



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 30, 2004

Ms. Lillian Guillen Graham
Assistant City Attorney
City of Mesquite
P. O. Box 850137
Mesquite, Texas 75185-0137

OR2004-0689

Dear Ms. Graham:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 195247.

The City of Mesquite Fire Department (the "department") received a request for information regarding the requestor's application for employment with the department. You claim that the information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You assert that the submitted information in Exhibits 2 and 4 is excepted from disclosure pursuant to section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You inform us that the applicant signed a confidentiality agreement to protect the results of a confidential background investigation, which would not be disclosed to anyone, including the applicant. However, section 552.101 may not be invoked based on an agreement to keep information confidential unless a governmental body is specifically authorized by statute to enter an agreement to keep information confidential. *See* Open Records Decision Nos. 444 (1986), 605 (1992), 585 (1991). A governmental body cannot, through an agreement or contract, overrule or repeal provisions of chapter 552. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to chapter 552] cannot be compromised simply by its decision to enter into a contract."). Consequently, unless the

submitted information comes within an exception to disclosure, it must be released, regardless of any expectation or agreement to the contrary.

We note that section 552.101 encompasses the doctrine of common-law privacy. Common-law privacy protects information 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 public has no legitimate interest in the information. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). The type 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 personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from disclosure. See Open Records Decision Nos. 600 (1992). Having reviewed the submitted information, we find that some of the information in Exhibit 2 is protected by common-law privacy and must therefore be withheld pursuant to section 552.101. We have marked this information. We note that the submitted documents contain other information implicating the requestor's privacy interests that would be protected from disclosure under section 552.101, but since the requestor has a right of right of access under section 552.023, this information may not be withheld from him on privacy grounds.¹ See Gov't Code § 552.023 (a person has a special right of access to information that is excepted from public disclosure under laws intended to protect that person's privacy interest as the subject of the information).

Next, you claim that Exhibit 4 is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ) and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, or opinions, and other material reflecting the policymaking processes of the governmental body. Open Records Decision No. 615 (1993); see also *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the

¹ Should the department receive another request for this information from a person who would not have a right of access to it, the department should resubmit this same information and request another decision. See Gov't Code §§ 552.301, .302.

opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615 at 4-5. We have reviewed the information in Exhibit 4 and find that it relates to a specific personnel matter and does not constitute discussions regarding the city or fire department's policymaking. Accordingly, we conclude that the information found in Exhibit 4 may not be withheld under section 552.111.

We note that section 552.117 of the Government Code may be applicable to some of the submitted information in Exhibit 2. 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 request that this information be kept confidential under section 552.024 of the Government Code. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989)*. Therefore, pursuant to section 552.117(a)(1), the department must withhold the social security numbers of all current or former officials or employees who elected, prior to the department's receipt of this request, to keep such information confidential. The department may not withhold such information under section 552.117 for anyone who did not make a timely election. We have marked the social security numbers found in Exhibit 2 that must be withheld if section 552.117 applies.

Social security numbers that are not otherwise excepted from disclosure under section 552.117 might nevertheless be excepted from disclosure 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 social security numbers at issue are 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 Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing the social security numbers, the department should ensure that such numbers are not obtained or maintained pursuant to any provision of law enacted on or after October 1, 1990.

A portion of the submitted information found in Exhibit 2 is excepted from disclosure under section 552.130 of the Government Code. Section 552.130 excepts information from disclosure 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*. The department must withhold the information we have marked pursuant to section 552.130. However, the requestor has a special right of access to his own driver's license information under section 552.023.

Finally, we note that portions of the remaining submitted information found in Exhibit 2 are copyrighted. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *See* Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making such 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 private information we have marked is excepted from disclosure under section 552.101 and common-law privacy. The section 552.130 information we have marked must also be withheld from disclosure. The social security numbers of current or former employees who elected, prior to the receipt of this request, to keep their information confidential must be withheld under section 552.117(a)(1). If section 552.117 does not apply to these social security numbers, these numbers may still be excepted from disclosure under section 552.101 and federal law. The remaining portions of the copyrighted information in Exhibit 2 must be released in accordance with copyright law. Any 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,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/seg

Ref: ID# 195247

Enc. Submitted documents

c: Mr. Jay Glossup
837 Via Altos
Mesquite, Texas 75150
(w/o enclosures)