



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 12, 2004

Mr. John M. Hill
Cowles & Thompson
Suite 4000
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Dallas, Texas 75202-3793

OR2004-8635

Dear Mr. Hill:

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# 210838.

The Town of Little Elm (the "town"), which you represent, received two requests for information pertaining to a fire at a particular location and a named former employee. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, 552.108, 552.111, 552.1175, 552.119, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that some of the submitted information may constitute grand jury records that are not subject to the Act. This office has concluded that grand juries are not subject to the Act and that records that are within the constructive possession of grand juries are not public information subject to disclosure under the Act. *See* Open Records Decision No. 513 (1988). When an individual or entity acts at the direction of the grand jury as its agent, information prepared or collected by the agent is within the grand jury's constructive possession and is not subject to the Act. *See id.* Information that is not so held or maintained is subject to the Act and may be withheld only if a specific exception to disclosure is applicable. *See id.* Thus, to the extent that the submitted records are in the custody of the town as agent of the grand jury, the records are in the constructive possession of the grand jury and are therefore not subject to disclosure under the Act. However, to the

extent that these records are not in the custody of the town as agent of the grand jury, we will address your claims regarding this information.

We note that the submitted information includes an executed search warrant and supporting affidavit. The release of the affidavit is governed by article 18.01 of the Code of Criminal Procedure, which provides in part:

(b) No search warrant shall issue for any purpose in this state unless sufficient facts are first presented to satisfy the issuing magistrate that probable cause does in fact exist for its issuance. A sworn affidavit setting forth substantial facts establishing probable cause shall be filed in every instance in which a search warrant is requested. The affidavit is public information if executed, and the magistrate's clerk shall make a copy of the affidavit available for public inspection in the clerk's office during normal business hours.

Crim. Proc. Code art. 18.01(b). This provision makes the search warrant affidavit expressly public. The exceptions found in the Act do not, as a general rule, apply to information that is made public by other statutes. *See* Open Records Decision No. 525 (1989) (statutory predecessor). Therefore, the town must release the search warrant affidavit that we have marked in accordance with article 18.01(b) of the Code of Criminal Procedure.

Next, we note that portions of the submitted information are subject to section 552.022 of the Government Code. Section 552.022 makes certain information public unless it is expressly confidential under other law. *See* Gov't Code § 552.022(a). One category of public information under section 552.022 is "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]" *Id.* § 552.022(a)(1). Other categories subject to section 552.022 are "a policy statement or interpretation that has been adopted or issued by an agency [; and] information that is also contained in a public court record[.]" *Id.* § 552.022(a)(13), (17). The submitted information includes evaluations that are made public under section 552.022(a)(1) of the Government Code. Consequently, unless the evaluations are expressly confidential under other law or excepted from disclosure pursuant to section 552.108 of the Government Code, they must be released to the requestor. Further, the submitted records include a policy statement that is made public under section 552.022(a)(13), while the search warrant is a court-filed document that is made public under section 552.022(a)(17). Consequently, unless the policy statement and search warrant are made expressly confidential under other law, they must be released to the requestor.

Although the town claims that the information that is subject to subsections 552.022(a)(1), (a)(13), and (a)(17) is excepted from disclosure pursuant to sections 552.103 and 552.111 of the Government Code, we note that these exceptions to disclosure constitute discretionary exceptions to disclosure under the Act and, as such, do not constitute "other law" that makes

information confidential.¹ Accordingly, we conclude that the town may not withhold any portion of this particular information pursuant to sections 552.103 and 552.111 of the Government Code. The town also may not withhold any portion of the submitted information that is subject to sections 552.022(a)(13) and 552.022(a)(17) under section 552.108 of the Government Code.² However, since section 552.022(a)(1) provides that information that is public under that section may be excepted from disclosure under section 552.108 of the Government Code, we will address the town's section 552.108 claim with regard to that particular information, as well as the remaining submitted information. Furthermore, because sections 552.101, 552.102, 552.107(2), 552.1175, 552.119, and 552.130 of the Government Code are "other law" for purposes of section 552.022, we will address these provisions for the information subject to section 552.022 along with the remaining submitted information.

We first address your contention that the town is prohibited by a court order from disclosing the information at issue to the requestor. Section 552.107(2) of the Government Code excepts information from public disclosure if "a court by order has prohibited disclosure of the information." You have submitted for our review a copy of an "Order Abating Discovery." Upon review, we conclude that the order does not prohibit the release of any of the information at issue. Therefore, the information at issue is not excepted from disclosure under section 552.107(2) of the Government Code.

We next address your claim that the remaining submitted information, with the exception of the information subject to section 552.022(a)(13) and (17), is excepted from disclosure under section 552.108 of the Government Code. Section 552.108(a)(1) provides that information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from disclosure if "release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108 as an exception to disclosure of requested information must demonstrate how and why release of the

¹Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.,* Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general); *see also Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential for purposes of section 552.022.

²Section 552.108 is a discretionary exception that protects a governmental body's interests and is therefore not "other law" that makes information confidential for purposes of section 552.022. *See* Open Records Decision No. 177 (1977) (governmental body may waive statutory predecessor to section 552.108); *see also* Open Records Decision No. 522 at 4 (1989) (discretionary exceptions in general).

requested information would interfere with law enforcement. See Gov't Code § 552.108(a)(1), .301(e)(1)(A); see also *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

You indicate that the information at issue is related to a pending criminal case. Therefore, we agree that the release of the information that we have marked "would interfere with the detection, investigation, or prosecution of crime." Gov't Code § 552.108(a). Thus, we find that section 552.108(a)(1) is applicable to that information. We note, however, that the remaining submitted documents, which include the evaluations subject to section 552.022(a)(1), concern personnel information regarding a specified former town employee. You do not explain, nor are we able to ascertain from our review of these documents, how they relate to the pending criminal case. Accordingly, we conclude that the town may not withhold the remaining submitted documents from disclosure under section 552.108 of the Government Code.

We further note that section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. See Gov't Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle Publishing Company 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). See Open Records Decision No. 127 (1976) (summarizing types of basic information that must be made available to public). Accordingly, with the exception of basic information that must be released to the requestor, we conclude that the town may withhold the information we have marked pursuant to section 552.108(a)(1) of the Government Code. We note, however, that the town maintains the discretion to release all or part of that particular information that is not otherwise confidential by law. See Gov't Code § 552.007.

We next address your section 552.103 claim for the remaining information that is not subject to section 552.022. Section 552.103 of the Government Code provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) that the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

You represent to this office that the requested information relates to a pending criminal prosecution and civil probate case. You indicate that both the prosecution and the probate case were pending when the town received this request for information. We note, however, that the town is not a party to the pending criminal prosecution. *See* Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990). In such a situation, we require an affirmative representation from the prosecuting attorney representing the governmental body that is a party to the criminal litigation that he or she wants the information at issue withheld from disclosure under section 552.103. *See* Open Records Decision No. 392 (1983) (finding predecessor to section 552.103 only applicable to governmental body who has litigation interest). However, you fail to provide such an affirmative representation from the prosecuting attorney. Furthermore, you fail to explain how the personnel information at issue relates to either pending litigation. Consequently, no portion of the information at issue is excepted by section 552.103. *See* Gov't Code § 552.103.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov't Code § 552.101. Section 552.101 also encompasses information protected by other statutes. The submitted documents include W-4 tax forms. 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 No. 600 (1992) (W-4 forms). Tax return information is defined as data furnished to or collected by the Internal Revenue Service 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-4 forms are tax return information and are excepted from disclosure under section 552.101 as information made confidential by federal law.

The remaining submitted documents also include an Employment Eligibility Verification, Form I-9. Form I-9 is governed by section 1324a of title 8 of the United States Code, which provides that an I-9 form and “any information contained in or appended to such 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. *See* 8 U.S.C.

§ 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). Release of the Form I-9 in this instance would be “for purposes other than for enforcement” of the referenced federal statutes. Accordingly, we conclude that this form and the information attached thereto are confidential and may only be released in compliance with the federal laws and regulations governing the employment verification system.

You also claim that information contained in the submitted personnel file is excepted from disclosure under section 552.102(a) of the Government Code, which excepts “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). Section 552.102(a) is generally applicable to information relating to a public official or employee. *See* Open Records Decision No. 327 at 2 (1982) (anything relating to employee’s employment and its terms constitutes information relevant to person’s employment relationship and is part of employee’s personnel file). 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 excepted from disclosure under section 552.102(a) is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected from disclosure by the common-law right to privacy as incorporated by section 552.101 of the Government Code. *See also Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). Accordingly, we address the town’s section 552.102 claim in conjunction with its common-law privacy claim under section 552.101 of the Government Code.

Information is protected from disclosure by the common-law right to privacy when (1) it is highly intimate and embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *See id.* 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. This office has since concluded that other types of information also are protected from disclosure by the common-law right to privacy. *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 a drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress). Prior decisions of this office have also 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 not excepted from required public disclosure under common-law privacy: information regarding an individual's profession or business, organizational memberships, or religious affiliation, Open Records Decision No. 674 (2001); job qualifications, including college transcripts, Open Records Decision No. 470 (1987); age, salary, title, and date of employment, Open Records Decision Nos. 455 (1987), 373 (1983); licenses, certificates, and professional awards, Open Records Decision Nos. 444 (1986), 342 (1982); educational background and training, Open Records Decision Nos. 455 (1987), 444 (1986); past work history, Open Records Decision No. 455 (1987), 444 (1986); names, addresses, and telephone numbers of job references, Open Records Decision No. 455 (1987); performance evaluations, Open Records Decision Nos. 470 (1987), 400 (1983); and reasons for a public employee's demotion, dismissal, or resignation, Open Records Decision Nos. 444 (1986), 329 (1982), 278 (1981).

Based on your arguments and our review of the submitted information, we find that some of the submitted information is protected from disclosure by the common-law right to privacy. Accordingly, we conclude that the town must withhold the information that we have marked pursuant to sections 552.101 and 552.102 of the Government Code in conjunction with the common-law right to privacy.

The submitted records also contain information that is excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(2) excepts from required public disclosure the home address, home telephone number, social security number, and the family member information of a peace officer as defined by article 2.12 of the Code of Criminal Procedure. *See* Open Records Decision No. 622 (1994). The town must withhold those portions of the records that reveal a peace officer's home address, home telephone number, social security number, and family member information pursuant to section 552.117(a)(2). The town must also withhold the peace officer's former home addresses and telephone information from disclosure. *See* Open Records Decision No. 622 (1994). We have marked the types of information in the submitted records that the town must withhold under section 552.117(a)(2).

Further, you claim that some of the submitted information is excepted from disclosure under section 552.130 of the Government Code. Section 552.130 excepts from disclosure 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, we conclude that the town must withhold the Texas driver's license numbers within the submitted information under section 552.130.

Insurance policy numbers contained in the submitted information are excepted from disclosure under section 552.136 of the Government Code, which provides 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 town must, therefore, withhold the information we have marked under section 552.136.

The submitted information also contains e-mail addresses that are subject to section 552.137 of the Government Code. Section 552.137 provides in part:

(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.

Gov’t Code § 552.137(a), (b). Section 552.137 excepts certain e-mail addresses of members of the public who have not affirmatively consented to the release of the e-mail addresses. Section 552.137(c) provides certain conditions under which e-mail addresses of members of the public are not excepted from disclosure, which are not applicable here. *See* Gov’t Code § 552.137(c) (e-mail address provided by contractor or vendor, contained in bid proposal, or on letterhead or document available to public generally not excepted under section 552.137). Further, section 552.137 does not apply to the work e-mail addresses of officers or employees of a governmental body, a website address, or the general e-mail address of a business. Unless the relevant individuals have affirmatively consented to the release of these e-mail addresses, the town must withhold the e-mail addresses we have marked under section 552.137(a).

Finally, we note that a portion of the information not otherwise excepted from disclosure appears to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).³

In summary, to the extent that any portion of the submitted information is in the custody of the town as agent of the grand jury, such information is in the constructive possession of the grand jury and is therefore not subject to disclosure under the Act. To the extent that any

³As our ruling is dispositive, we do not address your remaining claims.

portion of the submitted information is not in the custody of the town as agent of the grand jury, we conclude as follows: 1) the search warrant affidavit we have marked must be released to the requestor pursuant to article 18.01 of the Code of Criminal Procedure; 2) with the exception of basic information, which must be released, the information we have marked may be withheld under section 552.108(a)(1) of the Government Code; 3) forms I-9 and W-4 must be withheld under section 552.101 in conjunction with federal law; 4) the town must withhold the information that we have marked pursuant to sections 552.101 and 552.102 of the Government Code in conjunction with the common-law right to privacy; 5) the town must withhold the peace officer's home address, home telephone number, social security number, and family member information pursuant to section 552.117(a)(2); 6) Texas driver's license numbers must be withheld under section 552.130 and the information that we have marked under section 552.136; and 7) unless consent to release has been granted, the town must withhold the e-mail addresses we have marked under section 552.137(a). The remaining submitted information must be released to the requestor, in compliance with copyright law for any information protected by copyright.

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 210838

Enc. Submitted documents

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