



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 7, 2009

Ms. Cara Leahy White  
Taylor Olson Adkins Sralla Elam, L.L.P.  
6000 Western Place, Suite 200  
Fort Worth, Texas 76107-4654

OR2009-09363

Dear Ms. White:

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# 348173.

The City of Haltom (the "city"), which you represent, received a request for the requestor's personnel file from April 1, 1991 to the date of the request and for payroll documentation regarding the requestor from January 1, 2006 to the date of the request. You claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

We note a portion of the submitted information, which we have marked, is not responsive to the instant request because it pertains entirely to another officer. The city need not release non-responsive information in response to this request and this ruling will not address that information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."<sup>1</sup> This section encompasses information protected by other statutes. Section 1703.306 of the Occupations Code provides in relevant part the following:

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<sup>1</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

(1) the examinee or any other person specifically designated in writing by the examinee[.]

...

(b) The board or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

Occ. Code § 1703.306(a)(1), (b). The submitted information contains pre-examination questions of a polygraph examination of the requestor. Where information falls within both a specific and a general provision of law, the specific provision prevails over the general. *See Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d887, 901 (Tex.2000) (“more specific statute controls over the more general”); *Cuellar v. State*, 521 S.W.2d 277 (Tex.Crim.App.1975) (under well-established rule of statutory construction, specific statutory provisions prevail over general ones); Open Records Decision Nos. 598 (1991), 583 (1990), 451 (1986). The statutory access provision in section 1703.306(a)(1) of the Occupations Code is more specific than the general protection afforded to broader categories of information under section 552.103 of the Government Code. Therefore, because the requestor has a possible right of access to his own polygraph information under section 1703.306(a)(1), that information may not be withheld from him on the basis of section 552.103. Thus, according to section 1703.306(a)(1), the city has the discretion to release such information, which we have marked. *See* Open Records Decision No. 481 at 9 (1987) (predecessor to section 1703.306 permits, but does not require, examination results to be disclosed to examinees). Otherwise, the marked polygraph pre-examination questions we have marked must be withheld under section 552.101 in conjunction with section 1703.306(a).

Next, we note that the submitted information includes the requestor’s fingerprints. The public availability of fingerprints is governed by chapter 560 of the Government Code. *See* Gov’t Code §§ 560.001(1) (“biometric identifier” means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry); 560.003 (biometric identifier in possession of governmental body is exempt from disclosure under Act). Section 560.002 provides, however, that “[a] governmental body that possesses a biometric identifier of an individual . . . may not sell, lease, or otherwise disclose the biometric identifier to another person unless . . . the individual consents to the disclosure[.]” *Id.* § 560.002(1)(A). Thus, the requestor has a right of access to his own fingerprints under section 560.002(1)(A). *See* Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual

requests information concerning himself). Although the city seeks to withhold the fingerprints under section 552.103 of the Government Code, the exceptions to disclosure found in the Act are generally not applicable to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the fingerprints that we have marked must be released to this requestor pursuant to section 560.002 of the Government Code.

Next, we note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides, in pertinent part, as follows:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

(2) the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body;

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(1), (2), (17). The submitted information includes completed performance evaluations, reports, salary information, and court-filed documents. Therefore, as prescribed by section 552.022, the city must release this information unless it is confidential under other law. You argue that the information at issue is excepted from disclosure under section 552.103 of the Government Code. However, this section is a discretionary exception under the Act and does not constitute "other law" for purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Accordingly, the city may not withhold this information under section 552.103 of the Government Code. We note some of this information is subject to sections 552.101 and 552.130 of the Government Code. Sections 552.101 and 552.130 constitute other law for purposes of section 552.022; therefore, we will consider the applicability of these exceptions to the information we have marked under section 552.022.

Section 552.101 also encompasses section 550.065 of the Transportation Code. The submitted information includes an ST-3 report form that appears to have been completed

pursuant to chapter 550 of the Transportation Code. See Transp. Code § 550.064 (officer's accident report). Section 550.065(b) states except as provided by subsection (c), 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, the Texas Department of Transportation or another 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.* In this instance, the requestor has not provided the city with at least two of the three items of information specified by section 550.065(c)(4). Therefore, the city must withhold the submitted ST-3 report we have marked pursuant to section 552.101 in conjunction with section 550.065(b) of the Transportation Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which 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. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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. This office has found personal financial information not relating to the financial transaction between an individual and a governmental body excepted from required public disclosure under common-law privacy. See Open Records Decision Nos. 600 (1992), 545 (1990). The information we have marked constitutes personal financial information. Therefore, the city must withhold the information we have marked pursuant to section 552.101 in conjunction with common-law privacy.

Section 552.130 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[.]" Gov't Code § 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.

We will now address your section 552.103 claim for the remaining information that is not subject to section 552.022. Section 552.103 provides in relevant part as follows:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state, and provide documentation showing, that prior to the city's receipt of this request, a lawsuit styled *Wyman Eric Chambless v. The City of Haltom City, Texas*, Cause No. 07-12-938, was filed, and is currently pending, in the District Court of Wise County, Texas, 271<sup>st</sup> Judicial District. You indicate that the submitted information relates to the whistleblower claim at issue in the litigation. Accordingly, we find that litigation was pending when the city received this request for information and that the information at issue relates to the pending litigation. Therefore, section 552.103 is generally applicable to the remaining information.

We note, however, the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that is related to litigation through discovery procedures. See ORD 551 at 4-5. If the opposing party has seen or had access to information that is related to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. See Open Records Decision Nos. 349 (1982), 320 (1982). We note most of the remaining information, which we have marked, has been provided to or obtained from the opposing party in litigation. As such, the city may not withhold this information under section 552.103. Furthermore, the applicability of section 552.103(a) ends once the litigation has concluded. See Attorney General Opinion MW-575 (1982); see also Open Records Decision No. 350 (1982).

Next, we consider whether the information that is not excepted under section 552.103 must otherwise be withheld. Section 552.101 of the Government Code also encompasses federal law. Prior decisions of this office have 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 Nos. 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, 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] 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).

Subsections (c) and (e) of section 6103 are exceptions to the confidentiality provisions of section 6103(a) and provide for disclosure of tax information to the taxpayer or the taxpayer's designee. See 26 U.S.C. § 6103(c), (e)(1)(A)(i) (tax return information may be disclosed to taxpayer), (e)(7) (information may be disclosed to any person authorized by subsection(e) to obtain such information if Secretary of Treasury determines such disclosure would not seriously impair tax administration); see also *Lake v. Rubin*, 162 F.3d 113 (D.C. Cir. 1998) (26 U.S.C. § 6103 represents exclusive statutory route for taxpayer to gain access to own return information and overrides individual's right of access under the federal Freedom of Information Act). Section 6103(c) provides that, unless the Secretary of Treasury determines that disclosure would seriously impair tax administration, tax record information may be released to any person or persons as the taxpayer may designate in a consent to such disclosure. See 26 U.S.C. § 6103(c). The submitted information contains the requestor's W-4 forms; therefore, pursuant to section 6103(c) of title 26 of the United States Code, the city must release these forms to the requestor if the Secretary of Treasury determines that such disclosure would not seriously impair federal tax administration. Otherwise, the submitted W-4 forms are confidential under section 6103 of title 26 of the United States Code and must be withheld under section 552.101 of the Government Code.

The remaining information contains an F-5 form. Section 552.101 also encompasses section 1701.454 of the Occupations Code which governs the release of the submitted F-5 form. Section 1701.454 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). In this instance, the submitted information indicates that the officer at issue was not terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses. Therefore, the city must withhold the submitted F-5 form, which we have marked, pursuant to section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

The remaining information also contains 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 submitted DD-214 form came into the possession of the city on or after September 1, 2003, the city must withhold this form in its entirety under section 552.140. If the form was received by the city before September 1, 2003, the city may not withhold it pursuant to that section.

In summary, the city must release the requestor's fingerprints under section 560.002 and the requestor's W-4 forms pursuant to section 6103(e)(7) of title 26 of the United States Code if such disclosure would not seriously impair federal tax administration, and may release the requestor's polygraph pre-examination questions. The city must withhold (1) the ST-3 form we have marked under section 552.101 in conjunction with section 550.065 of the Transportation Code; (2) the information we have marked under section 552.101 in conjunction with common-law privacy; (3) and the Texas motor vehicle information we have marked under section 552.130; (4) the F-5 form we have marked under section 552.101 in conjunction with section 1701.454 of the Occupations Code; and (5) the DD-214 form we have marked if the city came into its possession on or after September 1, 2003. The city may withhold the remaining information not seen by the opposing party in the pending litigation under section 552.103 of the Government Code. The remaining information must be released to the requestor.<sup>2</sup>

This letter ruling is limited to the particular information 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 information or any other circumstances.

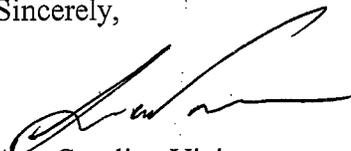
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information

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<sup>2</sup>We note the remaining information contains social security numbers not belonging to the requestor. 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. Gov't Code § 552.147. We also note that the requestor has a special right of access to some of the information being released in this instance. *See id.* § 552.023(a). Because such information may be confidential with respect to the general public, if the city receives another request for this information from a different requestor, the city must again seek a ruling from this office.

under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ana Carolina Vieira', written in a cursive style.

Ana Carolina Vieira  
Assistant Attorney General  
Open Records Division

ACV/eeg

Ref: ID# 348173

Enc. Submitted documents

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c: Requestor  
(w/o enclosures)