



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 3, 2003

Mr. W. W. McNeal
McNeal, Garner & Lippe P.L.L.C.
P.O. Box 1259
Lockhart, Texas 78644

OR2003-8662

Dear Mr. McNeal:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 191946.

The Martindale Police Department (the "department"), which you represent, received a request for information relating to a particular police officer. You believe that some of the requested information is excepted from disclosure under sections 552.101 and 552.102 of the Government Code. We have considered the exceptions you raise and have reviewed the information you submitted.

We first note that one of the submitted documents does not appear to be responsive to this request for information. Chapter 552 of the Government Code does not require the department to release information that did not exist when it received this request or to create responsive information.¹ Thus, if the marked document dated September 11, 2003 did not yet exist when the department received this request, the request does not encompass that document, and it need not be released.²

We next note that the department has not complied with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires the governmental body to ask for the

¹See *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

²The requestor has informed this office that he submitted his request for information on July 31, 2003.

attorney general's decision and state the exceptions to disclosure that it claims not later than the tenth business day after the date of its receipt of the written request for information. *See* Gov't Code § 552.301(b). Section 552.301(e) requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of its receipt of the request, (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request, or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples of the information if it is voluminous. *See id.* § 552.301(e)(1)(A)-(D). If a governmental body does not request an attorney general decision as prescribed by section 552.301, the information requested in writing is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold the information. *See id.* § 552.302.

In this instance, the department has not submitted a copy of the written request for information, as required by section 552.301(e)(1)(B). Likewise, the department has not submitted a signed statement of the date of its receipt of the request, or evidence sufficient to establish that date, as required by section 552.301(e)(1)(C). Therefore, the information that is responsive to this request is presumed to be public and must be released, unless there is a compelling reason to withhold any of the information from the public. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). The presumption that information is public under section 552.302 can generally be overcome when the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). In this instance, the department raises sections 552.101 and 552.102 of the Government Code. As the applicability of either of these sections can provide a compelling reason for non-disclosure under section 552.302, we will consider whether the department must withhold any of the submitted information under sections 552.101 or 552.102.

Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that other statutes make confidential. In this instance, one of the submitted documents is confidential under section 1701.306 of the Occupations Code. Chapter 1701 of the Occupations Code is applicable to the Texas Commission on Law Enforcement Officer Standards and Education ("TCLEOSE"). Section 1701.306 provides in part:

(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.*

Occ. Code § 1701.306(a)-(b) (emphasis added). We have marked the information that the department must withhold under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.

Section 552.101 also encompasses the common-law right to privacy. Information must be withheld from the public under section 552.101 in conjunction with common-law privacy when the information is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, *and* (2) of no legitimate public interest. *See Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Section 552.102(a) of the Government Code excepts from required public disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]” Section 552.102(a) is applicable to information that relates to public officials and employees. *See Open Records Decision No. 327 at 2* (1982) (anything relating to employee's employment and its terms constitutes information relevant to person's employment relationship and is part of employee's personnel file). The test of whether information is private under section 552.102(a) is the same as the standard for common-law privacy under section 552.101 of the Government Code. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.). Accordingly, we will consider whether any of the submitted information is private under section 552.101.

Common-law privacy encompasses certain types of personal financial information. This office has determined that financial information relating only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See, e.g., Open Records Decision Nos. 545 at 4* (1990) (“In general, we have found the kinds of financial information not excepted from public disclosure by common-law privacy to be those regarding the receipt of governmental funds or debts owed to governmental entities”), *523 at 4* (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), *373 at 4* (1983) (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-

case basis). Thus, a public employee's allocation of part of the employee's salary to a voluntary investment program offered by the employer is a personal investment decision, and information about that decision is protected by common-law privacy. *See, e.g.*, Open Records Decision Nos. 600 at 9-12 (1992) (participation in TexFlex), 545 at 3-5 (1990) (deferred compensation plan). Likewise, an employee's designation of a retirement beneficiary is excepted from disclosure under the common-law right to privacy. *See* Open Records Decision No. 600 at 9 (1992). However, where a transaction is funded in part by a governmental body, it involves the employee in a transaction with the governmental body, and the basic facts about that transaction are not protected by common-law privacy. *Id.* at 9. We have marked personal financial information that the department must withhold under section 552.101 of the Government Code in conjunction with common-law privacy.

The submitted documents also include information that the department must withhold under section 552.117 of the Government Code. The present and former home addresses and home telephone numbers, personal pager and mobile numbers, social security number, and family member information of a peace officer are excepted from disclosure under section 552.117(a)(2), regardless of whether the officer complies with sections 552.024 or 552.1175 of the Government Code. Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. The submitted documents reflect that the information at issue relates to a peace officer. Therefore, we have marked the types of information that are excepted from disclosure under section 552.117(a)(2).

The department may also be required to withhold a small portion of the submitted information under section 552.1175 of the Government Code. Section 552.1175 also applies to information that relates to peace officers, as defined by article 2.12 of the Code of Criminal Procedure, and provides in 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). In this instance, the submitted documents contain information that relates to Comal County Sheriff's Deputies and a City of San Antonio Police Officer. If these individuals are still peace officers and elect to restrict access to their information in accordance with section 552.1175, or they are no longer peace officers but previously made such elections when they were still peace officers, then the department must withhold their home addresses and telephone numbers, social security numbers, and family member

information under section 552.1175. Otherwise, the department must release this information. We have marked the information that the department may be required to withhold under section 552.1175.

Lastly, we note that the submitted documents also include information that relates to a Texas driver's license. Section 552.130 of the Government Code 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[.]" Gov't Code § 552.130(a)(1). We have marked Texas driver's license information that the department must withhold under section 552.130.

In summary: (1) the department must withhold the information that is confidential under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code and the personal financial information that is protected by common-law privacy under section 552.101; (2) the department also must withhold the information that is excepted from disclosure under sections 552.117(a)(2) and 552.130; and (3) the department may be required to withhold the information that we have marked under section 552.1175. The rest of the submitted 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).

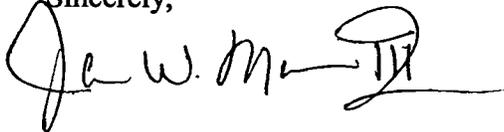
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,

A handwritten signature in black ink, appearing to read "J.W. Morris, III". The signature is fluid and cursive, with a large initial "J" and "M".

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 191946

Enc: Submitted documents

c: Mr. Eric M. Mojica
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Lockhart, Texas 78644
(w/o enclosures)