ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 21, 2006

Ms. Charlotte L. Staples
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6000 Western Place, Suite 200
I-30 at Bryant-Irving Road
Fort Worth, Texas 76107-4654

OR2006-01666

Dear Ms. Staples:

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# 242618.

The North Richland Hills Police Department (the "department"), which you represent, received a request for information related to a named police officer and a specified speed measuring device. You state that the department has no documents responsive to portions of the request.[1] You claim that the remaining requested information is excepted from disclosure under sections 552.102, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (allowing interested party to submit comments indicating why requested information should or should not be released).

To the extent any additional information responsive to this request existed on the date the department received this request, we assume that you have released it to the requestor. If you have not released any such information, you must release it to the requestor at this time. *See* Gov't Code §§ 552.301(a), .302.

[1]Chapter 552 of the Government Code does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App. – San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

Next, we must address the department's obligations under section 552.301 of the Government Code. Sections 552.301(a) and (b) provide:

> (a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the Act's exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.
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> (b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the tenth business day after the date of receiving the written request.

Gov't Code § 552.301(a), (b). You indicate that the department received the present request for information on November 28, 2005. Accordingly, you were required to submit your request for a decision from this office no later than December 12, 2005. We received your request for a decision on December 14, 2005 in an envelope that had no postmark date. *See id.* § 552.308 (submission is timely if the document is sent by first class United States mail and bears a post office cancellation mark indicating a time within the required period). Consequently, we determine that the department failed to request a decision within the ten business day period as mandated by section 552.301(b) of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.– Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). You assert that portions of the requested information are excepted from disclosure under sections 552.102, 552.103, and 552.108 of the Government Code. Sections 552.103 and 552.108 are discretionary in nature; they serve only to protect a governmental body's interests and may be waived. As such, they do not generally constitute compelling reasons to withhold information. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 586 (1991) (governmental body may waive section 552.108), 177 (1977) (governmental body may waive statutory predecessor to section 552.108); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Therefore, none of the submitted information is excepted from release pursuant to sections 552.103 or 552.108 of the Government Code. However, section 552.102 can provide compelling reasons to overcome the presumption of openness; therefore, we will consider whether this claim requires you to withhold the submitted information.

The department seeks to withhold the transcripts included in the personnel records pursuant to section 552.102 of the Government Code. Section 552.102(a) excepts from required public disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." This exception applies when the release of information would result in a violation of the common-law right to privacy. *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.). The common-law right to privacy is violated if: (1) the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person, and (2) the information is of no legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex.– 1976). Information about public employees' job performance or the reason for their dismissal, demotion, promotion, or resignation is not generally excepted from public disclosure. Open Records Decision Nos. 470 at 4 (1987), 444 at 5-6 (1986), 405 at 2-3 (1983). After carefully considering the information at issue, we find that section 552.102 is inapplicable to this information. Therefore, no portion of the submitted transcripts may be withheld under 552.102(a) in conjunction with common-law privacy.

Section 552.102(b) excepts from disclosure all information from transcripts of professional public school employees other than the employee's name, the courses taken, and the degree obtained. Gov't Code § 552.102(b); Open Records Decision No. 526 (1989). Upon review, we find that the individual at issue is not a public school employee. Thus, the department may not withhold any information pursuant to section 552.102(b) of the Government Code.

We note that portions of the submitted information are subject to section 552.117 of the Government Code. Section 552.117(a)(2) excepts from disclosure the current and former home addresses and telephone numbers, pager 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.[2] Section 552.117(a)(1) protects the current and former home addresses and telephone numbers, social security number, and family member information of a current or former employee of a governmental body who requests that the information be kept confidential under section 552.024. Whether a particular item of information is protected by section 552.117(a)(1) must be determined 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, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not make a timely election under section 552.024 to keep the information confidential.

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[2]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 an individual who was a peace officer when the city received this request for information, the marked information must be withheld under section 552.117(a)(2). To the extent that the marked information does not relate to a peace officer, the information must be withheld under section 552.117(a)(1) if the individual to whom it relates requested confidentiality for the information under section 552.024 prior to the departments's receipt of this request.

We note that the submitted information contains a social security number. Section 552.147 of the Government Code provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. Therefore, the department must withhold the social security numbers contained in the submitted information under section 552.147.[3]

In summary, to the extent that the information that we have marked under section 552.117 relates to an individual who was a peace officer when the city received this request for information, the marked information must be withheld under section 552.117(a)(2). To the extent that the marked information does not relate to a peace officer, the information must be withheld under section 552.117(a)(1) if the individual to whom it relates requested confidentiality for the information under section 552.024 prior to the departments's receipt of this request. The department must withhold the social security numbers contained in the submitted information under section 552.147. The remaining information must be released to the requestor.

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).

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[3]We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

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 Forrest
Assistant Attorney General
Open Records Division

JF/er

Ref: ID# 242618

Enc. Submitted documents

c: Mr. Michael Hvidston
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(w/o enclosures)