



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 15, 2006

Mr. David K. Walker
County Attorney
Montgomery County Attorney's Office
207 West Phillips, 1st Floor
Conroe, Texas 77301

OR2006-06344

Dear Mr. Walker:

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# 251691.

The Montgomery County Sheriff's Department (the "sheriff") received a request for the personnel files of seven named officers, excluding their social security numbers, dates of birth, home addresses and telephone numbers, and driver's license numbers. You state that you will release a portion of the information to the requestor. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.108, 552.122, and 552.140 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that a portion of the submitted information is not responsive to the present request. The requestor has specifically excluded the officers' social security numbers, dates of birth, home addresses and telephone numbers, and driver's license numbers. Accordingly, any of this information within the requested documents is not responsive to the present request. This ruling does not address the sheriff's arguments regarding the public availability of any information that is not responsive to the present request, and the sheriff need not release that information in response to this request.

Section 552.122 of the Government Code excepts from required public disclosure “a test item developed by a . . . governmental body[.]” Gov’t Code § 552.122(b). In Open Records Decision No. 626 (1994), this office determined that the term “test item” in section 552.122 includes “any standard means by which an individual’s or group’s knowledge or ability in a particular area is evaluated,” but does not encompass evaluations of an employee’s overall job performance or suitability. *Id.* at 6. The question of whether specific information falls within the scope of section 552.122(b) must be determined on a case-by-case basis. *Id.* Traditionally, this office has applied section 552.122 where release of “test items” might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Section 552.122 also protects the answers to test questions when the answers might reveal the questions themselves. *See* Attorney General Opinion JM-640 at 3 (1987); Open Records Decision No. 626 at 8 (1994).

You inform us that Exhibit D consists of an examination utilized by the sheriff during its screening and interview process. You also state that the sheriff continues to administer the exam, and thus, releasing the exam questions and their answers would compromise its integrity in the future. Based on your representations and our review of the submitted information, we find that the submitted exam questions in Exhibit D constitute “test items” under section 552.122(b) and that the release of these questions would compromise the effectiveness of future examinations. We also find that the release of the answers to these questions would tend to reveal the questions themselves. Accordingly, we conclude that the sheriff may withhold the submitted questions in Exhibit D, along with their corresponding answers, under section 552.122(b) of the Government Code.¹

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 confidential criminal history record information (“CHRI”) generated by the National Crime Information Center or by the Texas Crime Information Center. Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety (“DPS”) maintains, except that 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,

¹ As our ruling is dispositive, we need not address your other argument against disclosure of Exhibit D.

subchapter F. We agree that the information we have marked in Exhibit E is excepted from required public disclosure by section 552.101 of the Government Code.

You argue that the remaining information in Exhibit E is subject to common law privacy. Section 552.101 encompasses the doctrine of common law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common law privacy, both prongs of this test must be met. *Id.* at 681-82. A compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Furthermore, we find that a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. We note, however, that the present request does not implicate privacy concerns. Furthermore, there is a legitimate public interest in the qualifications of a police officer. *See Open Records Decision No. 444 at 5-6 (1986)* (public has interest in public employee's qualifications, work performance, and circumstances of employee's resignation or termination). Accordingly, the sheriff may not withhold any of the remaining information in Exhibit E on the basis of common law privacy.

Exhibit F 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 sheriff first came into possession of the submitted DD-214 forms and other military discharge records in Exhibit F. Therefore, if the submitted DD-214 forms in Exhibit F came into the sheriff's possession on or after September 1, 2003, we conclude that the sheriff must withhold this information under section 552.140.

You also raise common law privacy for the remaining information in Exhibit F. Common law privacy includes the type of information considered intimate and embarrassing by the

Texas Supreme Court in *Industrial Foundation*, which encompasses 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. 540 S.W.2d 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), 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). Upon review, we conclude that you have failed to explain how any portion of the remaining information in Exhibit F constitutes highly intimate or embarrassing information the release of which would be highly objectionable to a reasonable person. Thus, no portion of the remaining information may be withheld on this basis. *See* Open Records Decision Nos. 444 at 5-6 (1986) (public has interest in public employee's qualifications, work performance, and circumstances of employee's resignation or termination), 405 at 2-3 (1983) (public has interest in manner in which public employee performs job); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow); *and see* Gov't Code § 301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

We note, however, that a portion of the remaining information is subject to section 552.117 of the Government Code. Section 552.117(a)(2) excepts from disclosure the home address, home telephone number, social security number, and the family member information of a peace officer as defined by article 2.12 of the Code of Criminal Procedure. *See* Gov't Code § 552.117(a)(2); Open Records Decision No. 622 (1994). The family member information we have marked in Exhibit F must be withheld under section 552.117(a)(2).

In summary, we have marked information which is not responsive to the present request. The sheriff may withhold Exhibit D under section 552.122 of the Government Code. The sheriff must withhold the CHRI information we have marked in Exhibit E under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code. If the submitted DD-214 forms in Exhibit F came into the sheriff's possession on or after September 1, 2003, they must be withheld under section 552.140 of the Government Code. The information we have marked pursuant to section 552.117 of the Government Code must also be withheld. 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,



Margaret Cecere
Assistant Attorney General
Open Records Division

MC/eb

Ref: ID# 251691

Enc. Submitted documents

c: Ms. Lydia Clay-Jackson
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(w/o enclosures)