



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

April 6, 2004

Ms. Kathleen Weisskopf
Assistant City Attorney
City of Arlington
P. O. Box 90231
Arlington, Texas 76004-3231

OR2004-2750

Dear Ms. Weisskopf:

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# 198923.

The Arlington Police Department (the "department") received a request for a named department police officer's personnel file. You state that some information will be released to the requestor. You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.115, 552.117, 552.119, 552.122, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Included among the documents you seek to withhold is an accident report form that appears to have been completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer's accident report). Section 550.065(b) of the Transportation Code states that except as provided by subsection (c), accident reports are privileged and confidential. Section 550.065(c)(4) provides for the release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2)

¹We assume that the sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

name of any person involved in the accident; and (3) specific location of the accident. Transp. Code § 550.065(c)(4). Under this provision, the Department of Public Safety or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more pieces of information specified by the statute. *Id.* In the situation at hand, the requestor has not provided the department with two of the three pieces of information. Thus, you must withhold the accident report under section 550.065(b).

You claim that some of the submitted information is excepted from disclosure pursuant to section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *See Gov't Code § 552.101.* This section encompasses information that is protected from disclosure by other statutes. You submitted to this office the officer's Employment Eligibility Verification, Form I-9. A Form I-9 is governed by title 8, section 1324a of the United States Code, which provides that the form "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. 8 U.S.C. § 1324a(b)(5). Release of this document in this instance would be "for purposes other than for enforcement" of the referenced federal statute. Accordingly, we conclude that the Form I-9 is confidential for purposes of section 552.101 of the Government Code and may only be released in compliance with the federal laws and regulations governing the employment verification system.

You also argue that certain submitted tax information is excepted under section 552.101 of the Government Code. The submitted information contains the officer's W-4 Form. Title 26 section 6103(a) of the United States Code renders tax return information confidential. This term has been interpreted by federal courts to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *Mallas v. Kolak*, 721 F. Supp 748 (M.D.N.C. 1989). Because the W-4 Form constitutes tax return information, the department must withhold this information under section 552.101 in conjunction with federal law.

Section 1703.306 of the Occupations Code, which is also encompassed by section 552.101, provides as follows:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

(1) the examinee or any other person specifically designated in writing by the examinee;

(2) the person that requested the examination;

- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

Occ. Code § 1703.306. We agree that Exhibit 9 constitutes information that was acquired from a polygraph examination. It does not appear that any of the exceptions in section 1703.306 apply in this instance. *See* Open Records Decision 565 (1990) (construing predecessor statute). Accordingly, we conclude that the department must withhold Exhibit 9 pursuant to section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.

You also argue that Exhibit 8 is confidential pursuant to section 552.101 in conjunction with section 1701.306 of the Occupations Code. Section 1701.306 makes declarations of medical condition and of psychological and emotional health confidential and provides:

(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 (emphasis added). Accordingly, we conclude that the department must withhold Exhibit 8 pursuant to section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.

We next note that criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center 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. *See* Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *See 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. *See 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). Accordingly, to the extent that the requested information encompasses any such CHRI, the department must withhold that information pursuant to section 552.101 of the Government Code.

You also claim protection under section 58.007 of the Family Code for portions of the submitted information. Prior to its repeal by the Seventy-fourth Legislature, section 51.14(d) of the Family Code provided for the confidentiality of juvenile law enforcement records. Law enforcement records pertaining to conduct occurring before January 1, 1996 are governed by the former section 51.14(d), which was continued in effect for that purpose. Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 100, 1995 Tex. Gen. Laws 2517, 2591 (Vernon).

This office has concluded that section 58.007 of the Family Code, as enacted by the Seventy-fourth Legislature, does not make confidential juvenile law enforcement records relating to conduct that occurred on or after January 1, 1996. Open Records Decision No. 644 (1996). The Seventy-fifth Legislature, however, amended section 58.007 to once again make juvenile law enforcement records confidential effective September 1, 1997. Act of June 2, 1997, 75th Leg., R.S., ch. 1086, 1997 Tex. Sess. Law Serv. 4179, 4187 (Vernon). The Legislature chose not to make this most recent amendment retroactive in application. Consequently, law enforcement records pertaining to juvenile conduct that occurred between January 1, 1996 and August 31, 1997, are not subject to the confidentiality provisions of either the former section 51.14(d) or the current section 58.007 of the Family Code.

The records at issue concern juvenile conduct that occurred prior to January 1, 1996. Therefore, the records submitted as Exhibit 13 are confidential under the former section

51.14(d) of the Family Code and must be withheld from disclosure pursuant to section 552.101 of the Government Code.

You also claim that portions of the submitted information are excepted from disclosure pursuant to section 552.101 in conjunction with the common-law right to privacy. Information must be withheld from disclosure under the common-law right to privacy when it (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. See *Industrial Found. v. Texas 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. See *id.* at 683. In Open Records Decision No. 339 (1982), we concluded that a sexual assault victim has a common-law privacy interest which prevents disclosure of information that would identify the victim. See also *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, *writ denied*) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information).

Prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. See, e.g., Open Records Decision No. 600 (1992) (information revealing that employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure). In addition, this office has found that the following types of information are excepted from required public disclosure under common-law privacy: 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); certain personal choices relating to financial transactions between the individual and the governmental body, see Open Records Decision No. 600 (1992) (designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care); and information concerning the intimate relations between individuals and their family members, see Open Records Decision No. 470 (1987).

Based on our review of your arguments and the submitted information, we find that portions of this information are protected from disclosure by the common-law right to privacy. Accordingly, we conclude that the department must withhold most of the information that it has marked under common-law privacy pursuant to section 552.101 in conjunction with the common-law right to privacy. However, we have marked portions of this particular

information that are not protected from disclosure under the common-law right to privacy and may not be withheld from disclosure on that basis.

You also raise section 552.115 of the Government Code. Section 552.115 provides that a birth or death record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official is excepted from required public disclosure. In this instance, however, the submitted birth certificate is held by the department. Section 552.115 applies only to a birth certificate that is maintained by the bureau of vital statistics or a local registration official. Therefore, the department may not withhold the submitted birth certificate under section 552.115. *See also* Open Records Decision No. 338 (1982).

Next, section 552.117(a)(2) excepts from disclosure the present and former home addresses and telephone numbers, social security number, and family member information of a peace officer regardless of whether the officer requests confidentiality for that information under section 552.024 of the Government Code.² Thus, the department must withhold the information we have marked under section 552.117(a)(2).

You argue that a portion of the submitted information is excepted under section 552.119 of the Government Code. Section 552.119 of the Government Code excepts from public disclosure a photograph of a peace officer that, if released, would endanger the life or physical safety of the officer unless one of three exceptions applies. The three exceptions are: (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. This section also provides that a photograph exempt from disclosure under this section may be made public only if the peace 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 photograph at issue would endanger the life or physical safety of the officer. We therefore determine that the department may not withhold the submitted photograph of the officer pursuant to section 552.119 of the Government Code.

You claim that the documents submitted as Exhibit 11 are protected under section 552.122. Section 552.122(b) excepts from disclosure test items developed by a licensing agency or governmental body. In Open Records Decision No. 626 (1994), this office determined that the term "test item" in section 552.122 includes any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated, but does not encompass evaluations of an employee's overall job performance or suitability. Whether information falls within the section 552.122 exception must be determined on a case-by-case basis. Open

²"Peace Officer" is defined by article 2.12 of the Code of Criminal Procedure.

Records Decision No. 626 at 6 (1994). Having reviewed the submitted questions, we agree that they are “test items” as contemplated by section 552.122(b). Therefore, the department may withhold the information that we have marked in Exhibit 11 under section 552.122(b). With regard to the remaining information that you seek to withhold under section 552.122, we find that the document that we have marked does not constitute a test item. Therefore, that document is not excepted from disclosure under section 552.122.

Finally, you argue that some of the submitted information is excepted under section 552.130 of the Government Code. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirements 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[.]

Gov’t Code § 552.130(a). Accordingly, you must withhold the Texas driver’s license information we have marked under section 552.130.

In summary, the submitted accident report must be withheld under section 550.065(b) of the Transportation Code. Form I-9 is confidential for purposes of section 552.101 of the Government Code and may only be released in compliance with the federal laws and regulations governing the employment verification system. The department must withhold the following information under section 552.101 of the Government Code: (1) the W-4 form in conjunction with federal law, (2) Exhibit 9 in conjunction with section 1703.306 of the Occupations Code; (3) Exhibit 8 in conjunction with section 1701.306 of the Occupations Code; (4) any CHRI in the city’s possession in conjunction with chapter 411 and federal law; (5) Exhibit 13 in conjunction with section 51.14(d) of the Family Code; and (6) the personal financial information we have marked in conjunction with common-law privacy. The department must also withhold the information we have marked under sections 552.117 and 552.130 of the Government Code. The department may withhold the information that we have marked in Exhibit 11 under section 552.122(b). The remaining submitted information must be released to the requestor.³

³Because our ruling is dispositive, we need not address your remaining argument.

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 "Cindy Nettles". The signature is fluid and cursive, with the first name being more prominent.

Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 198923
Enc. Submitted documents

c: Mr. Peter J. Graham
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(w/o enclosures)