



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 10, 2008

Ms. Jessica Perez Gomez
Blanco, Ordonez & Wallace, P.C.
5715 Cromo Drive
El Paso, Texas 79912

OR2008-16871

Dear Ms. Gomez:

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# 329645.

The Socorro Police Department (the "department"), which you represent, received a request for information pertaining to a named police officer, including: 1) any documents pertaining to oral complaints made against the named officer; 2) any documents containing information involving allegations of inappropriate behavior or misconduct by the named officer; 3) any written complaints against the named officer; 4) any internal investigations of complaints against the named officer in a specified time period; 5) any disciplinary proceedings initiated against the named officer; 6) all records pertaining to the hiring, screening, and selection of the named officer. You state that the department does not possess any information responsive to category number 5 of the request.¹ You claim that the submitted information is excepted from disclosure under section 552.102 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

¹The Act does not require a governmental body to obtain information that is not held by or on behalf of the governmental body, nor does it require a governmental body to release information that did not exist when it received a request or to create responsive information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 267-68 (Tex. Civ. App.—San Antonio, 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

Initially, we note that a portion of the submitted information, which we have marked, is not responsive to this request because it does not pertain to the named police officer. The department need not release nonresponsive information in response to this request and this ruling will not address that information.

Section 552.102(a) excepts from required public disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." This exception applies when the release of information would result in a violation of the common-law right to privacy. *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.). The common-law right to privacy is violated if the information (1) contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and (2) is of no legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). This office has found that some kinds of medical information or information indicating disabilities or specific illnesses, and personal financial information not relating to a financial transaction between an individual and a governmental body are excepted from required public disclosure 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); see also Open Records Decision Nos. 600 (1992), 545 (1990). While you seek to withhold the submitted information in its entirety, this office has concluded that there is a legitimate public interest in the job performance of a public employee. Open Records Decision Nos. 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning performance of governmental employees); see also Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). However, we find that the department must withhold the information we have marked under section 552.102 of the Government Code in conjunction with common-law privacy.

We note that the remaining information contains a W-4 form. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."² Gov't Code § 552.101. This exception encompasses information protected by statutes. Prior decisions of this office have held 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 Nos. 600 (1992) (W-4 forms). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of income, payments, tax withheld, deficiencies, overassessments or tax payments ... or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service]

²The Office of the Attorney General will raise a mandatory exceptions like sections 552.101, 552.117, 552.130, 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).

with respect to a return ... or the determination of the existence, or possible existence, of liability ... for any tax, ... penalty, ..., or offense[.]” 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). The department must withhold the W-4 forms we have marked pursuant to federal law.

We also note that section 552.117 of the Government Code is applicable to some of the remaining information. Section 552.117(a)(2) of the Government Code exempts from disclosure the home address, home telephone number, social security number, and 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). Accordingly, the department must withhold the personal information we have marked under section 552.117(a)(2) of the Government Code.

Next, we note that some of the remaining information is confidential under section 552.130 of the Government Code. Section 552.130 exempts from 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)(1), (2). Accordingly, the department must withhold the Texas driver’s license information and Texas motor vehicle record information we have marked under section 552.130 of the Government Code.

Finally, we note that a portion of the remaining information is subject to section 552.140 of the Government Code. Section 552.140 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.

Id. § 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 *id.* § 552.140(a), (b). The submitted information indicates the department first came into possession of the submitted military discharge form after September 1, 2003. Thus, we conclude the department must withhold the submitted military discharge form, which we have marked, under section 552.140.

In summary, the department must withhold the information we have marked under section 552.102 of the Government Code in conjunction with common-law privacy. The

department must also withhold the W-4 form we have marked pursuant to federal law. Additionally, the department must withhold the information we have marked under section 552.117(a)(2) of the Government Code. Next, the department must withhold the Texas motor vehicle information we have marked under section 552.130 of the Government Code. Lastly, the department must withhold the military discharge form we have marked under section 552.140 of the Government Code. The remaining information must be released to the requestor.

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).

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,

A handwritten signature in black ink, appearing to read "Greg Henderson", with a long horizontal flourish extending to the right.

Greg Henderson
Assistant Attorney General
Open Records Division

GH/jb

Ref: ID# 329645

Enc. Submitted documents

c: Requestor
(w/o enclosures)