



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 19, 2005

Mr. Charles R. Kimbrough
Bickerstaff, Heath, Smiley, Pollan, Kever & McDaniel, L.L.P.
816 Congress Avenue, Suite 1700
Austin, Texas 78701

OR2005-08522

Dear Mr. Kimbrough:

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# 232535.

The 33rd Judicial District Narcotics Enforcement Team (the "district"), which you represent, received a request for nine categories of information pertaining to task force case logs, agents, and confidential informants, excluding the names and identifying information of any current informants. You state that some of the requested information has been made available to the requestor. You also state that the district does not have information responsive to some of the categories of requested information.¹ You claim that some of the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108, 552.117, 552.1175, 552.119, and 552.140 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that, for the requested copies of current confidential informant agreements, the requestor states that "names and identifying information redacted is fine[.]" Thus, the names and other identifying information of current informants in the submitted information is not responsive to the request for information. This ruling therefore does not address the

¹We note the Act does not require a governmental body to disclose information that did not exist when the request for information was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

public availability of this nonresponsive information, and the district is not required to release this information in response to this request. *See Bustamante*, 562 S.W.2d at 268.

We next note that some of the submitted information is subject to section 552.022. Under section 552.022(a)(3), information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body is expressly public unless it is expressly confidential under other law. Section 552.108 of the Government Code is a discretionary exception to disclosure that protects a governmental body's interests and may be waived by the governmental body. *See Open Records Decision Nos. 677 at 10-11 (2002) (attorney work-product privilege under section 552.111 may be waived), 586 (1991) (governmental body may waive law enforcement exception); see also Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally).* Therefore, section 552.108 does not constitute other law for purposes of section 552.022, and the district may not withhold this information, which we have marked, pursuant to that section. Section 552.101 also constitutes other law for purposes of section 552.022; therefore, we will address whether that section requires you to withhold any of the information at issue.

You assert that some of the submitted information, including the information subject to section 552.022, is excepted under section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses information protected by the informer's privilege, which has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The informer's privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. *Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978).* The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." *Open Records Decision No. 279 at 2 (1981); Wigmore, Evidence*, § 2374, at 767 (McNaughton rev. ed. 1961). The report must be of a violation of a criminal or civil statute. *See Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988).*

You state that Exhibits H and K contain identifying information of "non-current confidential informants" who "gave information relating to or assisting in an investigation of a possible violation of the criminal law to a law enforcement officer of the task force or the Texas Department of Public Safety conducting a narcotics or controlled substance investigation." You also indicate that the release of this information would endanger the informants' safety. After review of your arguments and the submitted documents, we conclude that the district may withhold the identifying information of informants in the submitted information pursuant to section 552.101 in conjunction with the informer's privilege.

Section 552.101 also encompasses information protected by other statutes. The submitted information contains F-5 forms (Report of Separation of License Holder). These forms are made confidential by section 1701.454 of the Occupations Code, which provides in relevant part that “[a] report or statement submitted to the commission under this subchapter is confidential and is not subject to disclosure under Chapter 552 of the Government Code. Occ. Code § 1701.454(a). The district must withhold the F-5 forms pursuant to section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

Section 552.101 also encompasses federal law. Section 6103(a) of title 26 of the United States Code provides that tax return information is confidential. *See* 26 U.S.C. § 6103(a)(2), (b)(2)(A), (p)(8); *see also* Open Records Decision No. 600 (1992); Attorney General Op. MW-372 (1981). Accordingly, the W-4 tax forms in the submitted documents are confidential under section 6103(a), and the district must withhold them under section 552.101 of the Government Code.

Section 552.101 also encompasses information protected by common law privacy. Section 552.102 of the Government Code 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. Accordingly, we address the district’s section 552.102 claim in conjunction with its common law privacy claim under section 552.101 of the Government Code.

Common law privacy protects information 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. *Indus. Found.*, 540 S.W.2d at 685. 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. *Id.* at 683. This office has found that the following types of information are excepted from required public disclosure under common law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). But this office has found that the public has a legitimate interest in information relating to employees of governmental bodies and their employment qualifications and job performance. *See* Open Records Decision Nos. 562

at 10 (1990), 542 at 5 (1990); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow).

The common law right to privacy also encompasses certain types of personal financial information. This office has determined that financial information that relates 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 certain state personnel records), 545 at 4 (1990) (financial information not excepted from public disclosure by common law privacy generally includes those regarding 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). 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, the details of an employee's enrollment in a group insurance program, the designation of the beneficiary of an employee's retirement benefits, and an employee's authorization of direct deposit of the employee's salary are protected by common law privacy. *See* Open Records Decision No. 600 at 9-12. But 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 private under section 552.101. *See id.* at 9 (basic facts of group insurance provided by governmental body not protected by common law privacy).

The submitted information contains financial information pertaining to district employees. To the extent that the marked financial information relates to an employment benefit that the district funds, in whole or in part, the information is not private and may not be withheld on that basis under section 552.101; however, to the extent that the marked financial information relates to an employment benefit that the district does not fund, in whole or in part, the information is confidential under common law privacy and must be withheld under section 552.101. We have also marked additional information that is confidential under common law privacy and that the district must withhold under section 552.101. However, we do not find the remaining information to be highly intimate or embarrassing information; therefore, this information is not confidential under common law privacy, and the district may not withhold it under section 552.101 on that ground.

Section 552.101 also encompasses the doctrine of constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's

autonomy within “zones of privacy” which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual’s privacy interests and the public’s need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the “most intimate aspects of human affairs.” *Id.* at 5; *see Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985). After review of the submitted information, we find that it does not contain information that is confidential under constitutional privacy; therefore, the district may not withhold it under section 552.101 on that ground.

You assert that some of the remaining information is excepted under section 552.108 of the Government Code. Section 552.108(a)(1) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime [if] release of the information would interfere with the detection, investigation, or prosecution of crime.” A governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov’t Code §§ 552.108(a)(1), (b)(1), 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). But section 552.108 generally is not applicable to an internal administrative investigation involving a law enforcement officer that did not result in a criminal investigation or prosecution. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App. 2002, no pet.); Open Records Decision No. 562 at 10 (1990); *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor not applicable to internal investigation that did not result in criminal investigation or prosecution); Open Records Decision No. 350 at 3-4 (1982).

You state that the information in Exhibit E you have highlighted in yellow relates to pending criminal investigations. Based on this representation, we conclude that the release of this information would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref’d n.r.e.*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). However, section 552.108 does not except 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*. The information you have highlighted in yellow in Exhibit E consists of basic information for purposes of section 552.108(c); therefore, the department may not withhold this information under section 552.108.

The information in Exhibit I consists of an internal administrative investigation of an officer resulting from a citizen’s complaint. You inform us that this report contains information relating to a criminal investigation, and that “[t]he matter was referred to the District Attorney of Burnett County, Texas for review and the filing of criminal action if deemed appropriate.” Based on your representations, we find you have established that Exhibit I

pertains to a criminal investigation. Therefore, with the exception of the basic front-page offense and arrest information, the district may withhold Exhibit I under section 552.108.²

You assert that some of the information in Exhibit H is excepted under section 552.117 of the Government Code. Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former 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). Section 552.117(a)(2) excepts from disclosure this same information regarding a peace officer, as defined by article 2.12 of the Texas Code of Criminal Procedure, regardless of whether the officer elected under section 552.024 or 552.1175 of the Government Code to keep such information confidential. We note, however, 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) (purpose of section 552.117 is to protect public employees from being harassed at home); *see also* Open Records Decision No. 658 at 4 (1998) (statutory confidentiality provision must be express and cannot be implied).

We have marked information that the district must withhold under section 552.117(a)(2) if the employee at issue was a district peace officer at the time of the request. If the employee at issue was not a district peace officer at the time of the request, the district must withhold this same information under section 552.117(a)(1) if the employee elected to keep such information confidential prior to the district's receipt of the request for information.

You assert that a photograph in Exhibit F is excepted under section 552.119 of the Government Code, which provides the following:

(a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, the release of which would endanger the life or physical safety of the officer, is excepted from [required public disclosure] unless:

- (1) the officer is under indictment or charged with an offense by information;
- (2) the officer is a party in a civil service hearing or a case in arbitration; or

²We note that basic information held to be public in *Houston Chronicle* is generally not excepted from public disclosure under section 552.103 of the Government Code. Open Records Decision No. 597 (1991).

(3) the photograph is introduced as evidence in a judicial proceeding.

(b) A photograph excepted from disclosure under Subsection (a) may be made public only if the peace officer gives written consent to the disclosure.

Gov't Code § 552.119.³ Under section 552.119, a governmental body must demonstrate, if the documents do not demonstrate on their face, that release of the photograph would endanger the life or physical safety of a peace officer.⁴ Furthermore, a photograph of a peace officer cannot be withheld under section 552.119 if (1) the officer is under indictment or charged with an offense by information; (2) the officer is a party in a civil service hearing or a case in arbitration; (3) the photograph is introduced as evidence in a judicial proceeding; or (4) the officer gives written consent to the disclosure. In this instance, you have not demonstrated, nor is it apparent from our review of the submitted information, that release of the photograph at issue would endanger the life or physical safety of the peace officer depicted. We therefore determine that the district may not withhold the photograph of the officer pursuant to section 552.119 of the Government Code.

We note that some of the remaining information is excepted under section 552.130 of the Government Code, which provides that a motor vehicle operator's, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1), (2). Therefore, the district must withhold the Texas driver's license numbers you have highlighted in yellow, as well as additional information we have marked, under section 552.130.

We note that some of the remaining information is excepted under section 552.136 of the Government Code. Section 552.136(b) 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." The district must withhold the account numbers we have marked under section 552.136.

We note that some of the remaining information is excepted under section 552.137 of the Government Code. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). See Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). You do not

³As amended by Act of April 22, 2005, 79th Leg., R.S., S.B. 148, § 1 (effective May 3, 2005).

⁴"Peace officer" is defined by article 2.12 of the Code of Criminal Procedure.

inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, the district must withhold the e-mail addresses we have marked under section 552.137.

You assert some of the submitted information is excepted under section 552.140 of the Government Code. Section 552.140 provides that a military veteran's DD-214 form or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003 is confidential for a period of seventy-five years and may only be disclosed in accordance with section 552.140 or in accordance with a court order. *See* Gov't Code § 552.140(a), (b). You do not inform us when the district came into possession of the submitted DD-214 forms. Therefore, if the DD-214 forms came into the possession of the district on or after September 1, 2003, the district must withhold these forms under section 552.140. Otherwise, the forms must be released, subject to the markings we have made under sections 552.101 and 552.117.

Finally, we note that some of the materials at issue may 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).

To conclude, pursuant section 552.101 of the Government Code, the district must withhold the following: (1) the F-5 forms, which are confidential under section 1701.454 of the Occupations Code; (2) the W-4 tax forms, which are confidential under section 6103 of title 26 of the United States Code; and (3) the marked financial information if it relates to an employment benefit that the district funds, in whole or in part; and (4) the remaining information we have marked that is confidential under common law privacy. The district may withhold (1) the identifying information of informants in the submitted information pursuant to section 552.101 in conjunction with the informer's privilege and (2) with the exception of the basic front-page offense and arrest information, the information in Exhibit I under section 552.108. The district must withhold (1) the information marked under section 552.117 if the employee at issue was a district peace officer at the time of the request or if the employee elected to keep such information confidential prior to the district's receipt of the request for information; (2) the marked Texas motor vehicle record information under section 552.130; (3) the marked account numbers under section 552.136; (5) the marked e-mail addresses under section 552.137; and (4) the DD-214 forms under section 552.140 if they came into the possession of the district on or after September 1, 2003. The district must

release the remaining information, but any copyrighted information may only be released in accordance with copyright law.⁵

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).

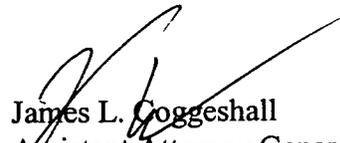
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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 Office of the Attorney General at (512) 475-2497.

⁵As our ruling is dispositive, we do not address your other arguments for exception of the submitted information.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. 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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/seg

Ref: ID# 232535

Enc. Submitted documents

c: Mr. Scott Henson
ACLU of Texas Police Accountability Project
P.O. Box 12905
Austin, Texas 78711
(w/o enclosures)