



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 9, 2004

Mr. Terrence S. Welch
Brown & Hofmeister, L.L.P.
1717 Main Street, Suite 4300
Dallas, Texas 75201

OR2004-0971

Dear Mr. Welch:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 195990.

The City of Kemp (the "city"), which you represent, received a request for information concerning a named police officer. You claim that the requested information is excepted from disclosure under sections 552.117, 552.119 and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We note that the requested documents include the officer's W-4 form. Section 552.101¹ 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. Employee W-4 forms are confidential under section 6103(a) of title 26 of the United States Code. *See* 26 U.S.C. § 6103(a); *see also* Open Records Decision No. 600 (1992). Accordingly, the city must withhold the officer's W-4 form under section 552.101 as information made confidential by law.

The requested information also includes a Form I-9. Section 1324a of title 8 of the United States Code provides that an Employment Eligibility Verification Form I-9 "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). The release of the Form I-9 in response to this request for

¹The Office of the Attorney General will raise a mandatory exception like section 552.101 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

information would be “for purposes other than for enforcement” of the referenced federal statutes. A Form I-9 may be released only for purposes of compliance with the federal laws and regulations governing the employment verification system. Therefore, the city must withhold the Form I-9 under section 552.101 of the Government Code in conjunction with federal law.

Further, the requested information includes a Report of Resignation or Separation of License Holder addressed to the Texas Commission on Law Enforcement (“the commission”). This form, commonly referred to as an “F-5,” is made confidential by section 1701.454 of the Occupations Code. Section 1701.452 requires that a law enforcement agency submit a report to the commission regarding an officer licensed under chapter 1701 who resigns from the law enforcement agency. *See* Occ. Code § 1701.452. Section 1701.454 provides in relevant part:

(a) A report or statement submitted to the commission under this subchapter is confidential and is not subject to disclosure under Chapter 552 of the Government Code.

Occ. Code § 1701.454. Therefore, the city must withhold the F-5 pursuant to section 552.101 in conjunction with section 1701.454 of the Occupations Code.

Section 552.101 also encompasses the doctrine of common law privacy. 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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (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. 540 S.W.2d at 683. This office has also found that 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) are excepted from disclosure under common law privacy. Therefore, we have marked the medical information that must be withheld under section 552.101 in conjunction with the common law right to privacy.

This office has also determined that some personal financial information is highly intimate or embarrassing and thus meets the first part of the *Industrial Foundation* test. *See* Open Records Decision Nos. 600 (1992) (Employee’s Withholding Allowance Certificate; designation of beneficiary of employee’s retirement benefits; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history), 523 (1989). However, where a transaction is funded in part by the state, it involves the employee in a transaction with the state and is not protected by

privacy. Thus, information about the essential features of an employee's participation in a group insurance program funded in part by the state involves him in a transaction with the state and, therefore, is not excepted from disclosure by a right of privacy. On the other hand, information relating to an employee's choice of insurance carrier and his election of optional coverages is confidential under the right of privacy. *Id.* at 10-11. Similarly, this office has determined that information revealing the personal financial decision to voluntarily have certain deductions made from an employee's paycheck meets the *Industrial Foundation* test. Open Records Decision No. 545 (1990). We have marked the personal financial information that is excepted from disclosure under section 552.101 and common law privacy.

The requested documents contain information that may be excepted from disclosure under section 552.117 of the Government Code.² Section 552.117(a)(2) makes confidential all information that relates to the home address, home telephone number, social security number and family information of a "peace officer." Whether a particular item of information is protected under this section must be determined at the time that the request for the information is received by the governmental body. *See* Open Records Decision No. 530 at 5 (1989). Section 552.117(a)(2) applies to "peace officers" as defined by article 2.12 of the Code of Criminal Procedure. If the peace officers named in the requested documents were employed by the city at the time of the request, or if the officers were no longer employed by the city at the time of the request and are still licensed peace officers, their information must be withheld pursuant to section 552.117(a)(2). If the officers were no longer employed by the city at the time of the request and were no longer licensed peace officers, and the former officers made an election to keep their information confidential in accordance with section 552.024 prior to the city's receipt of the current records request, the information must be withheld under section 552.117(a)(1). *See* Gov't Code § 552.117(a)(1). If the officers have never been employed by the city but have elected under section 552.1175(b) to restrict access to their information in city records, then the city must withhold the information under section 552.1175. We have marked the information that may be excepted from disclosure under sections 552.117(a)(1), 552.117(a)(2) and 552.1175 of the Government Code.

Next, we address your section 552.119 claim against disclosure. Section 552.119 of the Government Code 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:

²In 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).

(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. Under section 552.119, a governmental body must demonstrate, if the documents do not demonstrate on their face, that release of the photograph would endanger the life or physical safety of a peace officer. Furthermore, a photograph of a peace officer cannot be withheld under section 552.119 if (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; (3) the photograph is introduced as evidence in a judicial proceeding; or (4) the officer gives written consent to the disclosure.

In this instance, you have not demonstrated, nor is it apparent from our review of the submitted information, that release of the photographs at issue would endanger the life or physical safety of the peace officer depicted. We therefore determine that the city may not withhold the photographs of the officer pursuant to section 552.119 of the Government Code.

Finally, you claim that some of the requested information is confidential under section 552.130 of the Government Code. This section provides in relevant 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[.]

Thus, you must withhold the Texas driver's license number and expiration date we have marked under section 552.130 of the Government Code.

In summary, you must withhold the officer's W-4 form, the Form I-9 and the F-5 under section 552.101 in conjunction with applicable federal or state law. Common law privacy protects the medical and personal financial information we have marked. We have marked

information that may be excepted from disclosure under sections 552.117(a)(1), 552.117(a)(2) and 552.1175. The marked driver's license number and expiration date must be withheld under section 552.130. 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 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,



Melissa Vela-Martinez
Assistant Attorney General
Open Records Division

MVM/sdk

Ref: ID# 195990

Enc. Submitted documents

c: Ms. Ann Q. Thompson
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(w/o enclosures)