



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 3, 2007

Mr. Timothy B. Soefje
The Messer Law Firm
6947 Main Street
Frisco, Texas 75034

OR2007-00045

Dear Mr. Soefje:

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# 268210.

The Lavon Police Department (the "department"), which you represent, received a request for the personnel file of a named former police officer. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.111, 552.117, and 552.130 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

We begin by noting that one of the submitted documents is not responsive to the instant request for information, as it was created after the date that the department received the request. This ruling does not address the public availability of any information that is not responsive to the request, and the department need not release that information in response to this request. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986) (governmental body not required to disclose information that did not exist at time request was received).

¹Although you initially raised section 552.119 of the Government Code as an exception to disclosure, you did not submit to this office written comments stating the reasons why this section would allow the information to be withheld. We therefore assume you no longer assert this exception. See Gov't Code §§ 552.301, .302.

Section 552.102(a) 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.” *Id.* § 522.102. 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 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 552.101.² Accordingly, we will address your privacy claims under sections 552.101 and 552.102 together.

Common law privacy 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. *Indus. 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. Prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. See Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). For example, a public employee’s allocation of his salary to a voluntary investment program or to optional insurance coverage which is offered by his employer is a personal investment decision and information about it is excepted from disclosure under the common law right of privacy. See Open Records Decision No. 545 (1990). Likewise, an employee’s designation of a retirement beneficiary is excepted from disclosure under the common law right to privacy. See Open Records Decision No. 600 (1992). However, information revealing that an employee participates in a group insurance plan funded partly or wholly by the governmental body is not excepted from disclosure. See Open Records Decision No. 600 at 10 (1992). After examining the submitted information, we find that the information we have marked is confidential under the common law right of privacy and is therefore excepted from disclosure under sections 552.101 and 552.102 of the Government Code. However, we find that the remaining information is not confidential under common law privacy and may not be withheld under either section 552.101 or 552.102 on that basis. See generally 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 employees), 423 at 2 (1984) (scope of public employee privacy is narrow), 329 at 2

²Section 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 also encompasses the doctrine of common law privacy.

(1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former sections 552.101 or 552.102 of Government Code), 208 at 2 (1978) (information relating to complaint against public employee and disposition of complaint is not protected under common law right of privacy).

Section 552.101 also encompasses information protected by other statutes. The submitted information contains a Report of Separation of License Holder (F-5) which is made confidential by section 1701.454 of the Occupations Code. Section 1701.454 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. The department must withhold the F-5 of the named individual pursuant to Government Code section 552.101 in conjunction with section 1701.454 of the Occupations Code.

Section 552.101 also encompasses criminal history record information (“CHRI”). 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” but does not include “driving record information maintained by [the Department of Public Safety (“DPS”)] under Subchapter C, Chapter 521, Transportation Code.” Gov’t Code § 411.082(2). CHRI obtained from the National Crime Information Center or the Texas Crime Information Center is confidential under federal and state law.

Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. *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.”), (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.”). Under chapter 411 of the Government Code, a criminal justice agency may obtain CHRI from DPS or from another criminal justice agency. Gov’t Code §§ 411.083(b)(1), .087(a)(2), .089(a). However, CHRI so obtained is confidential and may only be disclosed in very limited instances. *See id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Therefore, to the extent that the submitted records contain CHRI and it falls within the ambit of these state and federal regulations, the department must withhold the CHRI from the requestor under section 552.101 in conjunction with chapter 411 of the Government Code.

Next, the submitted records also contain information that may be excepted from disclosure under section 552.117(a)(2). Section 552.117(a)(2) of the Government Code excepts from

public disclosure the current and former home addresses, home telephone numbers, 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 and 552.1175 of the Government Code.³ We note, however, that a post office box number is not a “home address” for purposes of section 552.117.⁴ We also note that section 552.117(a)(2) of the Government Code is applicable to a peace officer’s cell phone and pager numbers only if the cell phone or pager service is paid for by the officer with his or her own funds. *See* Open Records Decision No. 670 at 6 (2001). In this case, the named individual at issue is no longer employed by the department. If the named individual at issue remains a licensed peace officer as defined by article 2.12, then the department must withhold the information we have marked pursuant to section 552.117(a)(2).

If the named former department officer is no longer a licensed peace officer, his personal information may be excepted under section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The department may only withhold information under section 552.117(a)(1) if the former department officer made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. If the former officer timely elected to keep his personal information confidential, the department must withhold the marked personal information regardless of whether he is still a peace officer. The department may not withhold this information under section 552.117(a)(1) if the former officer did not make a timely election to keep the information confidential.

Even if the former officer’s social security number is not protected under section 552.117, it must be withheld under section 552.147 of the Government Code. This section provides that “[t]he social security number of a living person is excepted from” required public

³“Peace officer” is defined by Article 2.12 of the Texas Code of Criminal Procedure.

⁴*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); *see also* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express and cannot be implied), 478 at 2 (1987) (language of confidentiality statute controls scope of protection), 465 at 4-5 (1987) (statute explicitly required confidentiality).

disclosure under the Act. *Id.* § 552.147. Therefore, the department must withhold the submitted social security numbers under section 552.147 of the Government Code.⁵

Section 552.130 of the Government Code excepts from disclosure information that relates to a driver's license or motor vehicle title or registration issued by an agency of this state. Gov't Code § 552.130. We have marked the Texas-issued driver's license and motor vehicle record information that the department must withhold under section 552.130 of the Government Code.

We note that the remaining information contains an e-mail address that is excepted from disclosure under section 552.137 of the Government Code. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). The e-mail address at issue is not the type specifically excluded by section 552.137(c). Therefore, unless the individual whose e-mail address is at issue consented to its release, the department must withhold it in accordance with section 552.137 of the Government Code.

You also claim that portions of the remaining information are protected under section 552.111 of the Government Code. Section 552.111 excepts from public disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. Section 552.111 encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of this exception is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* Open Records Decision No. 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to

⁵We 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.

personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995).

The information at issue pertains to administrative and personnel matters; thus, we conclude the department has failed to establish that the submitted information is subject to the deliberative process privilege. Accordingly, the department may not withhold any of the remaining information under section 552.111 of the *Government Code*.

In summary, the information we have marked is confidential under the common law right of privacy and is therefore excepted from disclosure under sections 552.101 and 552.102 of the *Government Code*. The department must withhold the F-5 of the named individual pursuant to section 552.101 of the *Government Code* in conjunction with section 1701.454 of the *Occupations Code*. To the extent that the submitted records contain CHRI that falls within the ambit of state and federal regulations, the department must withhold the CHRI from the requestor under section 552.101 in conjunction with chapter 411 of the *Government Code*. To the extent that the personal information we have marked pertains to an individual who is a licensed peace officer, this information must be withheld pursuant to section 552.117(a)(2) of the *Government Code*. Pursuant to section 552.117(a)(1) of the *Government Code*, the same information must be withheld if this individual is not a licensed peace officer, but made a timely election to keep such information confidential. Social security numbers must be withheld pursuant to section 552.147 of the *Government Code*. The Texas driver's license and motor vehicle records we have marked must be withheld under section 552.130 of the *Government Code*. Unless the individual whose e-mail address is at issue consented to its release, the department must withhold the marked e-mail address under section 552.137 of the *Government 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*, 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/eb

Ref: ID# 268210

Enc. Submitted documents

c: Mr. Ed Moore
2309 West Parker Road
Plano, Texas 75023
(w/o enclosures)