



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 9, 2004

Ms. Rebecca H. Brewer
Abernathy, Roeder, Boyd & Joplin, P.C.
P.O. Box 1210
McKinney, Texas 75070-1210

OR2004-0969

Dear Ms. Brewer:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 195790.

The City of Wylie (the "city"), which you represent, received a request for the disciplinary records of four named city police officers. You have submitted copies of two investigation reports, which you have marked as exhibits B-1 and B-2. If the city holds any other disciplinary records with respect to any of the officers specified in the request, we presume that information has been released to the requestors. *See* Gov't Code §§ 552.301, 302 (providing, among other things, that if governmental body does not submit to attorney general copy or representative sample of requested information, that information is presumed public). You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We note at the outset that the release of the submitted records is governed by section 552.022 of the Government Code. Section 552.022 provides that, except as provided by section 552.108, a completed report or investigation made of, for, or by a governmental body is not excepted from required disclosure under the act unless the report or investigation is expressly confidential under other law. Gov't Code § 552.022(a)(1). The two exhibits that you have submitted to this office pertain to completed departmental investigations; section 552.022(a)(1) therefore applies and the exhibits must be released unless they are expressly made confidential under other law.¹ Because sections 552.101 and 552.117

¹ We note that you have not raised section 552.108 for the submitted information. *See* Gov't Code § 552.022(a)(1).

constitute other law for purposes of section 552.022, we will consider the applicability of those sections to the completed investigations.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information made confidential by other statutes. You claim exhibit B-1 is subject to section 58.007 of the Family Code. Section 58.007(c) makes confidential law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated. Section 58.007(c) is applicable to records of juvenile conduct that occurred on or after September 1, 1997. *See* Act of June 2, 1997, 75th Leg., R.S., ch. 1086, §§ 20, 55(a), 1997 Tex. Gen. Laws 4179, 4187, 4199; Open Records Decision No. 644 (1996). The juvenile must have been ten years of age or older and under seventeen years of age when the conduct occurred. *See* Fam. Code § 51.02(2) (defining "child" for purposes of title 3 of Family Code). We have marked juvenile law enforcement records in exhibit B-1 that are confidential under section 58.007. These records must be withheld in accordance with section 552.101 of the Government Code.

We note that the two investigations at the heart of exhibit B-1, the initial arrest of several juveniles and the subsequent probe into the officers' handling of the arrest, are interconnected. However, each gives rise to a distinct set of concerns: the public's legitimate interest in charges of police misconduct and the privacy interests of the juveniles who are implicated in the ensuing investigation. Because the remaining information in exhibit B-1 relates to a disciplinary investigation of city police officers and to this extent does not constitute a law enforcement record or file of juvenile conduct, it may not be withheld on the basis of section 58.007 of the Family Code. However, other exceptions to disclosure do apply to portions of the remaining information in exhibit B-1.²

Common-law privacy, which is incorporated into the act through section 552.101, 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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy encompasses the specific types of information that the Texas Supreme Court held to be intimate or embarrassing in *Industrial Foundation*. *See* 540 S.W.2d at 683 (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). This office has since concluded that other types of information also are private under section 552.101. *See generally* Open Records Decision No. 659

²The Office of the Attorney General will raise other mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

at 4-5 (1999) (summarizing information attorney general has determined to be private); *cf.* Fam. Code § 58.007. We have marked the information in exhibits B-1 and B-2 that must be withheld under section 552.101 in conjunction with common-law privacy. The city must also withhold similar identifying information contained in the video and cassette tapes submitted with exhibit B-1; if it lacks the technical capacity to do so, these tapes must be withheld in their entirety.

Exhibit B-1 includes information from 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.” We have marked the information in exhibit B-1 that is confidential under section 1703.306(b). This information must be withheld in accordance with section 552.101 of the Government Code.

Exhibit B-1 includes criminal history record information (“CHRI”). *See* Gov’t Code § 411.082(2) (CHRI means information collected about a person and does not include driving record information). CHRI generated by the National Crime Information Center (“NCIC”) or by the Texas Crime Information Center (“TCIC”) is confidential. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety (“DPS”) maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov’t Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. Assuming that exhibit B-1 contains CHRI that falls within the ambit of these state and federal regulations, this CHRI is confidential by law and must therefore be withheld under section 552.101.

Exhibit B-1 includes fingerprint information that is subject to sections 560.002 and 560.003 of the Government Code. Section 560.002 makes confidential biometric identifiers, including fingerprints, and permits their disclosure only under specific circumstances. Gov’t Code §§ 560.002 (making biometric identifiers confidential), .001 (including fingerprints in definition of biometric identifier). Section 560.003 further provides that a biometric identifier in the possession of a governmental body is exempt from disclosure under the act.

It does not appear to this office that section 560.002 permits the disclosure of the submitted fingerprint information. Therefore, the city must withhold the fingerprint information we have marked under section 552.101 in conjunction with section 560.002 of the Government Code.

Exhibit B-2 includes mental health records that are subject to chapter 611 of the Health and Safety Code. Section 611.002(a) of the Health and Safety Code protects from disclosure communications between a patient and a mental health professional and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a mental health professional are confidential. We have marked the information in exhibit B-2 that is confidential under section 611.002(a). This information must be withheld in accordance with section 552.101 of the Government Code.

We have also marked social security numbers that appear in both exhibits. In certain circumstances, social security numbers must be withheld 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 numbers 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 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 city pursuant to any provision of law enacted on or after October 1, 1990.

We now turn to the other sections of the act that may except portions of the submitted information from disclosure. We understand you to assert that sections 552.117(a)(2) and 552.1175 of the Government Code make some of the submitted information confidential.³ However, these sections apply only to the home addresses and telephone numbers, social security numbers, and personal family information for current and former peace officers. Insofar as the documents provided contain no information falling into any of these categories, we determine that sections 552.117(a)(2) and 552.1175 are inapplicable.

Exhibits B-1 and B-2 include certain information that is protected by section 552.130 of the Government Code. Section 552.130 excepts from disclosure information relating to a Texas motor vehicle operator's or driver's license and information relating to a Texas motor vehicle title or registration. Gov't Code § 552.130. The city must withhold the license and motor

³In Senate Bill 1388, which became effective on June 20, 2003, the Seventy-eighth Legislature amended section 552.117 of the Government Code by adding "(a)" to the relevant language of this provision. *See* Act of May 30, 2003, 78th Leg., R.S., ch. 947, 2003 Tex. Sess. Law Serv. 2822 (Vernon) (to be codified as an amendment to Gov't Code § 552.117).

vehicle information we have marked under section 552.130. The city must also withhold similar information contained in the video tapes submitted with exhibit B-1; if it lacks the technical capacity to do so, these tapes must be withheld in their entirety.

Exhibit B-1 also contains a telephone bill. The bill includes information that is subject to section 552.136 of the Government Code, which makes confidential account numbers that can be used to obtain money, goods, or services. Gov't Code § 552.136(a)(1). We have marked the account number that the city must withhold under section 552.136.

In summary, the city must withhold the following information pursuant to section 552.101 of the Government Code: (1) the juvenile law enforcement records we have marked pursuant to section 58.007(c) of the Family Code; (2) the information we have marked pursuant to common-law privacy, as well as similar identifying information contained in the video and cassette tapes submitted with exhibit B-1; (3) the polygraph information we have marked pursuant to section 1703.306 of the Occupations Code; (4) criminal history record information that is confidential under state and/or federal law; (5) the fingerprint information we have marked pursuant to section 560.002 of the Government Code; (6) the mental health records we have marked pursuant to section 611.002(a) of the Health and Safety Code; and (7) the social security numbers we have marked, if these numbers are confidential under the 1990 amendments to the federal Social Security Act. The city must withhold the Texas driver's license and motor vehicle information we have marked under section 552.130 of the Government Code, as well as similar information contained in the submitted video tapes. The city must also withhold the account number we have marked under section 552.136 of the Government Code. If the city lacks the technical capacity to edit the submitted video and cassette tapes in such a way as to protect confidential information from disclosure, these tapes must be withheld in their entirety. The 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 thirty calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within ten 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 ten 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 ten 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 ten calendar days of the date of this ruling.

Sincerely,



Steven W. Bartels
Assistant Attorney General
Open Records Division

SWB/seg

Ref: ID# 195790

Enc. Submitted documents

c: Mr. Christopher Hoover
520 Central Parkway East, Suite 112
Plano, Texas 75074
(w/o enclosures)