



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 30, 2005

Ms. Jamie Gaines
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OR2005-07833

Dear Ms. Gaines:

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# 231367.

The Addison Police Department (the "department"), which you represent, received a request for information regarding certain department procedures and a named department officer. You indicate that the department has released some responsive information but claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.111, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 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. 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 in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976) for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 together with your claim regarding section 552.102.

In *Industrial Foundation*, the Texas Supreme Court held that information is protected by common-law privacy if it (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate

concern to the public. *Id.* at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. In this respect, common-law privacy under the Act differs from the privacy right protected under the exemptions of the federal Freedom of Information Act (“FOIA”) that prohibit the disclosure of information that “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” *See* 5 U.S.C. §§ 552(b)(6), (7)(C). To determine whether the FOIA exemptions prohibit disclosure, federal courts must balance the individual’s privacy interest against the public interest in disclosure. *See, e.g., U.S. Dep’t of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994); *Sherman v. U.S. Dep’t of the Army*, 244 F.3d 357, 366 (5th Cir. 2001) (individual researching service awards of soldiers failed to articulate clearly compelling public interest in disclosure of soldiers’ social security numbers); *Halloran v. Veterans Admin.*, 874 F.2d 315, 319 (5th Cir. 1989). In applying common-law privacy under Texas law, however, the courts have rejected the balancing of interests test. *See Indus. Found.*, 540 S.W.2d at 681-82 (under policy determination that Texas legislature made in enacting predecessor to section 552.101, court is not free to balance public’s interest in disclosure against harm to person’s privacy); *Ross v. Midwest Communications, Inc.*, 870 F.2d 271, 272 (5th Cir. 1989) (court rejected “open-ended balancing of interests” and instead applied *Industrial Foundation* test). As the Third Court of Appeals has noted, the requirement of showing both elements of the *Industrial Foundation* test properly “balances” the individual’s privacy and the articulated purpose of the Act. *Hubert*, 652 S.W.2d at 550 (under the Act, “the proper way to evaluate a claimed invasion of privacy is to apply the state tort law dealing with that injury”). 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. 540 S.W.2d at 683.

In this instance, you claim that performance evaluations and appraisals, employment development plans, an internal investigation, employment history and salary information, education and training information, and other records pertaining to the named department officer are protected from disclosure based on privacy grounds. However, even if this information could be considered highly intimate or embarrassing, we find that it is of legitimate public concern. *See* Gov’t Code § 552.022(a)(2) (salary of employee of governmental body is public information unless expressly confidential under other law); Open Records Decision Nos. 545 at 4 (1990) (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities), 470 (1987) (public employee’s job performance does not generally constitute employee’s private affairs), 455 (1987) (public employee’s job performance or abilities generally not protected by privacy), 444 (1986) (concluding that public has obvious interest in having access to information concerning performances of governmental employees, particularly employees who hold positions as sensitive as those held by members of law enforcement), 423 at 2 (1984) (scope of public employee privacy is narrow), 405 at 2-3 (1983) (public has interest in workplace conduct of public employee), 342 (1982) (qualifications of public employee, including experience, licenses and certificates, professional awards and recognitions, tenure,

salary, educational level, membership in professional organizations, and previous employment are available to the public), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom 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); *see also* Open Records Decision No. 562 at 9, n.2 (1990) (public has interest in preserving the credibility and effectiveness of the police force). We therefore conclude that none of the submitted information is excepted from disclosure under either section 552.101 of the Government Code in conjunction with common-law privacy or section 552.102 of the Government Code.

You also argue that the internal investigation is excepted from disclosure on the basis of Open Records Decision Number 208 (1978). In support of this argument, you quote an excerpt from that decision, which states “that the details of the investigation and internal recommendations as to action to be taken are excepted from required public disclosure.” *Id.* at 2. However, the statement on which you rely was referring to information that was excepted from required public disclosure under the statutory predecessor to section 552.108 of the Government Code. *See id.* Specifically at issue was whether a complainant’s identifying information, which is not excepted from disclosure under section 552.108, was otherwise protected based on the privacy components of the statutory predecessors to sections 552.101 and 552.102. *See id.*; *see also* Gov’t Code § 552.108(c). As the department is not seeking to withhold the internal investigation under section 552.108 and we have already determined that none of the information at issue is subject to section 552.101 with common-law privacy or section 552.102, we conclude that the department may not withhold the submitted internal investigation on the basis of Open Records Decision Number 208.

We next address your claim that other portions of the submitted information are excepted from disclosure under section 552.108 of the Government Code. Section 552.108(b)(1) excepts from disclosure “[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if: (1) release of the internal record or notation would interfere with law enforcement or prosecution.” Section 552.108(b)(1) is intended to protect “information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State.” *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.).

To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a governmental body must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. Instead, the governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. *See* Open Records Decision No. 562 at 10 (1990) (construing statutory predecessor). In addition, generally known policies and techniques may not be withheld under section 552.108. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common law rules, and constitutional

limitations on use of force are not protected under law enforcement exception), 252 at 3 (1980) (governmental body did not meet burden because it did not indicate why investigative procedures and techniques requested were any different from those commonly known). The determination of whether the release of particular records would interfere with law enforcement is made on a case-by-case basis. *See* Open Records Decision No. 409 at 2 (1984) (construing statutory predecessor).

You argue that if “the requested documents contained in the policies and procedures manual . . . were revealed, the public could then anticipate an officer’s moves during the arrest, search, transportation, and booking process.” Upon review of the submitted records and your arguments, we agree that some of the submitted information consists of detailed police procedures the release of which would interfere with law enforcement. We have marked the information that the department may withhold pursuant to section 552.108(b)(1). As for the remaining information, we find that you have failed to explain how its release “would interfere with law enforcement or prosecution.” Thus, none of the remaining submitted information may be withheld on this basis.

Next, we address your claim under section 552.111 of the Government Code. This section excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Tex. Att’y Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). An agency’s policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; Open Records Decision No. 615 at 4-5. Having reviewed the information at issue, we find that none of it consists of the type of advice, recommendations, opinions, or other material reflecting policymaking processes that is subject to section 552.111. As such, none of remaining submitted information may be withheld on this basis.

You also claim that some of information pertaining to the named department officer is protected under section 552.117 of the Government Code. Section 552.117(a)(2) excepts from disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of a peace officer regardless of whether the officer requests confidentiality under section 552.024 or 552.1175.¹ We note, however,

¹“Peace officer” is defined by article 2.12 of the Code of Criminal Procedure.

that an individual's personal post office box number is not a "home address" and therefore may not be withheld under section 552.117. *See* Gov't Code § 552.117; Open Records Decision No. 622 at 4 (1994) ("The legislative history of section 552.117(1)(A) makes clear that its purpose is to protect public employees from being harassed *at home*. *See* House Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985); Senate Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985)." (Emphasis added.)); *see also* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express and cannot be implied), 478 at 2 (1987) (language of confidentiality statute controls scope of protection), 465 at 4-5 (1987) (statute explicitly required confidentiality). We also note that section 552.117 does not except a peace officer's date of birth from disclosure. *See* ORD 658 at 4, 478 at 2 (1987), 465 at 4-5 (1987). We have marked the information that the department must withhold pursuant to section 552.117(a)(2).

Lastly, we note that the remaining submitted information includes Texas motor vehicle record information. Section 552.130 of the Government Code excepts from disclosure information that relates to a driver's license or motor vehicle title or registration issued by an agency of this state. Gov't Code § 552.130. As such, the department must withhold the Texas motor vehicle record information we have marked pursuant to section 552.130.

In summary, the department (1) may withhold the information we have marked pursuant to section 552.108(b)(1) of the Government Code; (2) must withhold the information we have marked under section 552.117(a)(2) of the Government Code; (3) must withhold the Texas motor vehicle record information we have marked in accordance with section 552.130 of the Government Code; and (4) must release the remaining submitted information.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the

Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,



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Assistant Attorney General
Open Records Division

RBR/krl

Ref: ID# 231367

Enc. Submitted documents

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(w/o enclosures)