



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 30, 2004

Ms. Linda Weller
City Manager
City of Gruver
P.O. Box 947
Gruver, Texas 79040

OR2004-3552

Dear Ms. Weller:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 200582.

The City of Gruver (the "city") received a request for eleven categories of information, including the personnel files of three named individuals, as well as police videotapes. You state that you will release some responsive information to the requestor.¹ You claim that portions of the remaining requested information are excepted from disclosure under sections 552.102, 552.108, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered the comments submitted to this office by the individuals whose information is at issue. *See* Gov't Code §552.304.

Initially, we note that the submitted drug test results are subject to the Medical Practice Act (the "MPA"), Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides in part:

¹We note that you originally sought to withhold portions of requested cell phone bills, item 5 of the request, under sections 552.117 and 552.136. You subsequently notified us that the phone bills contained no information protected by section 552.117 and, therefore, the city would make these records available to the requestor. You did not submit copies of any cell phone bills to this office to be ruled upon. Therefore, this ruling does not reach the issue of whether any information contained in the requested cell phone bills is excepted from disclosure under section 552.136 of the Government Code. *See* Gov't Code §§ 552.301(e)(1)(D), 552.306.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b), (c). Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *Id.* §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). The submitted drug test results constitute medical records that may only be released in accordance with the MPA.

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. You assert that section 143.089 of the Local Government Code makes confidential the personnel file of one of the individuals whose information has been requested, who you state is a police officer. Chapter 143 of the Local Government Code authorizes a municipality with a population of 10,000 or more, and a salaried fire and police department, to hold an election to adopt a "fire fighters' and police officers' civil service law." Loc. Gov't Code §§ 143.002, .004. According to the 2004 Texas State Directory, however, the population of the City of Gruver is 1,162.² Furthermore, you do not inform us that the city is a civil service city. We therefore conclude that the confidentiality provisions of section 143.089 are not applicable to the records at issue.

Employee W-4 forms are excepted from disclosure under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code. Open Records Decision No. 600 (1992). The city must therefore withhold the submitted W-4 forms under section 552.101.

²*Texas State Directory*, 47th ed. (Austin: Texas State Directory, Inc., 2004), 492.

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); see 8 C.F.R. § 274a.2(b)(4). Release of this document under the Public Information Act (the "Act") would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we conclude that the submitted Form I-9 must be withheld under section 552.101 and may only be released in compliance with the federal laws and regulations governing the employment verification system.

Next, we note that section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Act. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). 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. *Id.* at 685. The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* includes 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. *Id.* at 683.

This office has 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.

Section 552.117(a)(1) excepts from 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 that this information be kept confidential under section 552.024 of the Government Code. Whether a particular item of information is excepted from disclosure under section 552.117(a)(1) must be determined at the time the governmental body receives the request for information. *See* Open Records Decision No. 530 at 5 (1989). Thus, the city 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 city's receipt of this request for information. The city 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 information confidential. We have marked the submitted information that the city must withhold under section 552.117(a)(1) if the person to whom the marked information pertains timely elected under section 552.024 to keep the information confidential.

Regardless of the applicability of section 552.117(a)(1), social security numbers may be excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). These amendments make a social security number confidential if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 at 2-4 (1994). We have no basis for concluding that the social security number in question is confidential under section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. We caution the city, 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, the city should ensure that it was not obtained and is not maintained by the city pursuant to any provision of law enacted on or after October 1, 1990.

Section 552.117(a)(2) excepts from public disclosure the home address, home telephone number, and social security number of a peace officer, as defined by article 2.12 of the Code of Criminal Procedure, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with section 552.024 or 552.1175 in electing for the confidentiality of such information. You state that a portion of the submitted information pertains to a police officer. Thus, the city must withhold the information we have marked under section 552.117(a)(2) of the Government Code.

Section 552.130 of the Government Code prohibits the release of information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. *See* Gov't Code § 552.130. Accordingly, the city must withhold the information we have marked pursuant to section 552.130 of the Government Code.

Finally, we turn to your contention that the requested videotapes for the period July 1, 2003 to February 1, 2004 are excepted from disclosure by section 552.108 of the Government Code. Section 552.108(a)(1) of the Government Code excepts from required public disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime.” Section 552.108(a)(1) protects information pertaining to a pending criminal investigation or prosecution because it is presumed that the release of such information would interfere with the detection, investigation, or prosecution of crime. See *Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976).

You state that “the only police videotapes during this time period currently in our possession are 2 tapes. The first tape is being maintained for one Minor in Possession, one Open Container, and one Public Intoxication pending prosecution. The second tape is being maintained for one Driving While Intoxicated and one Public Intoxication. Both of these tapes also include various traffic stops, which it is still yet unknown how they will plead in court.” We thus understand you to assert that the videotapes at issue depict traffic stops involving cases that are pending prosecution. On the basis of this representation, we find that release of the videotapes at issue “would interfere with the detection, investigation, or prosecution of crime.” *Id.* Accordingly, you may withhold the video tapes under section 552.108(a)(1).³

In summary, the submitted drug test results may only be released in accordance with the MPA. The city must withhold the following information pursuant to section 552.101 of the Government Code: (1) Employee W-4 forms; (2) the Employment Eligibility Verification, Forms I-9; and (3) the information we have marked under common-law privacy. We have marked the information that the city may be required to withhold under section 552.117(a)(1), but only if the employee whose information is at issue timely elected to keep such information confidential. Regardless of the applicability of section 552.117(a)(1), the city may be required to withhold the social security numbers under federal law. We have also marked the information the city must withhold in conjunction with section 552.117(a)(2). The city must also withhold the information we have marked under section 552.130 of the Government Code. The submitted videotapes may be withheld under section 552.108(a)(1). The remaining information must be released to the requestor.

³We note that the videotapes you have submitted contain information recorded prior to July 1, 2003. This information is not responsive to the instant request for information, as it was created before the relevant time period. This ruling does not address the public availability of any information that is not responsive to the request, and the city need not release that information in response to this request.

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,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/jh

Ref: ID# 200582

Enc. Submitted documents

c: Mr. John Chambers
P.O. Box 38
Cactus, Texas 79013
(w/o enclosures)