



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 23, 2004

Mr. John T. Patterson
Assistant City Attorney
City of Waco
P.O. Box 2570
Waco, Texas 76702

OR2004-9985

Dear Mr. Patterson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 213608.

The Waco Police Department (the "department") received a request for the following information concerning a named former police officer: 1) any police report listing the officer as a suspect, 2) any documents relating to an internal or administrative investigation of the officer, 3) any documents relating to the officer's resignation, 4) the officer's personnel record, and 5) the public portion of the officer's personnel record. You claim that the requested information is excepted from disclosure under sections 552.101, 552.108, 552.117, 552.122, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

Initially, we note that a portion of the submitted information constitutes grand jury records that are not subject to the Public Information Act (the "Act"). This office has concluded that grand juries are part of the judiciary and are, thus, not subject to the Act. *See Gov't Code* § 552.003 ("governmental body" does not include judiciary). Records that are within the

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

constructive possession of grand juries are not public information that is 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.* We note that a portion of the submitted information, which we have marked, was obtained by the department through the use of a grand jury subpoena at the direction of the grand jury. Thus, we understand that the department is holding these marked records as an agent of the grand jury. Accordingly, we conclude that this particular marked information is in the constructive possession of the grand jury and is, therefore, not subject to disclosure under the Act.

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. This section encompasses the doctrine of common-law privacy. Information is protected from disclosure by the common-law right to privacy when (1) it is highly intimate or 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 Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976).

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 Committee for Freedom of the Press*, 489 U.S. 749 (1989). In this instance, the requestor seeks copies of all records in which a named individual is listed as a suspect, as well as any information related to criminal investigations involving the individual. Thus, the request requires the department to compile information relating to this individual. Based on the reasoning set out in *Reporters Committee*, we conclude that such a compilation implicates the specified individual's right to privacy to the extent that it includes information where the named individual was a criminal suspect, arrestee, or defendant. However, because the police reports in Exhibit 3 relate to a peace officer, we find that there is a legitimate public interest in the disclosure of this information. *See generally* Open Records Decision No. 484 (1987) (public's interest in knowing how police departments resolve complaints against police officer ordinarily outweighs officer's privacy interest), 423 at 2 (1984) (scope of public employee privacy is narrow), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under statutory predecessor to section 552.101), 208 at 2 (1978) (information relating to complaint against public employee and disposition of the complaint is not protected under either the constitutional or common-law right of privacy). Accordingly, you may not withhold any of the information in Exhibit 3 under section 552.101 of the Government Code and *Reporters Committee*.

The common-law right to privacy also encompasses the specific types of information held to be intimate or embarrassing in *Industrial Foundation*. *See id.* at 683 (information relating

to sexual assault, pregnancy, mental or physical abuse in 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 held 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). We have marked information in Exhibit 3 that the department must withhold under section 552.101 in conjunction with common-law privacy.

We note that criminal history record information (“CHRI”) obtained from the National Crime Information Center (the “NCIC”) or the Texas Crime Information Center (the “TCIC”) is confidential under federal and state law.² 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).³ 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 or another criminal justice agency must be withheld from the public as provided by subchapter F of chapter 411 of the Government Code. Therefore, any criminal history record information in Exhibit 3 obtained from the NCIC or TCIC must be withheld under section 552.101 in conjunction with federal law and subchapter F of chapter 411 of the Government Code.

We note that a portion of the information in Exhibit 3 may be confidential under section 411.153 of the Government Code. Section 411.153(a) provides that “[a] DNA record stored

²The Office of the Attorney General will raise a mandatory exception like section 552.101 on behalf a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

³We 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”).

in the DNA database is confidential and is not subject to disclosure under the open records law, Chapter 552 [of the Government Code].” Gov’t Code § 411.153(a). “DNA database” means the database that contains forensic DNA records maintained by the [public safety] director.” Gov’t Code § 411.141(2); *see id.* § 411.001(3). We have marked the documents in Exhibit 3 that are DNA records. To the extent the DNA records are maintained in the public safety director’s DNA database, the department must withhold the DNA records under section 552.101 in conjunction with section 411.153 of the Government Code. If, on the other hand, the DNA records in Exhibit 3 are not maintained in the public safety director’s DNA database, the records are not confidential under section 411.153 of the Government Code.

You also claim that two of the police reports in Exhibit 3 are excepted from disclosure pursuant to section 552.108 of the Government Code. Section 552.108(a)(2) excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. Based on the information you provided, we understand you to assert that police reports 97-002295 and 97-012271 pertain to cases that concluded in a result other than conviction or deferred adjudication. Therefore, we agree that section 552.108(a)(2) is applicable to these reports.

However, section 552.108 is inapplicable to basic information about an arrested person, an arrest, or a crime. Gov’t Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle Publishing 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). Thus, with the exception of the basic front page offense and arrest information, you may withhold police reports 97-002295 and 97-012271 from disclosure based on section 552.108(a)(2).

Section 552.101 also encompasses information protected by section 143.089(g) of the Local Government Code. You indicate that the City of Waco is a civil service city under chapter 143 of the Local Government Code. Section 143.089 contemplates two different types of personnel files, a police officer’s civil service file that a city’s civil service director is required to maintain, and an internal file that a police department may maintain for its own use. Local Gov’t Code § 143.089(a), (g). The officer’s civil service file must contain certain specified items, including commendations, periodic evaluations by the police officer’s supervisor, and documents relating to any misconduct in any instance in which the department took disciplinary action against the officer under chapter 143 of the Local Government Code. *Id.* § 143.089(a)(1)-(2). In cases in which a police department investigates a police officer’s misconduct and takes disciplinary action against a police officer, section 143.089(a)(2) requires the department to place all investigatory records relating to the investigation and disciplinary action, including background documents such as complaints, witness statements, and documents of like nature from individuals who were

not in a supervisory capacity, in the police officer's civil service file maintained under section 143.089(a). *See Abbott v. Corpus Christi*, 109 S.W.3d 113, 122 (Tex. App.—Austin 2003, no pet.). Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See* Local Gov't Code §§ 143.051-.055.

All investigatory materials in a case resulting in disciplinary action are “from the employing department” when they are held by or in possession of the department because of its investigation into a police officer's misconduct, and the department must forward them to the civil service commission for placement in the civil service personnel file. *Id.* at 122. However, information that reasonably relates to an officer's employment relationship with the police department and that is maintained in a police department's internal file pursuant to section 143.089(g) is confidential and must not be released. *City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, pet. denied); *City of San Antonio v. Texas Attorney General*, 851 S.W.2d at 949.

You state that the information in Exhibits 4, 6, and 8 is maintained in the police department's personnel file pursuant to section 143.089(g).⁴ Based on your representations and our review, we find that the information in Exhibits 4, 6, and 8 is confidential pursuant to section 143.089(g) of the Local Government Code and must be withheld under section 552.101 of the Government Code. Because our ruling is dispositive on this issue, we need not address your other arguments for this information.

The submitted materials also include fingerprint information that is subject to sections 560.001, 560.002, and 560.003 of the Government Code. They provide as follows:

Sec. 560.001. DEFINITIONS. In this chapter:

- (1) “Biometric identifier” means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.

- (2) “Governmental body” has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

⁴We note that Exhibit 4 includes investigatory documents relating to disciplinary action taken against the named officer that are required to be placed in the civil service commission's personnel file under section 143.089(a) of the Local Government Code. *See* Loc. Gov't Code § 143.089(a). We also note that section 143.089(g) requires a police department who receives a request for information maintained in a file under section 143.089(g) to refer that person to the city's civil service director or the director's designee. *See id.* § 143.089(g). If you have not already done so, you must refer the requestor to the civil service director at this time.

Sec. 560.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

(1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:

(A) the individual consents to the disclosure;

(B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or

(C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and

(2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 560.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

It does not appear to this office that section 560.002 permits the disclosure of the submitted fingerprint information. Therefore, the department must withhold the fingerprint information we have marked under section 552.101 in conjunction with section 560.003 of the Government Code.

You claim that Exhibits 10 and 11 are excepted in their entirety pursuant to section 552.107 of the Government Code. Section 552.107 protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel,

such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein.)

You inform us that the information in Exhibit 10 is a draft of letter written by an assistant city attorney in connection with an internal investigation and contains legal advice and opinion. You state that the notes and research in Exhibit 11 were prepared by an assistant attorney made in connection with rendering legal advice to the police department. Having considered your arguments and the submitted information, we agree that Exhibit 10 constitutes privileged attorney-client communications that may be withheld under section 552.107(1). However, Exhibit 11 consists of handwritten notes. The notes themselves do not indicate, and you have not otherwise explained, how they reflect privileged communications. Therefore, we find that you have not met your burden of establishing that these notes constitute privileged attorney-client communications, and the department may not withhold Exhibit 11 on the basis of section 552.107.

Next, a portion of the submitted information may be subject to 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)*. In this case, the named individual at issue is no longer employed as an officer with the Waco Police Department. If the named individual at issue remains either a licensed peace officer as defined by article 2.12 or a security officer commissioned under section 51.212 of the Education Code, the department must withhold the information we have marked pursuant to section 552.117(a)(2).

To the extent that the named individual at issue is no longer a licensed officer, his personal information may still be excepted under section 552.117(a)(1). Section 552.117(a)(1)

excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, if the named individual is no longer a licensed police officer, the department must withhold the information we have marked under section 552.117 provided he elected to keep this information confidential under section 552.024 of the Government Code prior to the date on which the request for this information was received. Otherwise, we conclude that the department must release the marked information regarding the former police department employee.

Even if not protected by section 552.117, social security numbers may be confidential under federal law. A social security number or related record” may 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 or 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 number in the file is 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 the social security number, you should ensure that no such information was obtained or is maintained by the department pursuant to any provision of law, enacted on or after October 1, 1990.

You assert that some of the submitted information is excepted from disclosure under section 552.130 of the Government Code. This section 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 department must withhold the information we have marked pursuant to section 552.130 of the Government Code.

Section 552.136 is applicable to certain account numbers and other “access devices.”⁵ This exception provides as follows:

- (a) In this section, “access device” means a card, plate, code, account number, personal identification number, electronic serial number, mobile

⁵The Office of the Attorney General will raise a mandatory exception like section 552.136 on behalf a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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. We have marked information in Exhibit 3 that must be withheld under section 552.136.

In summary, the department must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. Criminal history record information obtained from the NCIC or TCIC networks must be withheld under section 552.101 in conjunction with federal law and subchapter F of chapter 411 of the Government Code. To the extent the marked DNA records are maintained in the public safety director's DNA database, they must be withheld under section 552.101 in conjunction with section 411.153 of the Government Code. Except for basic front page and arrest information, you may withhold police reports 97-002295 and 97-012271 in Exhibit 3 under section 552.108(a)(2). The department must withhold Exhibits 4, 6, and 8 under section 552.101 in conjunction with section 143.089(g) of the Local Government Code, and the marked fingerprint information under section 552.101 in conjunction with section 560.003 of the Government Code. The department may withhold Exhibit 10 under section 552.107. Finally, the department must withhold the information we have marked under section 552.117, if this section applies, as well as under sections 552.130 and 552.136 of the Government Code. The social security number may be protected under federal law. The remaining 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).

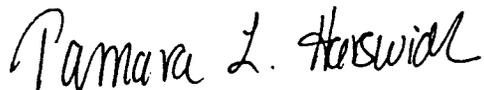
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,



Tamara L. Harswick
Assistant Attorney General
Open Records Division

TLH/sdk

Ref: ID# 213608

Enc. Submitted documents

c: Mr. Peter Walker
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