



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 27, 2006

Mr. John Dewey  
City Attorney  
City of Lake Jackson  
5 Oak Drive  
Lake Jackson, Texas 77566

OR2006-04266

Dear Mr. Dewey:

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# 247350.

The Lake Jackson Police Department (the "department") received a request for information regarding a specified investigation and the personnel files for two named officers. You claim that the 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.

Initially, we note that some of the requested information appears to be the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2006-01671 (2006). With regard to information in the current request that is identical to the information previously requested and ruled upon by this office, we conclude that, as we have no indication that the law, facts, and circumstances on which the prior ruling was based have changed, the department must continue to rely on that ruling as a previous determination and withhold or release this information in accordance with Open Records Letter No 2006-01671. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Because the submitted information appears to be the subject of a previous request for information, we note that the department appears to have released some of the information that you now seek to withhold from the public. We note that section 552.007 of the Government Code prohibits selective disclosure of information that a governmental body has

voluntarily made available to any member of the public. *See* Gov't Code § 552.007(b). As a general rule, if a governmental body releases information to one member of the public, the Act's exceptions to disclosure are waived unless the information is deemed confidential under the Act. Open Records Decision Nos. 490 (1988), 400 (1983). Although protection for information covered by the Act's permissive exceptions, such as sections 552.108 and 552.103, can be waived, protection for information deemed confidential by law ordinarily is not waived through "selective disclosure." *See* Open Records Decision Nos. 490, 400. If it is established that the department previously released any of the submitted information to a member or members of the public, the department cannot now withhold such information under section 552.103 or 552.108. However, if the department previously released confidential information, such information remains confidential and must not be released pursuant to section 552.007.

Next, we address your claims with regard to the submitted information that is not encompassed by Open Records Letter No 2006-01671 and has not been previously released. We note that a portion of the submitted information is illegible. As this office cannot review illegible information, we are unable to determine if any of this illegible information must be withheld from disclosure. *See* Gov't Code § 552.301(e)(1)(D). Therefore, we are returning the illegible portion of the submitted information unmarked. To the extent, however, that the department maintains a legible copy of the information at issue, it must be released or withheld in conformity with this ruling.

Section 552.103 of the Governmental Code provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The department has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open

Records Decision No. 551 at 4 (1990). The department must meet both prongs of this test for information to be excepted under 552.103(a).

You state that the submitted information is related to pending litigation of a criminal nature. We note, however, that neither the department nor the Brazoria County District Attorney's Office has explained how the submitted information is related to this pending litigation. *See* Gov't Code § 552.301(e) (governmental body must provide comments explaining why exceptions raised should apply to information requested); *see also* Open Records Decision No. 575 at 2 (1990) (stating that the predecessor to section 552.103 is generally only applicable to information related to pending or reasonably anticipated litigation to which the state or political subdivision is a party). Accordingly, we find that you have failed to demonstrate the applicability of section 552.103 to the submitted information, and therefore none of it may be withheld on that basis.

Section 552.108(a) of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime." Gov't Code § 552.108(a)(1). Generally, 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), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

The submitted information consists of both an internal investigation report and information from the personnel files of two officers. We note that section 552.108 is generally not applicable to records of administrative investigations that did not result in a criminal investigation or prosecution. *See Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (addressing statutory predecessor to Gov't Code § 552.108). The department has provided a statement from the Brazoria County District Attorney's Office stating that there is a pending prosecution against the requestor's client. However, neither the department nor the Brazoria County District Attorney's Office have demonstrated how section 552.108 is applicable to the submitted internal affairs investigation report or officer's personnel files. Therefore, we find that no portion of this information may be withheld under section 552.108. *See* Gov't Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706; Open Records Decision No. 434 at 2-3 (1936).

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. We will therefore address common law privacy under section 552.101 together with your claim regarding section 552.102.

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. Section 552.101 encompasses the doctrine of common law privacy, which 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. *Indust. 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. In addition, this office has found that the following types of information are excepted from required public disclosure under common law privacy: personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 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), 545 (1990); 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). We note, however, that the work conduct, job performance, and salary information of public employees is subject to a legitimate public interest and therefore generally not protected from disclosure under common law privacy. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute employee's private affairs), 455 (1987) (public employee's job performance or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (scope of public employee privacy is narrow). We have reviewed the submitted information and find some of it is protected under common law privacy. Therefore the information we have marked must be withheld under section 552.101 in conjunction with common law privacy.

The submitted information contains W-2 and W-4 tax forms. Section 552.101 of the Government Code 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 department must withhold the submitted W-2 and W-4 tax forms pursuant to section 552.101 in conjunction with section 6103(a) of Title 26 of the United States Code.

We note that the submitted information includes Report of Resignation or Separation of License Holder forms addressed to the Texas Commission on Law Enforcement ("commission"). Section 1701.452 requires that a law enforcement agency submit a report to the commission regarding an officer licensed under chapter 1701 who resigns or is terminated from the law enforcement agency. *See* Occ. Code § 1701.452. Section 1701.454

makes such reports, which are commonly referred to as "F-5s," confidential and provides in relevant part:

(a) 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. Therefore, the department must withhold the marked F-5 pursuant to section 552.101 in conjunction with section 1701.454 of the Occupations Code.

The submitted information also includes a document that is subject to chapter 611 of the Health and Safety Code, which provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002 provides in part the following:

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.

Health & Safety Code § 611.002(a). Section 611.001 defines a "professional" as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. Mental health records may only be released in accordance with the access provisions of sections 611.004 and 611.0045 of the Health and Safety Code. *See* Open Records Decision No. 565 (1990). These sections permit disclosure of mental health records to a patient, a person authorized to act on the patient's behalf, or a person who has the written consent of the patient. Health & Safety Code § 611.004, .0045. The department may only release the marked mental health records in accordance with sections 611.004 and 611.0045 of the Health and Safety Code.

We next address section 552.117 of the Government Code. Section 552.117(a)(2) excepts the home address and telephone number, social security number, and family member information of a peace officer as defined by article 2.12 of the Code of Criminal Procedure, regardless of whether the officer made an election under section 552.024. Gov't Code § 552.117(a)(2); *see* Open Records Decision No. 622 (1994). We note that section 552.117 also encompasses a personal cellular telephone number, provided that the cellular phone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular mobile phone numbers paid for by governmental body and intended for official use). Accordingly, we conclude that the department must withhold the information we have marked under section 552.117(a)(2).

We note that some of the submitted information may 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). Thus, to the extent the information we have marked 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.

We note that some of the remaining information contains Texas motor vehicle record information. Section 552.130 of the Government Code provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 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. The department must withhold the Texas motor vehicle record information we have marked under section 552.130.

Finally, we note that the remaining submitted information contains military discharge information. 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). 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 department first came into possession of the submitted military discharge record. Therefore, if this form came into the department's possession on or after September 1, 2003, we conclude that the department must withhold this information, which we have marked, under section 552.140. Otherwise, the form must be released, subject to the markings we have made under section 552.117(a)(2).

In summary, with regard to the information that is identical to the information previously requested and ruled upon by this office, the department must continue to rely on Open Records Letter No. 2006-01671 as a previous determination. With regard to the submitted information that is not encompassed by Open Records Letter No 2006-01671 and has not been previously released: (1) the W-2 and W-4 tax forms we have marked must be withheld pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of Title 26 of the United States Code; (2) the marked F-5 pursuant to section 552.101 in conjunction with section 1701.454 of the Occupations Code; (3) the marked information under sections 552.101 of the Government Code in conjunction with common law privacy; (4) the marked home addresses and telephone numbers, social security numbers, and family member information relating to peace officers employed by the department must be withheld pursuant to section 552.117(a)(2) of the Government Code; (5) the marked information concerning police officers outside the department if section 552.117 is applicable; and (6) the military discharge record which we have marked must be released or withheld in compliance with section 552.140 of the Government Code. The marked mental health record may only be released in accordance with section 611.004 and 611.0045 of the Health and Safety Code. The remaining submitted 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*, 342 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,



Brian J. Rogers  
Assistant Attorney General  
Open Records Division

BJR/krl

Ref: ID# 247350

Enc. Submitted documents

c: Mr. Michael C. Diaz  
1480 East Highway 6  
Alvin, Texas 77511  
(w/o enclosures)