



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

April 14, 2004

Mr. Larry Weikel
Chief of Police
City of Cisco
P. O. Box 110
Cisco, Texas 76437

OR2004-3005

Dear Mr. Weikel:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 199543.

The Cisco Police Department (the "department") has requested a ruling regarding the public availability of certain information it has submitted to this office. You do not claim any exceptions to disclosure but instead ask for an "exemption." We have reviewed the submitted information.

Initially, we must address the department's obligations under the Public Information Act (the "Act"), chapter 552 of the Government Code. The Act does not permit a governmental body that receives a request to simply submit the information to this office for an "exemption" to public disclosure. Responsibility for making an initial determination on whether information may be withheld from the public lies with the governmental body that receives a request for information. If the governmental body does not wish to withhold requested information under discretionary exceptions to disclosure and does not believe such information to be subject to mandatory exceptions or otherwise confidential by law, the governmental body must release the requested information as soon as possible under the circumstances. *See* Open Records Decision No. 664 (2000). If, however, the governmental body wishes to withhold requested information under discretionary exceptions or believes the requested information cannot lawfully be released, the governmental body is required to request a ruling from this office and comply with the procedural requirements outlined in section 552.301 of the Government Code. *See generally* Gov't Code § 552.301.

Pursuant to section 552.301(b), a governmental body that receives a request for information that it wishes to withhold must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See* Gov't Code

§ 552.301(a), (b). Within fifteen business days of receiving the request, the governmental body must submit to this office (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e)(1)(A)-(D). You have not claimed any exceptions to disclosure and have not provided any written explanation as to why any of the submitted information should be withheld from disclosure. Further, you have not submitted a copy of the written request for information or a signed statement or sufficient evidence showing the date the department received the present request for information. Therefore, we have no way of determining whether the department requested a ruling from this office within ten business days of receiving the request. We therefore conclude that the department failed to comply with section 552.301 in requesting this ruling.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Generally speaking, a compelling reason exists when third party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). We will therefore consider whether any of the submitted information is confidential.¹

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 another statute makes confidential. Section 1701.306 of the Occupations Code governs certain declarations of medical condition and of psychological and emotional health 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

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

(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). We have marked the information that must be withheld under section 552.101 in conjunction with section 1701.306 of the Occupations Code.

The submitted information also 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 or is terminated 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 department must withhold the F-5 pursuant to section 552.101 in conjunction with section 1701.454 of the Occupations Code.

The submitted documents also include W-4 forms. Federal tax return information is confidential under section 6103(a) of title 26 of the United States Code. *See* 26 U.S.C. § 6103(a). The term “return information” includes “the nature, source, or amount of income” of a taxpayer. *See* 26 U.S.C. § 6103(b)(2). Our office has specifically held that a governmental body must withhold a Form W-4 in its entirety. Open Records Decision No. 600 at 9 (1992). Therefore, the department must withhold the submitted W-4 forms under section 552.101 of the Government Code in conjunction with section 6103 of title 26 of the United States Code.

Also, the submitted information includes an Employment Eligibility Verification, Form I-9, governed by section 1324a of title 8 of the United States Code. This statute provides that a 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. 8 U.S.C.

§ 1324a(b)(5); *see* 8 C.F.R. § 274a.2(b)(4). Release of this document under the Act would be “for purposes other than for enforcement” of the referenced federal statutes. Accordingly, we conclude that the submitted Form I-9 is confidential under section 552.101. Thus, the department may release this form only in compliance with the federal laws and regulations governing the employment verification system.

We next note that the submitted documents include a Texas Peace Officer’s Accident Report form, which is subject to chapter 550 of the Transportation Code. Section 550.065(b) provides that, except as provided by subsection (c), accident reports are privileged and confidential. *See* Transp. Code § 550.065(b). 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) name of any person involved in the accident; and (3) specific location of the accident. *See* 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. *See id.* In this instance, we find that the requestor has not provided the department with at least two of the three pieces of information required under section 550.065(c)(4). Accordingly, we conclude that the department must withhold the accident report form that we have marked pursuant to section 550.065(c)(4) of the Transportation Code.

Section 552.101 also encompasses the common-law right to privacy, which protects information if 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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). This office has found that personal financial information not related to a financial transaction between an individual and a governmental body is generally protected by common-law privacy. *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, are protected under common-law privacy), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history protected under common-law privacy), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). We note, however, that one of the individuals to whom the submitted information relates is deceased. The right of privacy is purely personal and lapses at death. *See Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref’d n.r.e.); *see also* Attorney General Opinions JM-229 (1984); H-917 (1976). On the other hand, if the release of information about a deceased person reveals highly intimate or embarrassing information about living persons, the information must be withheld to protect the living individuals’ privacy. *See* Attorney General Opinion JM-229. We find that some of the submitted information is protected by common-law privacy. This information, which we have marked, must be withheld under section 552.101 of the Government Code.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home address, home telephone number, and social security number of a peace officer, as well as information that reveals whether a peace officer has family members, regardless of whether the peace officer complies with sections 552.024 or 552.1175. We have marked the information that the department must withhold under section 552.117(a)(2) if the information relates to a peace officer as defined by article 2.12 of the Code of Criminal Procedure.²

To the extent that the information that we have marked under section 552.117 does not relate to a peace officer, the department may nevertheless be required to withhold the marked information under section 552.117(a)(1). Section 552.117(a)(1) excepts from public disclosure the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who timely requests confidentiality for this information under section 552.024. The determination of whether section 552.117(a)(1) protects a particular item of information must be made at the time of the governmental body's receipt of the request for that information. *See* Open Records Decision No. 530 at 5 (1989). Thus, the department may only withhold information under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the commission's receipt of this request for information. The department may not withhold information under section 552.117(a)(1) on behalf of a current or former employee who did not make a timely election under section 552.024 to keep the individual's section 552.117 information confidential. Therefore, to the extent that the information marked under section 552.117 relates to a current or former department employee who is not a peace officer, but who timely requested confidentiality under section 552.024, the department must withhold any such information under section 552.117(a)(1). We also note that the protection afforded by section 552.117 includes information pertaining to a deceased individual who is a former official or employee of a governmental body who timely elected to keep his or her information confidential under section 552.024. We further note, however, that section 552.117 does not protect the social security number of a deceased employee. *Cf.* Attorney General Opinions JM-229 (1984) ("the right of privacy lapses upon death"), H-917 (1976) ("We are . . . of the opinion that the Texas courts would follow the almost uniform rule of other jurisdictions that the right of privacy lapses upon death."); Open Records Decision No. 272 (1981) ("the right of privacy is personal and lapses upon death").

We have also marked some information which the department may be required to withhold under section 552.1175 of the Government Code. This section provides in part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure[.]

.....

²We note that section 552.117(a)(2) does not apply to a deceased peace officer.

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(a)(1), (b). Thus, if the information we have marked pursuant to section 552.1175 relates to a licensed peace officer who elects to restrict access to his or her personal information in accordance with section 552.1175(b), then the department must withhold the information we have marked under section 552.1175. If no election is made pursuant to section 552.1175, the information must be released.

Next, section 552.130 of the Government Code excepts from disclosure information relating to a driver's license or motor vehicle title or registration issued by an agency of this state. *See* Gov't Code § 552.130. Thus, the department must withhold the information we have marked under section 552.130. We note again that one of the individuals to whom the submitted information relates is deceased. Section 552.130 was enacted to protect the privacy of an individual, and therefore, the protection extinguishes upon the individual's death. Thus, as privacy rights lapse upon an individual's death, the department must withhold the license plate number of the deceased's vehicle under section 552.130 only to the extent that a living person has an ownership interest in the vehicle. Otherwise, the department must release this information to the requestor. We have marked the information subject to section 552.130.

Finally, the submitted information contains an account number. Section 552.136 of the Government Code provides as follows:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. Thus, the account number we have marked is confidential and therefore must be withheld under section 552.136 of the Government Code.

To summarize, we conclude that the department must withhold the following information under section 552.101 of the Government Code: (1) the L-2 Declaration of Medical Condition and L-3 Declarations of Psychological and Emotional Health pursuant to section 1701.306 of the Occupations Code, (2) the F-5 pursuant to section 1701.454 of the Occupations Code, (3) the submitted W-4 forms in conjunction with section 6103 of title 26 of the United States Code, (4) the submitted Form I-9, (5) the accident report form that we have marked pursuant to section 550.065(c)(4) of the Transportation Code, and (6) the information we have marked in conjunction with common-law privacy. The department must also withhold the information we have marked pursuant to section 552.117(a)(2), provided that information relates to a licensed peace officer. If the information does not relate to a licensed peace officer, the department may be required to withhold this information under section 552.117(a)(1). The department may also be required to withhold the information we have marked pursuant to section 552.1175. The department must also withhold the information we have marked under section 552.130, including the deceased individual's licensed plate if a living individual has an ownership interest in the vehicle, and the information we have marked under section 552.136. The remaining submitted 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,



Sarah I. Swanson
Assistant Attorney General
Open Records Division

SIS/lmt

Ref: ID# 199543

Enc. Submitted documents

c: Requestor
c/o Larry Weikel
City of Cisco
P. O. Box 110
Crisco, Texas 76437
(w/o enclosures)