



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 6, 2003

Ms. J. Middlebrooks
Assistant City Attorney
Criminal Law and Police Division
City of Dallas
1400 South Lamar Street #300A
Dallas, Texas 75215-1801

OR2003-8009

Dear Ms. Middlebrooks:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 190686.

The Dallas Police Department (the "department") received a request for the complete personnel file of Officer Laura Robinson, to include "all internal affairs and public integrity records; evaluations; documentation about any commendations, disciplinary actions, grievances or complaints; resume; college credits; and any and all other documentation concerning job performance or work history." The requestor also specifically requests "Officer Robinson's Daily Observation Reports by her Field Training Officer(s)." We note you have not submitted any information responsive to the request for the Daily Observation Reports, nor have you raised any exceptions to its disclosure. Accordingly, we assume you have released such information, to the extent it exists, to the requestor. If not, you must release it immediately. *See* Gov't Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000) (concluding that section 552.221(a) requires that information not excepted from disclosure must be released as soon as possible under the circumstances). You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.117, 552.119, and 552.130 of the Government Code. We have

considered the exceptions you claim and reviewed the submitted representative sample of information.¹

We must address the department's obligations under section 552.301 of the Government Code with respect to the information you have submitted for review. 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 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. The department failed to submit written comments stating the reasons why your claimed exceptions apply to the requested information, or a copy or representative sample of the requested information, within fifteen business days of receiving the request as required under section 552.301(e)(4).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 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). As the exceptions you raise are mandatory exceptions to disclosure that generally may not be waived by the governmental body, and can provide compelling reasons to overcome the presumption of openness, we will address your claimed exceptions to disclosure with respect to the submitted information. *Cf.* Open Records Decision No. 665 at 2 n.5 (2000) (discussing discretionary exceptions that may be waived by failure to comply with procedural requirements of section 552.301).

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. You indicate that the submitted

¹ We 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.

information contains medical records, access to which is governed by the Medical Practice Act ("MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides in pertinent part:

(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.

Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). We have marked information in the submitted documents that may be released only as provided under the MPA. Open Records Decision No. 598 (1991).

You also indicate that the submitted information contains mental health records. Section 611.002 of the Health and Safety Code applies to "[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." *See also* Health & Safety Code § 611.001 (defining "patient" and "professional"). We have marked mental health records that are within the scope of section 611.002 and may not be released except in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. Health & Safety Code § 611.002(b); *see id.* §§ 611.004, 611.0045.

The submitted documents also include information relating to a polygraph examination. Section 1703.306(b) of the Occupations Code provides that "[a] governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information." The department must withhold the marked polygraph examination information under section 552.101 of the Government Code in conjunction with section 1703.306(b) of the Occupations Code.

Next, criminal history record information ("CHRI") is confidential and not subject to disclosure. Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the

purpose for which it was given.”), (2) (“No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself.”). Section 411.083 provides that any CHRI maintained by the Department of Public Safety (“DPS”) is confidential. Gov’t Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *Id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies).² Therefore, the department must withhold any CHRI falling within the ambit of these state and federal regulations pursuant to section 552.101 of the Government Code.

We note you have marked specific information in the submitted documents that you contend is protected by common-law privacy. Section 552.101 also encompasses the common-law right of privacy, which protects information if 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. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types 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. In addition, this office has found that the following types of information are excepted from required public disclosure under common-law privacy: an individual’s criminal history when compiled by a governmental body, *see* Open Records Decision No. 565 (citing *United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)), personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), 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), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). Upon review, we agree that a small portion of the submitted information, which we have marked, is protected by common-law privacy and must be withheld under section 552.101 on that basis. As for the remaining information, we find that, even if it could be considered highly intimate or embarrassing, it is of legitimate public concern. *See* Open Records Decision Nos. 444 at 5-6 (1986) (public has interest in job qualifications and performance and circumstances of public employee), 405 at 2-3 (1983); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). Thus the department may not withhold this information, which we have marked, pursuant to section 552.101.

²However, the definition of CHRI does not include driving record information maintained by DPS under chapter 521 of the Transportation Code. *See* Gov’t Code § 411.082(2)(B).

We next address your claim under section 552.117 of the Government Code. Section 552.117(a)(2) of the Government Code excepts from required public disclosure the home address, home telephone number, social security number, and the family member information of a peace officer as defined by article 2.12 of the Code of Criminal Procedure. *See* Open Records Decision No. 622 (1994). We have marked the information that the department must withhold under section 552.117(a)(2).

We also note that the department may be required to withhold a small portion of the submitted information pursuant to section 552.1175 of the Government Code. Section 552.1175 applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure and provides in pertinent part:

(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). The submitted personnel records contain the home address and telephone number of a Johnson County Deputy Constable. Thus, if the deputy constable at issue made a proper section 552.1175 election, the department must withhold the information that we have marked pursuant to section 552.1175. Otherwise, the department must release the information that we have marked pursuant to section 552.1175 of the Government Code.

You contend that a photograph of Officer Robinson is excepted under section 552.119 of the Government Code. Section 552.119 provides:

(a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under Section 51.212, Education Code, the release of which would endanger the life or physical safety of the officer, is excepted from [required public disclosure] unless:

- (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.

(b) A photograph exempt from disclosure under Subsection (a) may be made public only if the peace officer or security officer gives written consent to the disclosure.

Gov't Code § 552.119. In this instance, you have not demonstrated, nor is it apparent from our review of the submitted information, that release of the photograph at issue would endanger the life or physical safety of the officer. We therefore determine that the department may not withhold the photograph of the officer in the submitted documents pursuant to section 552.119.

The submitted documents contain information that is excepted from disclosure under section 552.130 of the Government Code. Section 552.130 provides in pertinent part:

(a) Information is excepted from the requirements 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 information in the submitted documents that the department must withhold under section 552.130.

Finally, we note that the submitted documents contain the social security number of a member of the public, which may be confidential under federal law. A social security number may 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 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 id.* We have no basis for concluding that the social security number of a member of the public contained in the submitted documents is confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you

should ensure that no such information was obtained or is maintained by the department pursuant to any provision of law enacted on or after October 1, 1990.

In summary, we have marked information that may be released only as provided under the MPA. We have also marked mental health information that may be released only as provided under sections 611.004 and 611.0045 of the Health and Safety Code. The marked polygraph examination information must be withheld under section 552.101 in conjunction with section 1703.306 of the Occupations Code. Any criminal history record information in the submitted documents must be withheld pursuant to section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code and federal regulations. We have marked information that the department must withhold under section 552.101 of the Government Code in conjunction with common-law privacy, and under sections 552.117(a)(2) and 552.130 of the Government Code. A social security number of a member of the public may be excepted under section 552.101 in conjunction with federal law. The remainder of the submitted information must be released 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. *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# 190686

Enc: Submitted documents

c: Ms. Pam Maples
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