information in Exhibit K pursuant to section 552.102 of the Government Code.

You also contend that the names of references contained in the application for employment submitted as Exhibit H and the resume submitted as Exhibit I are protected by privacy. In Open Records Decision No. 455 (1987), this office concluded that information concerning an applicant's references and experience have a direct bearing on an applicant's past employment record and suitability for public employment and are not protected by common-law privacy. *See* Open Records Decision Nos. 455 (1987), 257 (1980) (qualifications and experience of applicants for public employment not protected by privacy). Consequently, we determine that the information concerning the officer's personal and professional references that you have highlighted in Exhibits H and I is not excepted from disclosure under section 552.101 in conjunction with common-law privacy.

Next, you contend that the driver's license number of the officer at issue is excepted from disclosure under section 552.101. Please note that section 552.130 of the Government Code provides for the confidentiality of Texas motor vehicle license and registration information. Section 552.130 provides in pertinent 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[.]

Accordingly, the city must withhold the officer's Texas driver's license number under section 552.130 of the Government Code.

Next, section 552.117(a)(2) of the Government Code excepts from disclosure information that relates to the home address, home telephone number, or social security number of a peace officer as defined by article 2.12 of the Code of Criminal Procedure, or that reveals whether the peace officer has family members. We note, however, that the protections of section 552.117 only apply to information that the city holds in its capacity as an employer. You indicate that the officer at issue is no longer employed by the city. Thus, because the city does not hold the submitted information as the individual's employer, section 552.1175, which also applies to current peace officers, is the applicable exception under these circumstances. This section 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.

We have marked the information in the submitted documents that the city must withhold under section 552.1175, provided the individual at issue is currently a licensed peace officer and is in compliance with section 552.1175(b).

The submitted documents contain the officer's personal e-mail address. Personal e-mail addresses are excepted from disclosure under section 552.137 of the Government Code.² Section 552.137 of the Government Code 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.

Section 552.137 is applicable only to personal e-mail addresses, and does not apply to a general e-mail address of a business, an Internet website address, or an e-mail address maintained by a governmental body for an official or employee of the governmental body. Unless the officer has consented to its release, the city must withhold the officer's personal e-mail address pursuant to section 552.137 of the Government Code.

Finally, we note that some of the submitted records are protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are protected by copyright. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception

² Please note that section 552.136 of the Government Code, as added by chapter 545, Act of the 77th Legislature, relating to the confidentiality of certain e-mail addresses, has been repealed as duplicative of section 552.137, added by chapter 356, Act of the 77th Legislature. *See* Act of May 21, 2003, 78th Leg., R.S., ch. 1276, § 9.013, 2003 Tex. Sess. Law Serv. 4158, 4218.

applies to the information. *Id.* If a member of the public wishes to make copies of materials protected by copyright, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the city must withhold the L-2 form submitted as Exhibit D and the L-3 form submitted as Exhibit E pursuant to section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code. The city must withhold the officer's Texas driver's license number pursuant to section 552.130 of the Government Code. We have marked the information that the city must withhold pursuant to section 552.117(a)(2) of the Government Code. The city must withhold the officer's personal e-mail address pursuant to section 552.137 of the Government Code. The remainder of the submitted information must be released to the requestor in compliance with copyright law.

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,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 187721

Enc: Submitted documents

c: Mr. David Fernandez, Jr.
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(w/o enclosures)