



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 17, 2004

Ms. Rebecca Brewer
Abernathy Roeder Boyd & Joplin, P.C.
P. O. Box 1210
McKinney, Texas 75070-1210

OR2004-4038

Dear Ms. Brewer:

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# 201603.

The City of Frisco (the "city"), which you represent, received two requests for information from the same requestor for the personnel files of two named police officers, including any information regarding internal and external complaints filed against one of the named officers. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.117 and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.102(a) of the Government Code protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The test for determining whether information is excepted under section 552.102 is the same as the one used to decide whether it is protected by the common law right to privacy under section 552.101.¹ *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.).

Information is protected under the common law right to privacy when (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

¹Section 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 the common law right to privacy.

the public. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The common law right to 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 section 552.101. See Open Records Decision Nos. 659 at 4-5 (1999) (summarizing information attorney general has determined to be private), 470 at 4 (1987) (illness from severe emotional job-related stress), 455 at 9 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 343 at 1-2 (1982) (references in emergency medical records to drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress). Additionally, where an individual's criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual's right to privacy. See *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989).

Common law privacy under section 552.101 also encompasses certain types of personal financial information. This office has determined that financial information relating only to an individual ordinarily satisfies the first element of the common law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. See Open Records Decision Nos. 600 at 9-12 (1992) (identifying public and private portions of state employees' personnel records), 545 at 4 (1990) ("In general, we have found the kinds of financial information not excepted from public disclosure by common law privacy to be those regarding the receipt of governmental funds or debts owed to governmental entities"), 523 at 4 (1989) (noting distinction under common law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), 373 at 4 (1983) (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis). Thus, a public employee's allocation of part of the employee's salary to a voluntary investment program offered by the employer is a personal investment decision, and information about that decision is protected by common law privacy. See, e.g., Open Records Decision Nos. 600 at 9-12 (1992) (participation in TexFlex), 545 at 3-5 (1990) (deferred compensation plan). Likewise, an employee's designation of a retirement beneficiary, choice of optional insurance coverage, choice of a particular insurance carrier, decision regarding the direct deposit of compensation and the forms that allow allocation of pretax compensation to group insurance, health care or dependent care are all excepted from disclosure under the common law right to privacy. See Open Records Decision No. 600 at 9-12 (1992). However, where a transaction is funded in part by a governmental body, it involves the employee in a transaction with the governmental body, and the basic facts about that transaction are not protected by common law privacy. *Id.* at 9. Having reviewed the submitted personnel files, we have determined that some of the

information, including the change of beneficiary forms, insurance enrollment and application forms, cafeteria salary reduction forms and claim forms are excepted from disclosure under section 552.101 in conjunction with the common law right to privacy. Additionally, some medical information is also excepted from disclosure pursuant to this exception. We have marked the information the city must withhold under section 552.101 in conjunction with the common law right to privacy.

Section 552.101 also encompasses information protected by other statutes. The submitted files contain declarations of psychological and emotional health that are required by the Texas Commission on Law Enforcement Officer Standards and Education (the "commission") and that are confidential pursuant to section 1701.306 of the Occupations Code. Section 1701.306 provides as follows:

(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(a)-(b) (emphasis added). We have marked the information that the city must withhold under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.

Section 611.002 of the Health and Safety Code encompasses information created or maintained by a mental health professional and provides in part:

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b). Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See id.* § 611.001(2). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See Open Records Decision No. 565 (1990)*. We have marked the submitted information that is confidential under section 611.002 of the Health and Safety Code. There is no indication that the requestor has a right of access to this information under sections 611.004 and 611.0045. Therefore, the city must withhold the information that is encompassed by section 611.002 under section 552.101 of the Government Code.

Some of the records at issue are medical records, access to which is governed by the Medical Practice Act (the “MPA”), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

(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.

The 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. Occ. Code §§ 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)*. We have marked the documents that are medical records subject to the MPA.

We note that the submitted files contain Form W-4s and W-2s, as well as other tax return information. Prior decisions of this office have held that section 6103(a) of title 26 of the United States Code renders tax return information confidential. *See Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms)*. Tax return information is defined as data furnished to or collected by the IRS with respect to the determination of possible existence of liability of any person under title 26 of the

United States Code for any tax. *See* 26 U.S.C. § 6103(b). We determine that the submitted W-4s and W-2s, as well as one other submitted document, are tax return information and therefore excepted from disclosure under section 552.101 as information made confidential by federal law.

We note that the submitted files contain criminal history record information ("CHRI"). CHRI obtained from the National Crime Information Center ("NCIC") or the Texas Crime Information Center is confidential under federal and state law. Federal law governs the dissemination of CHRI obtained from the NCIC network. Federal regulations prohibit the release to the general public of CHRI that is maintained in state and local CHRI systems. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given") and (c)(2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself"); *see also* Open Records Decision No. 565 at 10-12 (1990). The federal regulations allow each state to follow its own individual law with respect to CHRI that it generates. *See id.* at 10-12.

Sections 411.083(b)(1) and 411.089(a) of the Government Code 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* Gov't Code § 411.089(b).² Thus, CHRI generated by the federal government or another state may be disclosed only in accordance with the federal regulations. Likewise, CHRI held by the Texas Department of Public Safety (the "DPS") or another criminal justice agency must be withheld from the public as provided by subchapter F of chapter 411 of the Government Code. Furthermore, when a law enforcement agency compiles information that identifies a particular individual as a criminal suspect, arrested person, or defendant, the compilation of criminal history information takes on a character that implicates the individual's common-law privacy interests in a manner that the same information in an uncompiled state does not. *See U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); Open Records Decision No. 616 at 2-3 (1993). Therefore, to the extent that the submitted documents contain any CHRI that is confidential under federal law or subchapter F of chapter 411 of the Government Code, the city must withhold any such information under section 552.101 of the Government Code.³

²We note that the statutory definition of CHRI does not encompass driving record information maintained by the DPS under subchapter C of chapter 521 of the Transportation Code. *See* Gov't Code § 411.082(2) (defining "criminal history record information").

³You raise section 552.108 as the section applicable to the CHRI. However, section 552.108 is not generally applicable to the personnel records of law enforcement officers or to information relating to complaints involving law enforcement officers. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.); *see also* Open Records Decision Nos. 562 at 10 (1990) (predecessor to section 552.108(b) inapplicable to employment information in police officer's file), 361 at 2-3 (1983) (statutory

We note that one of the submitted files contains a high school transcript and a transcripts from institutions of higher education. The Family Educational Rights and Privacy Act of 1974 ("FERPA") provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent.⁴ See 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). The city is not an educational agency or institution.

However, FERPA provides that an educational agency or institution may only transfer personal information to a third party "on the condition that such party will not permit any other party to have access to such information without the written consent of the parents of the student." *Id.* § 1232g(b)(4)(B). The federal regulations provide that a third party that receives such information from an educational agency may use the information only for the purposes for which the disclosure was made. 34 C.F.R. § 99.33(a)(2). In this case, we are unable to determine whether the city obtained the transcripts from the identified school district or the institutions of higher education at issue. If the city did obtain any of them directly from the educational institutions that created them, pursuant to sections 1232g(b)(4)(B) and 99.33(a)(2), the city may only release the transcripts upon consent of the named officer. If the city did not receive the transcripts from the educational institutions that created them, then it may not withhold these transcripts under FERPA.

Next, you assert that some of the submitted information is excepted under section 552.117 of the Government Code. Section 552.117(a)(2) excepts from disclosure the home addresses and telephone numbers, personal pager and cellular telephone numbers, social security numbers, and family member information of a peace officer regardless of whether the officer made an election under section 552.024.⁵ Thus, pursuant to section 552.117(a)(2), the city must withhold the present and former home addresses and telephone numbers, social security numbers, and family member information of any individual who is a licensed peace officer.

predecessor to section 552.108(b) inapplicable to background information collected on unsuccessful applicant for employment with sheriff's department). Therefore, the city may not withhold any of the requested information under section 552.108.

⁴Section 552.026 of the Government Code provides that "[t]his chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with [FERPA]." Gov't Code § 552.026. Section 552.114 of the Government Code excepts from public disclosure student records at an educational institution funded completely or in part by state revenue. This office generally applies the same analysis under section 552.114 and FERPA. See Open Records Decision No. 539 (1990).

⁵"Peace Officer" is defined by article 2.12 of the Code of Criminal Procedure.

We note that post office boxes are not home addresses and are not protected under section 552.117. We have marked the types of information that may be confidential under section 552.117.

We also note that the submitted documents contain the home address and telephone number of a peace officer not employed by the city, as well as the social security number of an employee of the DFW airport police department. This information may be protected from disclosure under section 552.1175 of the Government Code. Section 552.1175 states in pertinent part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure;

....

(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.

However, you do not inform this office, nor does any of the submitted information indicate, whether the individuals whose information is at issue are currently licensed peace officers who have notified the city of their election of confidentiality for this information in accordance with subsections 552.1175(b)(1) and (2). *See, e.g.,* Open Records Decision No. 678 (2003) (concluding that county voter registrar was authorized to release voter information made confidential under section 552.1175 of Government Code to another governmental entity, but that transferred information would not be confidential in possession of transferee until recipient governmental entity receives a section 552.1175 notification). If the individuals are currently licensed peace officers who comply with section 552.1175(b), the city must withhold the information we have marked. If not, the city must release this information unless otherwise confidential by federal law as discussed below.

We note that social security numbers that are not otherwise excepted from disclosure under sections 552.117 or 552.1175 might nevertheless be excepted from disclosure under

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 and 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 at issue are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number, the city should ensure that it did not obtain or maintain the social security number pursuant to any provision of law, enacted on or after October 1, 1990.

We note that the submitted files contain driver's license numbers, as well as other information related to driver's licenses and vehicle registrations that are excepted from disclosure under section 552.130 of the Government Code. Section 552.130 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[.]

You must withhold the Texas driver's license numbers, as well as the other information related to driver's licenses and vehicle registrations that we have marked under section 552.130.

Further, we note that the submitted information contains account numbers. Section 552.136 of the Government Code states that "[n]otwithstanding 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. The city must, therefore, withhold the marked account numbers under section 552.136.

Finally, we note that the submitted files also contain an officer's personal e-mail address that is excepted from disclosure under section 552.137 of the Government Code. Section 552.137 provides:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating

electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Under section 552.137, a governmental body must withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See Gov't Code § 552.137(b)*. You do not indicate that the officer has affirmatively consented to the release of his personal e-mail address. Thus, the city must withhold the marked e-mail address from disclosure under section 552.137.

In summary, the city must withhold: (1) the information we have marked accordingly under section 552.101 in conjunction with common law privacy; (2) the declarations of psychological and emotional health we have marked under section 552.101 in conjunction with section 1701.306 of the Occupations Code; (3) the mental health information we have marked under 552.101 in conjunction with section 611.002 of the Health and Safety Code; (4) the information subject to the MPA, unless release is authorized pursuant to the MPA; (5) the W-4s and W-2s, as well as the other tax return information we have marked under

section 552.101 in conjunction with federal law; (6) CHRI information to the extent the submitted files contain CHRI that is confidential under federal law or subchapter F of chapter 411 of the Government Code; (7) the high school transcript and the transcripts from the institutions of higher education pursuant to FERPA, if the city obtained of them directly from the educational institutions that created them; (8) pursuant to section 552.117(a)(2), the home addresses and telephone numbers, social security numbers and family member information of peace officers employed by the city regardless of whether the officer made an election to withhold the information under section 552.024 of the Government Code; (9) pursuant to section 552.1175 of the Government Code, the home addresses, phone numbers and social security numbers of peace officers not employed by the city but who have notified the city of their election of confidentiality for this information; (10) pursuant to section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, any social security number obtained or maintained by the city pursuant to any provision of law enacted on or after October 1, 1990; (11) pursuant to section 552.130 of the Government Code, the information related to driver's licenses and vehicle registrations we have marked; (12) pursuant to section 552.136 of the Government Code, the account numbers we have marked; and (13) pursuant to section 552.137, the e-mail addresses we have marked. The remaining information in the personnel files must be released to the requestor.

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,



Cary Grace
Assistant Attorney General
Open Records Division

ECG/krl

Ref: ID# 201603

Enc. Submitted documents

c: Mr. Larry R. Dyer
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(w/o enclosures)