



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 14, 2005

Ms. Paula J. Alexander
General Counsel
Metropolitan Transit Authority of Harris County
1900 Main, Third Floor
Houston, Texas 77002

OR2005-10242

Dear Ms. Alexander:

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# 236221.

The Metropolitan Transit Authority of Harris County (the "authority") received a request for eight categories of information relating to a named officer of the authority's police department.¹ You inform us that the authority has released some of the requested information. You claim that other responsive information is excepted from disclosure under sections 552.101, 552.108, 552.119, 552.130, and 552.147 of the Government Code.²

¹We note that the requestor states that she does not seek access to the named officer's social security number, personal bank account information, date of birth, medical records, polygraph results, family information, biometric identifier information, or home address and telephone number. Thus, to the extent that the submitted documents contain these types of information, they are not responsive to this request. This decision does not address the public availability of information to which the requestor does not seek access, and that information need not be released.

²We note that you also claim exceptions to disclosure under sections 552.142 and 552.352. We do not address section 552.142, as you have submitted no arguments in support of its applicability. See Gov't Code §§ 552.301(e)(1)(A), .302. Section 552.352 is not an exception to disclosure. Rather, this section prescribes criminal penalties for the release of information that is considered confidential under the Act. See *id.* § 552.352.

We have considered the exceptions you claim and have reviewed the information you submitted.³

Section 552.101 of the Government Code exempts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses information that other statutes make confidential. The federal Family Educational Rights and Privacy Act of 1974 (“FERPA”) provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student’s education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student’s parent. *See* 20 U.S.C. § 1232g(b)(1). “Education records” means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). The authority is not an educational agency or institution.

FERPA also provides, however, that an educational agency or institution may only transfer personal information to a third party “on the condition that such party will not permit any other party to have access to such information without the written consent of the parents of the student.” *Id.* § 1232g(b)(4)(B). The federal regulations provide that a third party that receives such information from an educational agency may use the information only for the purposes for which the disclosure was made. *See* 34 C.F.R. § 99.33(a)(2).

In this instance, the authority appears to have received some of the submitted educational transcripts directly from the educational institutions. To the extent that the authority did so, we conclude that pursuant to sections 1232g(b)(4)(B) and 99.33(a)(2), the authority may only release transcripts received directly from the educational institutions on the consent of the individual to whom the transcripts pertain. To the extent that the authority did not receive the educational transcripts directly from the educational institutions, the transcripts are not confidential under FERPA and may not be withheld on that basis under section 552.101 of the Government Code.

Section 6103(a) of title 26 of the United States Code makes federal tax return information confidential. The term “return information” includes “the nature, source, or amount of income” of a taxpayer. 26 U.S.C. § 6103(b)(2). The W-2 forms that we have marked must be withheld under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

Section 1701.306 of the Occupations Code is applicable to the Texas Commission on Law Enforcement Officer Standards and Education. Section 1701.306 provides in part:

³We note that information contained in one of the submitted documents does not relate to the named officer and thus is not responsive to this request. This decision does not address the public availability of that information, which we have marked, and it need not be released.

(a) The commission may not issue a license to a person as an officer or county jailer unless the person is examined by:

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test.

(b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to the commission. *A declaration is not public information.*

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

The submitted documents also include information that is confidential under section 611.002 of the Health and Safety Code. Section 611.002 provides in part:

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

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

Health & Safety Code § 611.002(a)-(b); *see also id.* § 611.001 (defining “patient” and “professional”). Sections 611.004 and 611.0045 provide for access to information that is made confidential by section 611.002 only by certain individuals. *See id.* §§ 611.004, 611.0045; Open Records Decision No. 565 (1990). We have marked information that is confidential under section 611.002 of the Health and Safety Code. As there is no indication that the requestor has a right of access to the marked information under sections 611.004 and 611.0045, it must also be withheld under section 552.101 of the Government Code.

The submitted documents also include an accident report form that appears to have been completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer’s accident report). Section 550.065(b) states that except as provided by subsection (c), accident reports are privileged and confidential. Section 550.065(c)(4)

provides for the release of an accident report to a person who provides two of the following three pieces of information: (1) the date of the accident; (2) the name of any person involved in the accident; and (3) the specific location of the accident. *See id.* § 550.065(c)(4). Under this provision, the Texas Department of Public Safety or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more of the three items of information specified by the statute. *Id.* In this instance, the requestor has not provided two of the three required items of information. Therefore, the authority must withhold the accident report form that we have marked under section 550.065 of the Transportation Code.

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. CHRI means “information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions.”⁴ Gov’t Code § 411.082(2). Federal law governs the dissemination of CHRI obtained from the National Crime Information Center network. Federal regulations prohibit the release to the general public of CHRI 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”). The federal regulations allow each state to follow its own individual law with respect to CHRI that it generates. *See* Open Records Decision No. 565 at 10-12 (1990); *see generally* Gov’t Code ch. 411 subch. F. 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). Furthermore, information compiled by a law enforcement agency that relates to a specific individual as a possible criminal suspect, arrested person, or defendant takes on a character that implicates the individual’s common law right to privacy in a manner that the same information in an uncompiled state does not.⁵ *See U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); Open Records Decision No. 616 at 2-3 (1993).⁶ Thus, any responsive CHRI obtained from the NCIC or TCIC that is confidential under federal law or subchapter F of chapter 411 of the Government Code, as well as any criminal history

⁴We note that the statutory definition of CHRI does not encompass driving record information maintained by the Texas Department of Public Safety under subchapter C of chapter 521 of the Transportation Code. *See* Gov’t Code § 411.082(2) (defining “criminal history record information”).

⁵Section 552.101 of the Government Code also encompasses the common law right to privacy. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976).

⁶We note that privacy under *Reporters Committee* does not encompass records of traffic offenses. *Cf.* Gov’t Code § 411.082(2)

information that is private under *Reporters Committee*, must be withheld under section 552.101 of the Government Code.

The common law right to privacy protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common law privacy under section 552.101 encompasses the types of information that are held to be intimate or embarrassing in *Industrial Foundation*. *See* 540 S.W.2d at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has determined that other types of information also are private under section 552.101. *See generally* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private). Common law 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) (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), 523 at 4 (1989) (noting distinction under common law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), 373 at 4 (1983) (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis). We have marked personal financial and other information that the authority must withhold under section 552.101 of the Government Code in conjunction with common law privacy.

You also raise section 552.108(a)(2) and section 552.108(b)(2) of the Government Code. Section 552.108(a)(2) excepts from public disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]” Gov’t Code § 552.108(a)(2). Section 552.108(b)(2) 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 . . . the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]” *Id.* § 552.108(b)(2). A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information that the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Sections 552.108(a)(2) and 552.108(b)(2) are applicable only if

the information in question relates to a concluded criminal case that did not result in a conviction or a deferred adjudication.

In this instance, the submitted documents reflect that Exhibit C relates to an administrative investigation conducted by the authority's police department (the "department"). We note that section 552.108 is generally not applicable to the records of an investigation that is solely administrative in nature. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.), *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor to Gov't Code § 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution). You do not inform us, and Exhibit C does not itself otherwise indicate, that the department's administrative investigation has resulted in any criminal investigation or prosecution. We therefore conclude that you have not demonstrated that section 552.108 is applicable to Exhibit C, and the authority may not withhold any of the information in Exhibit C on that basis.

We next note that submitted information relating to current or former employees of the authority other than the named officer may be excepted from disclosure under section 552.117 of the Government Code.⁷ Section 552.117(a)(2) excepts from public disclosure the home address, home telephone number, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 or 552.1175.⁸ Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. To the extent that the information that we have marked under section 552.117 relates to a peace officer, the authority must withhold that information under section 552.117(a)(2).

To the extent that it does not relate to a peace officer, the marked information may be excepted from disclosure under section 552.117(a)(1). Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who timely and specifically requests that this information be kept confidential under section 552.024. The determination of whether a particular item of information is protected by section 552.117(a)(1) must be made at the time of the governmental body's receipt of the request for the information. *See Open Records Decision No. 530 at 5 (1989)*. Thus, a governmental

⁷Unlike other exceptions to disclosure, this office will raise section 552.117 on behalf of a governmental body, as it is a mandatory exception and may not be waived. *See Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions)*.

⁸We note that a post office box number is not a "home address" for purposes of section 552.117. *See Gov't Code § 552.117; Open Records Decision No. 622 at 4 (1994) (legislative history makes clear that purpose of Gov't Code § 552.117 is to protect public employees from being harassed at home) (citing 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)*.

body may only withhold information under section 552.117(a)(1) on behalf of a current or former employee who requested confidentiality under section 552.024 prior to the governmental body's receipt of the request for the information. A governmental body may not withhold information under section 552.117(a)(1) on behalf of a current or former employee who did not make a timely election to keep the information confidential. Therefore, the information that we have marked under section 552.117 must be withheld under section 552.117(a)(1) to the extent that the information relates to a current or former employee who timely requested confidentiality for the information under section 552.024.

We also note that some of the submitted information appears to relate to peace officers of a governmental body other than the department. With regard to that information, section 552.1175 of the Government Code provides in part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure[.]

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(a)(1), (b).⁹ Thus, to the extent that it relates to a peace officer who elects to restrict access to the information in accordance with section 552.1175(b), the information that we have marked under section 552.1175 must be withheld from disclosure.

Next, we address section 552.119 of the Government Code, which provides as follows:

(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:

⁹Section 552.1175 also is a mandatory exception and may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001).

- (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
- (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 § 552.119.¹⁰ Under section 552.119, a governmental body must demonstrate, if the information does not demonstrate on its face, that release of the photograph in question would endanger the life or physical safety of a peace officer. A photograph of a peace officer may not 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. 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 individual depicted. We therefore conclude that the authority may not withhold any of the submitted information under section 552.119.

Section 552.130 of the Government Code 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. Gov't Code § 552.130(a)(1)-(2). We have marked Texas driver's license and motor vehicle information that the authority must withhold under section 552.130.

We next note that section 552.136 is applicable to some of the submitted information.¹¹ 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 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

¹⁰As amended by Act of April 22, 2005, 79th Leg., R.S., S.B. 148, § 1 (effective May 3, 2005).

¹¹Section 552.136 also is mandatory and may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001).

(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 that the authority must withhold under section 552.136.

We also note that the submitted documents include military discharge records. Section 552.140 of the Government Code provides in relevant part:

(a) This section applies only to a military veteran's Department of Defense Form DD-214 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.

Gov't Code § 552.140(a).¹² 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 indicate when the authority first came into possession of the submitted DD-214 forms. Nevertheless, to the extent that these forms came into the authority's possession on or after September 1, 2003, they must be withheld under section 552.140. To the extent that the DD-214 forms came into the authority's possession prior to September 1, 2003, they must be released.

Lastly, we note that some of the submitted information is protected by copyright. A governmental body must allow inspection of copyrighted information unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information also must comply with copyright law, however, and is not required to furnish copies of copyrighted information. *Id.* A member of the public who wishes to make copies of copyrighted information 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 at 8-9 (1990).

In summary: (1) to the extent that the authority received the submitted educational transcripts directly from the educational institutions, such transcripts are confidential under FERPA and may only be released on the consent of the individual to whom the transcripts

¹²Section 552.140 also is mandatory and may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001).

pertain; (2) the authority must withhold the W-2 forms under section 552.101 of the Government Code in conjunction with section 6103 of title 26 of the United States Code; (3) the declaration must be withheld under section 552.101 and section 1701.306 of the Occupations Code; (4) the department must withhold the information that is confidential under section 552.101 and section 611.002 of the Health and Safety Code; (5) the accident report form must be withheld under section 550.065 of the Transportation Code; (6) any responsive CHRI obtained from the NCIC or TCIC that is confidential under federal law or subchapter F of chapter 411 of the Government Code, as well as any criminal history information that is private under *Reporters Committee*, must be withheld under section 552.101 of the Government Code; (7) the authority must withhold the marked personal financial and other information that is confidential under section 552.101 and common law privacy; (8) the information marked under section 552.117 must be withheld under section 552.117(a)(2) to the extent that the information relates to a peace officer; (9) to the extent that it does not relate to a peace officer, the information marked under section 552.117 must be withheld under section 552.117(a)(1) to the extent that it relates to a current or former employee who timely requested confidentiality for the information under section 552.024; (10) the information marked under section 552.1175 must be withheld to the extent that it relates to a peace officer of another governmental body who elects to restrict access to the information in accordance with section 552.1175(b); (11) the Texas driver's license and motor vehicle information must be withheld under section 552.130; (12) the information that is confidential under section 552.136 must be withheld; and (13) to the extent that they came into the authority's possession on or after September 1, 2003, the DD-214 forms must be withheld under section 552.140.¹³ The rest of the submitted information must be released. In releasing information that is protected by copyright, the authority must comply with copyright law.

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).

¹³As we are able to make these determinations, we do not address your claim under section 552.147 of the Government Code.

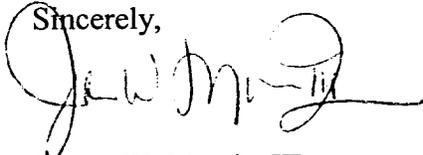
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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.

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 W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 236221

Enc: Submitted documents

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