



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 1, 2008

Mr. Jeff Ulmann
Knight & Partners
223 West Anderson Lane, Suite A-105
Austin, Texas 78752

OR2008-16320

Dear Mr. Ulmann:

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# 328871.

The City of Bertram (the "city"), which you represent, received a request for the complete personnel file of the city's Police Chief. You state you will release some of the requested information. You inform us you have redacted some of the Police Chief's personal information pursuant to section 552.117 of the Government Code and Open Records Decision No. 670 (2001).¹ You also state that you have redacted his social security number pursuant to section 552.147(b) of the Government Code.² You claim that the remaining information is excepted from disclosure under sections 552.101, 552.102, 552.117, 552.119, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the city's obligations under the Act. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. Gov't Code § 552.301(b). You state the city received the request for information on September 9, 2008. Therefore, you were required to submit your request for a decision and state the exceptions that apply by September 23, 2008. Although you timely raised sections 552.101, 552.102, 552.119, and 552.130, you did not raise section 552.117 of the

¹The previous determination issued in Open Records Decision No. 670 authorizes the city to withhold the home addresses and telephone numbers, personal cellular phone and pager numbers, social security numbers, and family member information of its peace officers under section 552.117(a)(2) without the necessity of requesting an attorney general decision.

²Section 552.147(b) 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.

Government Code until September 30, 2008.³ Consequently, we find that the city failed to comply with the requirements of section 552.301 in requesting this decision.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the information at issue is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information from disclosure. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. *See Open Records Decision No. 630* (1994). Because your claim under section 552.117 can provide a compelling reason to overcome the presumption, we will address the applicability of this exception to the submitted information, along with your timely asserted claims under sections 552.101, 552.102, 552.119, and 552.130.

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 information protected by other statutes, such as section 1324a of title 8 of the United States Code. This section provides that an Employment Eligibility Verification I-9 Form “may not be used for purposes other than for enforcement of this chapter” and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). The submitted documents contain an I-9 form. Release of this document in this instance would be “for purposes other than for enforcement” of the referenced federal statutes. Accordingly, we find that the submitted I-9 form is confidential under section 1324a of title 8 of the United States Code and must only be released in compliance with the federal laws and regulations governing the employment verification system.

We note that the submitted documents include W-2 and W-4 forms. This office has held that section 6103(a) of title 26 of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Section 6103(b) defines the term “return information” as a taxpayer's “identity, the nature, source, or amount of income.” *See* 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term “return information” expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *aff'd in part*, 993 F.2d 1111 (4th Cir. 1993).

³We note that although you also failed to timely raise section 552.1175, we do not address this exception because the proper exception to raise in this instance is section 552.117. Section 552.117 is applicable because the city holds the information at issue in the capacity as employer of the Police Chief.

Consequently, the city must withhold the submitted W-2 and W-4 forms pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

The submitted information also contains a L-2 Declaration of Medical Condition form and a L-3 Declaration of Psychological and Emotional Health form required by the Texas Commission on Law Enforcement Officer Standards and Education ("TCLEOSE"). These forms are confidential under section 1701.306 of the Occupations Code, which is also encompassed by section 552.101 of the Government Code. Section 1701.306 provides:

(a) [TCLEOSE] may not issue a license to a person as an officer or county jailer unless the person is examined by:

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test.

(b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to [TCLEOSE]. A declaration is not public information.

Occ. Code § 1701.306(a), (b). Thus, we find that the city must withhold the submitted L-2 and L-3 declarations under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.

Section 552.101 of the Government Code encompasses section 1701.454 of the Occupation Code, which governs the release of reports or statements submitted to the TCLEOSE. Section 1701.454 provides as follows:

(a) A report or statement submitted to the [TCLEOSE] 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.

(b) Except as provided by this section, a [TCLEOSE] member or other person may not release the contents of a report or statement submitted under this subchapter. The report or statement may be released only by the [TCLEOSE] employee having the responsibility to maintain the report or statement and only if:

(1) the head of a law enforcement agency or the agency head's designee makes a written request on the agency's letterhead for the report or statement accompanied by the agency head's or designee's signature; and

(2) the person who is the subject of the report or statement authorizes the release by providing a sworn statement on a form supplied by the commission that includes the person's waiver of liability regarding an agency head who is responsible for or who takes action based on the report or statement.

Occ. Code § 1701.454. The submitted information includes an F-5 Report of Separation of License Holder form. Therefore, the city must withhold the submitted F-5 form pursuant to section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code. We also understand you to assert that a submitted L-1 Report of Appointment/License Application form and a L-180 Report of Appointment form are also confidential under section 1701.454. However, L-1 and L-180 forms are not reports required to be filed with TCLEOSE under subchapter J of chapter 1701. Accordingly, the submitted L-1 and L-180 forms are not confidential under section 1701.454, and the city may not withhold them under section 552.101 on that ground.

Section 552.101 of the Government Code also encompasses criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that state agencies 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 in accordance with 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 only release CHRI 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 the DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-411.127. 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, subchapter F. Thus, the city must withhold the CHRI, which we have marked, within the submitted information under

section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. *See id.* § 411.083(b)(3).

Section 552.101 also encompasses common-law privacy. Section 552.102(a) excepts from public 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). Section 552.102 is applicable to information that relates to public officials and employees. *See* Open Records Decision No.327 at 2 (1982) (anything relating to employee's employment and its terms constitutes information relevant to person's employment relationship and is part of employee's personnel file). In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled the test to be applied to information protected under section 552.102 is the same 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. Accordingly, we will consider your privacy claims under both sections 552.101 and 552.102 together.

Common-law privacy protects information that (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. To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. The types 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 personal financial information not relating to a financial transaction between an individual and a governmental body is generally protected by common-law privacy. *See* Open Records Decision Nos. 600 (1992) (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pre-tax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). Upon review, we find that the information we have marked is protected by common-law privacy, and the city must, therefore, withhold this information under section 552.101 of the Government Code. However, the remaining information you seek to withhold under common-law privacy is not highly intimate or embarrassing information of no legitimate public concern. Therefore, this information is not confidential under common-law privacy, and the city may not withhold it on this basis.

Next, you claim some of the remaining information is excepted under section 552.117 of the Government Code. Section 552.117(a)(2) excepts from public disclosure a peace officer's home address and telephone number, social security number, and family member information

regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code.⁴ Gov't Code § 552.117(a)(2). Accordingly, the city must withhold the information we have marked under section 552.117(a)(2) of the Government Code.

Finally, you assert section 552.130 of the Government Code for submitted Texas motor vehicle record information. Section 552.130 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. Accordingly, the city must withhold the Texas motor vehicle record information we have marked under section 552.130.⁵

In summary, under section 552.101 of the Government Code, the city must withhold the following information: (1) the I-9 form in conjunction with section 1324a of title 8 of the United States Code, (2) the W-2 and W-4 forms in conjunction with section 6103(a) of title 26 of the United States Code, (3) the L-2 and L-3 declarations in conjunction with section 1701.306 of the Occupations Code, (4) the F-5 form in conjunction with section 1701.454 of the Occupations Code, (5) the marked CHRI in conjunction with federal law and chapter 411 of the Government Code, and (6) the marked information in conjunction with common-law privacy. The city must withhold the marked information under section 552.117(a)(2) of the Government Code. The marked Texas motor vehicle record information must be withheld under section 552.130 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). If the governmental body does not file suit over 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).

⁴ "Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

⁵As our ruling is dispositive with regard to this information, we need not address your argument under section 552.119.