



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 21, 2006

Mr. David M. Swope
Assistant County Attorney
Harris County Attorney
1019 Congress, 15th Floor
Houston, Texas 77002

OR2006-02744

Dear Mr. Swope:

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# 244500.

The Harris County Constable Precinct 2 (the "constable") received a request for several categories of information regarding three named deputy constables. You state that you are providing some of the requested information to the requestor.¹ You state that some of the requested information does not exist.² You claim, however, that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.1175, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that any person may submit comments stating why information should or should not be released).

¹We note that the constable has redacted social security numbers in the information released to the requestor. 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.

²The Act does not require a governmental body to release information that did not exist when a request for information was received, create information responsive information, or obtain information that is not held by or on behalf of the city. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

Initially, we note that the requestor has agreed to exclude from the request the named deputy constables' addresses and telephone numbers. Thus, this information is not responsive to the instant request and need not be released.

Next, we note that the submitted information contains I-9 and W-4 forms which are excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with federal statutes. 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 information protected by other statutes. Section 1324a of title 8 of the United States Code provides that an Employment Eligibility Verification Form I-9 "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). Release of this form under the Act would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we find that the I-9 forms and their attachments are confidential under section 552.101 of the Government Code and may only be released in compliance with the federal laws and regulations governing the employment verification system.

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 Opinion MW-372 (1981). Accordingly, we conclude that the constable must withhold the W-4 forms pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

You claim that the submitted information contains fingerprint information that is governed by sections 560.001, 560.002, and 560.003 of the Government Code, which are also encompassed by section 552.101 of the Government Code. Chapter 560 of the Government Code provides that a governmental body may not release fingerprint information except in certain limited circumstances. *See* Gov't Code §§ 560.001 (defining "biometric identifier" to include fingerprints), .002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), .003 (providing that biometric identifiers in possession of governmental body are exempt from disclosure under Act). You state that section 560.002 does not permit the release of the fingerprint information in this instance. Accordingly, the constable must withhold the information we have marked under section 552.101 in conjunction with section 560.003 of the Government Code.

You claim that the submitted information contains criminal history record information ("CHRI"), which is also encompassed by section 552.101 of the Government Code. CHRI generated by the National Crime Information Center or by the Texas Crime Information Center is confidential. Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government

Code. See Gov't Code § 411.083. Sections 411.083(b)(1) and 411.089(a) 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. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. See generally *id.* §§ 411.090 - .127. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. However, we note that the definition of CHRI does not include driving record information maintained by DPS under chapter 521 of the Transportation Code. See Gov't Code § 411.082(2)(B). After reviewing the submitted information, we have marked the CHRI which must be withheld under section 552.101 of the Government Code.

Section 552.102 excepts from disclosure "information in a person's 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(a) is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Act. See *Indus. Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). Accordingly, we will consider your privacy claims under section 552.101 and section 552.102(a) together.

In order for information to be protected from public disclosure by the doctrine of common-law privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation*. In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. In addition, this office has found that personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from disclosure under common-law privacy. See Open Records Decision No. 600 (1992) (designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care). Upon review, we have marked the information that must be withheld under section 552.101 in conjunction with common-law privacy.

Next, you claim section 552.1175 of the Government Code is applicable to some of the submitted information concerning the deputy constables. Section 552.1175 applies to peace officers³ and provides in pertinent part:

³"Peace officer" is defined by Article 2.12 of the Texas 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(b). This provision allows a peace officer who is not employed by the constable to elect to restrict access to his home address and telephone number, social security number, and family member information. However, the submitted information reflects that the officers in question are employed by the constable. Accordingly, section 552.1175 of the Government Code is inapplicable in this instance.

We note, however, that some of the information of the officers is excepted under section 552.117(a)(2) of the Government Code. Section 552.117(a)(2) excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information regarding a peace officer regardless of whether the officer elected under section 552.024 or 552.1175 of the Government Code to keep such information confidential. *See* Gov't Code § 552.117(a)(2). We note that section 552.117 also encompasses personal pager numbers of peace officers if the constable does not pay for the pager service. *See* Open Records Decision No. 670 (2001). We note, however, that dates of birth are not excepted from public disclosure under section 552.117 of the Government Code and they may not be withheld on that basis. *See* Gov't Code § 552.117(a)(2). Accordingly, pursuant to section 552.117(a)(2), the constable must only withhold the marked peace officers' family member information, as well as the peace officers' personal pager numbers if the constable does not pay for the service; otherwise, these pager numbers must be released. *See* Open Records Decision No. 670 (2001) (previous determination that governmental body may withhold home address, home telephone number, personal cellular phone number, personal pager number, social security number and information that reveals whether individual has family members, of any individual who meets definition of "peace officer" set forth in article 2.12 of Texas Code of Criminal Procedure without necessity of requesting attorney general decision as to whether exception under section 552.117(a)(2) applies).

You claim that some of the submitted information is confidential under section 552.130 of the Government Code. In relevant part, section 552.130 provides:

- (a) Information is excepted from required public disclosure if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

Gov't Code § 552.130. Therefore, we agree that you must withhold the Texas-issued motor vehicle record information we have marked under section 552.130 of the Government Code. We note that some of the submitted information is subject to section 552.136, which provides:

(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
- (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 the account numbers that must be withheld pursuant to section 552.136 of the Government Code.

Finally, we note that the submitted information includes a DD-214 form. Section 552.140 of the Government Code 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 constable came into possession of the submitted DD-214 form. Therefore, if the DD-214 form came into the possession of the constable on or after September 1, 2003, the constable must withhold this form in its entirety under section 552.140. If the form was received by the constable before September 1, 2003, the constable may not withhold it pursuant to section 552.140 of the Government Code.

In summary, the I-9 forms and their attachments are confidential and they may only be released in compliance with the federal laws and regulations governing the employment verification system. The constable must withhold the W-4 forms pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States

Code. The constable must withhold the information we have marked under section 552.101 and section 560.003 of the Government Code. The constable must withhold the CHRI we have marked under section 552.101 of the Government Code. The constable must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. Pursuant to section 552.117(a)(2), the constable must withhold the marked family member information, as well as the personal pager numbers if the service is not paid for by the constable. The constable must withhold the Texas-issued motor vehicle record information we marked under section 552.130 of the Government Code. The constable must withhold the account numbers we have marked under section 552.136 of the Government Code. Additionally, if the DD-214 form came into the possession of the constable on or after September 1, 2003, the constable must withhold this form in its entirety under section 552.140. If the form was received by the constable before September 1, 2003, the constable may not withhold it pursuant to section 552.140 of the Government Code. 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).

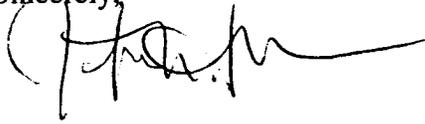
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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

A handwritten signature in black ink, appearing to read "Jaclyn N. Thompson", written over a faint circular stamp or watermark.

Jaclyn N. Thompson
Assistant Attorney General
Open Records Division

JNT/krl

Ref: ID# 244500

Enc. Submitted documents

c: Mr. Ronald C. Campana
6363 Woodway, Suite 725
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(w/o enclosures)