



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 16, 2010

Mr. Robert E. Hager  
Nichols, Jackson, Dillard, Hager & Smith, LLP  
1800 Lincoln Plaza  
500 North Akard  
Dallas, Texas 75201

OR2010-08801

Dear Mr. Hager:

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# 382906.

The Allen Police Department (the "department"), which you represent, received a request for any and all records pertaining to the requestor's employment file and the employment files of all persons who applied for a specified job and "made it to the oral board stage." You claim that the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.111, 552.117, 552.122, 552.130, and 552.140 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup> We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, you inform us that the department does not maintain employment files for the requestor or the other job applicants. You state you interpret this request to be for the applicant files for these individuals. A governmental body must make a good faith effort to relate a request for information held by the governmental body. *See* Open Records Decision No. 561 at 8 (1990). Based on our review, we find the department has made a good faith

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<sup>1</sup>We 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.

effort to relate the request to information in the department's possession. Accordingly, we will address your arguments against disclosure of the submitted information.

Next, we address the requestor's argument that the department failed to meet its obligations under section 552.301 of the Government Code. This section prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires the governmental body to ask for the attorney general's decision and state the exceptions to disclosure that it claims not later than the tenth business day after the date of its receipt of the written request for information. *See* Gov't Code § 552.301(b). Section 552.301(d) requires the governmental body to provide the requestor with a written statement that the governmental body wishes to withhold the requested information and a copy of the governmental body's written communication to the attorney general asking for a decision not later than the tenth business day after the date of its receipt of the written request for information. *See id.* § 552.301(d).

The department states it received the request for information on March 29, 2010. The department was required to request a decision from this office no later than April 12, 2010. The department's brief requesting a decision was submitted to and received by this office by April 12, 2010. Accordingly, we find the department complied with section 552.301(b). Additionally, we note the department's brief contains a notation that the requestor was copied on the brief on that date. Whether the requestor was actually provided with a copy of the department's brief on April 12, 2010 is a question of fact. This office is unable to resolve disputes of fact in the open records ruling process. Accordingly, we must rely upon the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernable from the documents submitted for our inspection. *See* Open Records Decision No. 522 at 4 (1990). Therefore, we conclude that the department complied with the procedural requirements of section 552.301(d) and will address its arguments against disclosure.

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 the common-law right of privacy, which protects information if it (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* include 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. Upon review, we find that none of the submitted information is highly intimate or embarrassing and of no legitimate public concern. Therefore, none of the submitted information may be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.108 of the Government Code provides the following:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication;

(3) it is information relating to a threat against a peace officer collected or disseminated under Section 411.048; or

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108. A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why the exception it claims is applicable to the information the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Upon review, we note that the information at issue consists of job applications submitted to the department. You have not stated that the submitted information pertains to an ongoing criminal investigation or prosecution, nor have you explained how its release would interfere in some way with the detection, investigation, or prosecution of crime. Thus, you have not met your burden under section 552.108(a)(1) or 552.108(b)(1). A governmental body claiming section 552.108(a)(2) or 552.108(b)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. It is not clear to this office, nor have you explained, how or if the investigation at issue has actually concluded. Thus, you have not met your burden under section 552.108(a)(2) or 552.108(b)(2). Section 552.108(a)(3) is also inapplicable as the submitted information does not relate to a threat against a police officer. *See Gov't Code* § 552.108(a)(3). Lastly, you do not assert that the information at issue was prepared by an attorney representing the state or that it reflects the mental impressions or legal reasoning of an attorney representing the state. *See id.* § 552.108(a)(4), (b)(3). Consequently, you have failed to demonstrate the applicability of section 552.108 to the information at issue. We therefore conclude that the department may not withhold any portion of the submitted information pursuant to section 552.108 of the Government Code.

Section 552.111 of the Government Code excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." *Id.* § 552.111. This section encompasses the deliberative process privilege. *See Open Records Decision No. 615 at 2* (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); *Open Records Decision No. 538 at 1-2* (1990).

In *Open Records Decision No. 615*, this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications consisting of advice, recommendations, and opinions reflecting the policymaking processes of the governmental body. *See ORD 615 at 5*. A governmental body's policymaking functions do not encompass internal administrative or personnel matters, and disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000)

(section 552.111 not applicable to personnel-related communications that did not involve policymaking). However, a governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995).

You contend that the submitted information is excepted under section 552.111. You state that the submitted information consists of interagency and intra-agency memoranda by and between law enforcement agencies. You further state that these communications were "created for the purpose of sharing private or joint knowledge of private matters related to the applicants and are internal notations of the law enforcement agency." Upon review, we find that the submitted information pertains to administrative and personnel matters. You have failed to establish that the submitted information concerns department matters that rise to the level of policymaking. Therefore, you have not demonstrated the applicability of section 552.111 to this information, and none of the submitted information may be withheld on this basis.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home addresses, home telephone numbers, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with section 552.024 of the Government Code.<sup>2</sup> Gov't Code § 552.117(a)(2). Therefore, the department must withhold the information we have marked in Exhibit D under section 552.117(a)(2) of the Government Code.

We note portions of the information in Exhibit B may be subject to section 552.1175 of the Government Code.<sup>3</sup> Section 552.1175 provides in part:

(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:

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<sup>2</sup>"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

<sup>3</sup>The Office of the Attorney General will raise a mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

(1) chooses to restrict public access to the information; and

(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.

*Id.* § 552.1175(a)(1), (b). We have marked information in Exhibit B that may be subject to section 552.1175. To the extent this information pertains to currently licensed peace officers who elect to restrict access to their information in accordance with section 552.1175(b), it must be withheld.

Section 552.122(b) of the Government Code excepts from disclosure test items developed by a licensing agency or governmental body. *Id.* § 552.122(b). In Open Records Decision No. 626 (1994), this office determined that the term "test item" in section 552.122 includes "any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated," but does not encompass evaluations of an employee's overall job performance or suitability. ORD 626 at 6. The question of whether specific information falls within the scope of section 552.122(b) must be determined on a case-by-case basis. *Id.* Traditionally, this office has applied section 552.122 where release of "test items" might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Section 552.122 also protects the answers to test questions when the answer might reveal the questions themselves. *See* Attorney General Opinion JM-640 at 3 (1987); ORD 626 at 8.

You raise section 552.122 for a portion of the submitted information. You state the information contains "evaluation results pertaining to the applicant's knowledge and ability in a particular area." Having considered your argument and reviewed the information at issue, we conclude that the submitted information consists of general questions evaluating an applicant's general workplace skills, subjective ability to respond to particular situations, and overall suitability for employment, and does not test any specific knowledge of an applicant. Accordingly, we determine that no portion of the submitted information constitutes a test item under section 552.122(b) and therefore may not be withheld on that basis.

Section 552.130 of the Government Code excepts from public disclosure information that relates to a Texas motor vehicle operator's or driver's license or permit or Texas motor vehicle title or registration. Gov't Code § 552.130(a)(1), (2). We note that section 552.130 protects personal privacy. In this instance, the requestor has a right of access to her own motor vehicle record information in Exhibit B and the department may not withhold that information from the requestor under section 552.130. *See id.* § 552.023 (person or person's authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and is protected from public disclosure by laws intended to protect person's privacy interests); Open Records Decision

No. 481 at 4. Accordingly, the department must withhold the Texas motor vehicle record information we have marked in Exhibits C and D under section 552.130 of the Government Code.

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.” Gov’t Code § 552.136; *see id.* § 552.136(a) (defining “access device”). We note that the requestor also has a right of access to her own insurance policy numbers and account numbers. *See id.* § 552.023(a); ORD 481 at 4. Accordingly, you must withhold the insurance policy numbers and account numbers we have marked in Exhibit C under section 552.136 of the Government Code.

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). We have marked an e-mail address within the submitted information that is subject to section 552.137(a). Accordingly, the department must withhold the e-mail address we have marked in Exhibit D pursuant to section 552.137 of the Government Code, unless the owner affirmatively consents to its disclosure.

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 id.* § 552.140(a), (b). Upon review, none of the submitted information consists of DD-214 forms or other records of military discharge. Therefore, none of the submitted information may be withheld under section 552.140 of the Government Code.

In summary, the department must withhold (1) the information we have marked in Exhibit D under section 552.117(a)(2) of the Government Code; (2) the information we have marked in Exhibit B under section 552.1175 of the Government Code to the extent this information pertains to currently licensed peace officers who elect to restrict access to their information; (3) the Texas motor vehicle record information we have marked in Exhibits C and D under section 552.130 of the Government Code; (4) the insurance policy numbers and account numbers we have marked in Exhibit C under section 552.136 of the Government Code; and (5) the e-mail address we have marked in Exhibit D pursuant to section 552.137 of the

Government Code, unless the owner affirmatively consents to its disclosure.<sup>4</sup> The remaining information must be released to this requestor.<sup>5</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 under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Andrea L. Caldwell  
Assistant Attorney General  
Open Records Division

ALC/eeg

Ref: ID# 382906

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>4</sup>We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas driver's license numbers, Texas license plate numbers, and copies of Texas driver's licenses under section 552.130 of the Government Code; insurance policy numbers under section 552.136 of the Government Code; and e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

<sup>5</sup>We note that the remaining 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. We also note the requestor has a special right of access to the information being released as Exhibit B that would otherwise be confidential with regard to the general public. *See* Gov't Code § 552.023. Accordingly, if the department receives another request for this same information from a different requestor, the department must against seek a decision from this office.