



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

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Mr. Ken Johnson
Assistant City Attorney
City of Waco
P.O. Box 2570
Waco, Texas 76702-2570

OR2004-1052

Dear Mr. Johnson:

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# 195949.

The City of Waco (the "city") received a request for the personnel file of a retired police officer. You claim that some of the requested information is excepted from disclosure under sections 552.101, 552.117, 552.122, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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, such as section 143.089(g) of the Local Government Code. We understand that the City of Waco is a civil service city under chapter 143 of the Local Government Code.

Section 143.089 contemplates two different types of personnel files: a police officer's civil service file that a city's civil service director is required to maintain, and an internal file that a police department may maintain for its own use. Local Gov't Code § 143.089(a), (g). In cases in which a police department investigates a police officer's misconduct and takes disciplinary action against a police officer, section 143.089(a)(2) requires the department to place all investigatory records relating to the investigation and disciplinary action, including background documents such as complaints, witness statements, and documents of like nature from individuals who were not in a supervisory capacity, in the police officer's civil service

file maintained under section 143.089(a).¹ See *Abbott v. Corpus Christi*, 109 S.W.3d 113, 122 (Tex. App.—Austin 2003, no pet. h.). The department must forward to the civil service commission for placement in the civil service personnel file all investigatory materials in a case resulting in disciplinary action are “from the employing department” when they are held by or in possession of the department because of its investigation into a police officer’s misconduct. *Id.* at 122. Such records are not confidential and are subject to release under the act unless an exception under the act applies. See *City of San Antonio v. Tex. Att’y General*, 851 S.W.2d 946, 948-49 (Tex. App.—Austin 1993, writ denied); see also Local Gov’t Code § 143.089(f); Open Records Decision No. 562 at 6 (1990). Information that reasonably relates to an officer’s employment relationship with the police department and that is maintained in a police department’s internal file pursuant to section 143.089(g) is confidential and must not be released. *City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, pet. denied); 851 S.W.2d at 949.

You have submitted copies of the civil service personnel file maintained by the civil service commission, which you have marked as exhibit 3, and the internal personnel file maintained by the city’s police department, which you have marked as exhibit 4. Based on our review of the submitted information, we determine that the information contained in exhibit 4 is confidential under section 143.089(g) of the Local Government Code and must be withheld in accordance with section 552.101 of the Government Code.²

We now address the applicability of your other arguments to the information in exhibit 3. You state that certain information is excepted from disclosure under section 552.101 in conjunction with 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). 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 common-law privacy, including information that reflects an individual’s personal financial decisions and is not related to a financial transaction between the individual and a

¹Chapter 143 enumerates the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. See Local Gov’t Code §§ 143.051-.055.

²Because we are able to make this determination, we need not address your claims that certain information included in exhibit 4 is made confidential by section 550.065(b) of the Transportation Code and section 1701.306 of the Occupations Code or excepted from disclosure under section 552.122 of the Government Code.

governmental body. *See* Open Records Decision Nos. 600 (1992) (public employee's withholding allowance certificate, designation of beneficiary of employee's retirement benefits, direct deposit authorization, and employee's decisions regarding voluntary benefits programs, among others, protected under common-law privacy), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history protected under common-law privacy); *see generally* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has determined to be private). However, this office has also recognized a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* ORD 600 (information revealing that employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure).

Based on our review of exhibit 3, we determine that the financial information that you have highlighted does not reflect personal decisions made by the individual officer, but instead reveals compensation that this officer received from the city. Accordingly, this information is not protected by common-law privacy. However, we have marked other information that must be withheld under section 552.101 in conjunction with common-law privacy.

You also claim that certain information contained in exhibit 3 is subject to section 1701.306 of the Occupations Code. Section 1701.306(a) requires as a condition of licensure that a licensed psychologist or psychiatrist provide a written declaration that a prospective officer is in satisfactory psychological and emotional health to serve as a law enforcement officer. Section 1701.306(b) provides that this declaration is not public information. However, the information that the city has marked does not constitute a declaration for purposes of this section and it may therefore not be withheld on that basis.

Certain information contained in exhibit 3 is criminal history record information ("CHRI") subject to chapter 411 of the Government Code.³ 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) (limiting use of CHRI disseminated to noncriminal justice agencies to the purpose for which the information was given), (2) (prohibiting confirmation of existence or nonexistence of CHRI 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). However, 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). The

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

city must withhold the CHRI we have marked pursuant to section 552.101 of the Government Code.

Next, you claim that certain information contained in exhibit 3 is subject to section 552.117 of the Government Code. Section 552.117(a) excepts from required public disclosure the home address, home telephone number, social security number, and family member information of certain government employees. *See* Open Records Decision No. 622 (1994). Section 552.117(a)(1) applies to both current and former employees of a governmental body, while section 552.117(a)(2) is reserved for *current* peace officers as defined by article 2.12 of the Code of Criminal Procedure. However, section 552.117 does not encompass personal post office box numbers. *See generally* Gov't Code § 552.117; *see also* Open Records Decision No. 622 at 4 (1994) ("The legislative history of [section 552.117(a)] makes clear that its purpose is to protect public employees from being harassed at home. *See* House Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985); Senate Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985)." (emphasis added)).

In this case, we presume that the retired officer in question is no longer employed by the city; however, we are unable to determine whether she was still a licensed peace officer at the time of the request. If she was, section 552.117(a)(2) would apply;⁴ if she was not, but made a timely election to keep personal information confidential, section 552.117(a)(1) would apply. If she was no longer a peace officer and she made no election prior to the request, the city may not withhold the information at issue under any provision of section 552.117. In the event that either subsection of section 552.117(a) applies, you must withhold most of the information you have marked, as well as the additional information that we have marked. We note that the personal post office box information you have marked must be released to the requestor.

Social security numbers that are not subject to any provision of section 552.117 may nevertheless be excepted from disclosure in certain circumstances pursuant to 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

⁴You note that certain personal information of any individual who meets the definition of a "peace officer" may be withheld on the basis of a previous determination of this office, without requesting a decision from this office, although you have not relied on this previous determination in this instance. *See* Open Records Decision No. 670 (2001); *see also* Open Records Decision No. 673 (2001) (criteria of previous determination regarding specific categories of information). We note, however, that the determination in Open Records Decision No. 670 would not govern the current request if the individual in question did not meet the definition of a "peace officer". *See* ORD 670 at 2-5 (citing definition contained in Code Crim Proc. art. 2.12).

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, it is your duty to 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.

You also claim that certain information contained in exhibit 3 is subject to section 552.130 of the Government Code. Section 552.130 excepts from disclosure information relating to a Texas driver's license and information relating to a Texas motor vehicle title or registration. Gov't Code § 552.130. The city must withhold the highlighted driver's license and motor vehicle information we have marked under section 552.130.

We note that exhibit 3 also includes information that is subject to section 552.136 of the Government Code. Section 552.136 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 exhibit 4 in its entirety under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. With respect to the information contained in exhibit 3, the city must withhold the following information under section 552.101 of the Government Code: (1) the information we have marked pursuant to common-law privacy and (2) the criminal history record information we have marked pursuant to chapter 411 of the Government Code. The city must also withhold most of the personal information that it has marked in exhibit 3, in addition to the information that we have marked (1) under section 552.117(a)(2) if the retired officer was still a licensed peace officer at the time of the request or (2) under section 552.117(a)(1) if she was not, but timely elected to keep this information confidential. However, the city must release this information if the retired officer was no longer a licensed peace officer and failed to make a timely election to except it from disclosure. Social security numbers that are not subject to any provision of section 552.117 must be withheld under section 552.101 if they are confidential under federal law. The city must withhold the driver's license and motor vehicle information we have marked under section 552.130. Finally, the city must withhold the account number we have marked under section 552.136. 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# 195949

Enc. Submitted documents

c: Ms. Cindy Culp
900 Franklin
Waco, Texas 76702
(w/o enclosures)