



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 29, 2008

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

OR2008-07333

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# 311455.

The City of Aubrey (the "city"), which you represent, received a request for nine categories of information pertaining to employment, citizen complaints, contracts with third parties, audits, certificate of occupancy inspections, and citations for code violations.¹ You claim that the second category of 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.²

We note that, with the exception of the information for which you have requested a ruling from this office, you state that you do not object to the release of the remaining requested information. As you have not submitted the remaining information for our review, we

¹You inform us, and the submitted documents indicate, that the city sought and received clarification of the request from the requestor. *See* Gov't Code § 552.222 (b) (stating that if information requested is unclear to governmental body or if a large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

²We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

assume you have released it to the extent that it existed at the time this request was received. If you have not released any such records, you must release them to the requestor at this time. *See id.* §§ 552.006, .301, .302; *see also* Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

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, including criminal history record information (“CHRI”). 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 generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). 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. *See* Gov’t Code § 411.082(2)(B) (term CHRI does not include driving record information). Upon review, we find that the information we have marked constitutes CHRI subject to chapter 411. Therefore, the city must withhold this information under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code and federal law. However, the remaining information does not consist of CHRI; thus the city may not withhold the remaining information under section 552.101 on that basis. *Id.*

Section 552.101 also encompasses information protected by common-law privacy, which you claim is applicable to some of the remaining submitted information. You also claim that some of the submitted information is subject to 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*, 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* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Act. *See Hubert v. Harte-Hanks Tex.*

Newspapers, 652 S.W.2d 546, 550 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (citing *Indus. Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976)). Accordingly, we will consider your common-law privacy claim under both sections 552.101 and 552.102.

Common-law privacy protects information if (1) the information contains highly intimate and 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. 540 S.W.2d 668 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. This office has also found that personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from disclosure under common-law privacy. See Open Records Decision No. 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, protected under common-law privacy). Upon review, we conclude that some of the submitted information is protected by common-law privacy. Accordingly, we have marked the information that must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

This office has also recognized that public employees may have a privacy interest in their drug test results. See Open Records Decision Nos. 594 (1991) (suggesting identification of individual as having tested positive for use of illegal drug may raise privacy issues), 455 at 5 (citing *Shoemaker v. Handel*, 619 F. Supp. 1089 (D.N.J. 1985), aff'd, 795 F.2d 1136 (3rd Cir. 1986)). Generally, however, the public has a legitimate interest in information that relates to public employment and public employees. See Open Records Decision No. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern). Information that pertains to an employee's actions as a public servant generally cannot be considered to be beyond the realm of legitimate public interest. See Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 444 at 5-6 (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). You assert that the drug test results of the firefighter at issue are confidential; however, we conclude that there is a legitimate public interest in this information. Upon review, we find that no portion of the remaining information is subject to common-law privacy. Accordingly, none of the remaining information may be withheld under section 552.102 or section 552.101 in conjunction with common-law privacy.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address, home telephone number, 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). Therefore, the city may only withhold information under section 552.117(a)(1) on behalf of current or former employees 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 the employees timely elected to keep their personal information confidential, the city must withhold the information we have marked under section 552.117(a)(1). The city may not withhold this information under section 552.117(a)(1) if the employees did not make a timely election to keep the information confidential.³

Section 552.117(a)(2) of the Government Code excepts the current and former home address and telephone number, social security number, and the family member information of a peace officer regardless of whether the officer made an election under section 552.024 of the Government Code or complies with section 552.1175 of the Government Code. *See* Gov't Code § 552.117(a)(2). This section applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Thus, the city must withhold the information we have marked under section 552.117(a)(2) of the Government Code.

Section 552.1175 of the Government Code⁴ provides in part the following:

(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

³We note that this information contains a social security number. To the extent this information is not protected under section 552.117, 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.

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

- (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, pursuant to section 552.1175, the city must withhold the information we have marked under section 552.1175 if the individuals at issue elect to restrict access to this information in accordance with section 552.1175(b). To the extent the individuals at issue do not elect to keep this information confidential, it may not be withheld on this basis.

Section 552.119 of the Government Code provides that:

(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 city may not withhold the photograph at issue pursuant to section 552.119 of the Government Code.

We note that the remaining submitted information contains motor vehicle record information. Section 552.130 of the Government Code excepts from disclosure "information [that] relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state." *Id.* § 552.130. Accordingly, the city must withhold the Texas motor vehicle record information we have marked pursuant to section 552.130 of the Government Code.

The remaining submitted information also contains an insurance policy number. Section 552.136(b) of the Government Code provides 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.” *Id.* § 552.136. The city must withhold the insurance policy number we have marked under section 552.136.

We note that the remaining 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 city came into possession of the submitted DD-214 form. Therefore, if the DD-214 form came into the possession of the city on or after September 1, 2003, the city must withhold the form in its entirety under section 552.140 of the Government Code. If the form was received by the city before September 1, 2003, the city may not withhold it pursuant to section 552.140 of the Government Code.

In summary, the city must withhold the CHRI we have marked under section 552.101 in conjunction with federal law and chapter 411 of the Government Code, the information we have marked under section 552.101 in conjunction with common-law privacy, and the information we have marked under sections 552.117(a)(1) and 552.117(a)(2) of the Government Code. If the individuals at issue elect to restrict access in accordance with section 552.1175(b), the city must withhold the information we have marked under section 552.1175 of the Government Code. The city must withhold the motor vehicle information we have marked under section 552.130 of the Government Code, the insurance account number we have marked under section 552.136 of the Government Code, and the DD-214 form we have marked under 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 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).

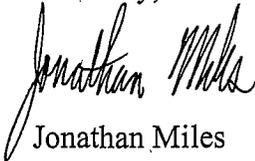
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/jh

Ref: ID# 311455

Enc. Submitted documents

c: Mr. David Coker
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(w/o enclosures)