ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 19, 2008

Mr. Clark McCoy
Wolfe, Tidwell & McCoy, LLP
2591 Dallas Parkway, Suite 205
Frisco, Texas 75034

OR2008-06813

Dear Mr. McCoy:

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# 310578.

The Aubrey Police Department (the "department"), which you represent, received a request for 1) all information relating to the past and current employment status of a named individual and 2) records of any disciplinary actions taken against this individual. You state that the department does not have any information responsive to the request for disciplinary actions against this individual. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.117, and 552.119 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you state the department does not have information that "specifically address[es] [this individual's] 'employment status.'" However, in contradiction, you state that the request "casts a broad net to request [this individual's] personnel file as a whole." A governmental body must make a good faith effort to relate a request to information that is within the governmental body's possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). As you have identified and submitted this individual's personnel file, which is responsive to the request for all information related to his past and current employment status, we will determine whether you must release this information to the requestor.

Next, we address your assertion that the personnel file is excepted from disclosure in its entirety under section 552.102 of the Government Code, which 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* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Government Code. *See Indus. Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). 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. To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82.

The information you seek to withhold pertains solely to a public employee's qualifications, job performance, and work conduct. This office has stated, in numerous decisions, that information pertaining to the work conduct and job performance 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). Thus, the department may not withhold the personnel file in its entirety under common-law privacy. We note, however, that the submitted documents contain the personal financial information of this individual. This office has found that personal financial information not related to a financial transaction between an individual and a governmental body is intimate and embarrassing. *See* Open Records Decision Nos. 600 (1992) (public employee's withholding allowance certificate, designation of beneficiary of employee's retirement benefits, direct deposit authorization, and employee's decisions regarding voluntary benefits programs, among others, are protected under common-law privacy), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history protected under common law privacy), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). Furthermore, we find that there is no legitimate public interest in the release of this information in this instance. Therefore, the department must withhold the financial information we have marked under section 552.102. *See* ORD 600.

In addition, this office has found that some kinds of medical information or information indicating disabilities or specific illnesses are confidential under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related

stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). We have marked medical information in the personal history statement that is not of legitimate public interest. Therefore, the department must withhold the medical information under section 552.102 of the Government Code. However, none of the remaining information may be withheld under section 552.102.

Next, we note that some of the submitted information is subject to section 552.101 of the Government Code. Section 552.101 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 information protected by other statutes, such as Chapter 411 of the Government Code. Criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center is confidential. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* 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. Thus, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 in conjunction with chapter 411, subchapter F of the Government Code. We have marked the information that constitutes CHRI and is confidential under section 411.083. This information must be withheld under section 552.101 of the Government Code.

The submitted information also contains an F-5 form (Report of Separation of License Holder), which is generally made confidential by section 1701.454 of the Occupations Code. Section 552.101 also encompasses section 1701.454, which provides in relevant part that "[a] report or statement submitted to the commission under this subchapter is confidential and is not subject to disclosure under Chapter 552, Government Code, unless the person resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses." Occ. Code § 1701.454(a). It does not appear that this individual resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses. Therefore, the department must withhold the F-5 form we have marked pursuant to section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

The submitted information also contains a CRB-3 accident report that appears to have been completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer's accident report). Section 552.101 also encompasses section 550.064(b), which states that, except as provided by subsection c, CRB-3 accident reports are privileged and confidential. Section 550.065(c)(4), provides for the release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *Id.* § 550.065(c)(4). Under this provision, a governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more pieces of information specified by the statute. *Id.* Here, the requestor has not provided the department with two of the required pieces of information. Thus, the department must withhold the marked CRB-3 accident report under section 552.101 in conjunction with section 550.065(b) of the Transportation Code.

You assert that this individual's personal information is excepted from disclosure under section 552.117(a)(2) of the Government Code. Section 552.117(a)(2) excepts from required public disclosure the current and former 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* Open Records Decision No. 622 (1994). You do not indicate that this individual is a currently licensed peace officer. If this individual is a currently licensed peace officer, the department must withhold the information we have marked under section 552.117(a)(2).

To the extent that this individual is not a currently licensed peace officer, section 552.117(a)(1) may apply. Section 552.117(a)(1) excepts from disclosure the current and former home addresses and home telephone numbers, social security numbers, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the department may only withhold information 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 on which the request for this information was made. Accordingly, if this individual timely elected to keep his personal information confidential, the department must withhold the marked information under section 552.117(a)(1). The department may not withhold the marked information under section 552.117(a)(1) if this individual did not make a timely election to keep this information confidential.

Next, you seek to withhold this individual's photograph pursuant to section 552.119 of the Government Code, which provides:

> (a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under

> Section 51.212, Education Code, the release of which would endanger the life or physical safety of the officer, is excepted from [required public disclosure] unless:
>
> > (1) the officer is under indictment or charged with an offense by information;
> >
> > (2) the officer is a party in a fire or police civil service hearing or a case in arbitration; or
> >
> > (3) the photograph is introduced as evidence in a judicial proceeding.
>
> (b) A photograph exempt from disclosure under Subsection (a) may be made public only if the peace officer or security officer gives written consent to the disclosure.

Gov't Code § 552.119. In this instance, you have not made any arguments explaining why the release of the photograph at issue would endanger the life or physical safety of this individual. We therefore determine that the department may not withhold the photograph at issue pursuant to section 552.119 of the Government Code.

Section 552.130 of the Government Code excepts from public disclosure information that 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(a). We, note, however that section 552.130 does not apply to out-of-state motor vehicle record information. Accordingly, the department must withhold the Texas motor vehicle record information we have marked under section 552.130.

Section 552.136 of the Government Code states that "[n]otwithstanding 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."[1] Gov't Code § 552.136. We find that the insurance policy number in the submitted information is an access device number for purposes of section 552.136. The department must withhold the insurance policy number we have marked under section 552.136.

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[1]The Office of the Attorney General will raise a mandatory exception like sections 552.136 and 552.140 on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Finally, the submitted information includes DD-214 forms. 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). Although you do not inform us when the department came into possession of the submitted DD-214 forms, based on our review, the forms came into the possession of the department after September 1, 2003. Thus, the department must withhold these forms in their entirety under section 552.140 of the Government Code.

In summary, the department must withhold the following information: (1) the personal financial information and medical information we have marked as excepted under section 552.102 of the Government Code, (2) the criminal history information that we have marked as confidential under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code, (3) the F-5 form we have marked pursuant to section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code, (4) the CRB-3 accident report we have marked pursuant to section 552.101 of the Government Code in conjunction with section 550.065(b) of the Transportation Code, (5) the Texas motor vehicle record information we have marked under section 552.130 of the Government Code, (6) the insurance policy number we have marked under section 552.136 of the Government Code, and (7) the DD-214 forms we have marked under section 552.140 of the Government Code. The department must withhold the information we have marked under section 552.117(a)(2) of the Government Code, if the individual is a currently licensed peace officer as defined in article 2.12 of the Code of Criminal Procedure. If the individual is not a currently licensed police officer, the information we have marked as excepted under section 552.117(a)(2) must be withheld under section 552.117(a)(1) if the individual made a timely election to withhold that information under section 552.024 of the Government Code. The remaining information must be released.[2]

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

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[2]We note that the submitted information contains social security numbers. 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. Thus, if section 552.117 of the Government Code does not apply, the individual's social security number may be withheld under section 552.147 of the Government Code.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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).

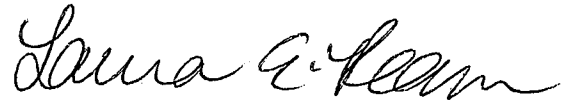
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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



Laura E. Ream
Assistant Attorney General
Open Records Division

LER/jb

Ref: ID# 310578

Enc. Submitted documents

c: Ms. Lori Gilbreath
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(w/o enclosures)