ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 20, 2010

Mr. B. Chase Griffith
Brown & Hofmeister, L.L.P.
740 East Campbell Road, Suite 800
Richardson, Texas 75081

OR2010-10795

Dear Mr. Griffith:

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# 387253 (McKinney ORR #10-2518).

The City of McKinney (the "city"), which you represent, received a request for (1) 9-1-1 or emergency calls resulting in the dispatch of officers to a specified address on a specified date; (2) all recordings of the detention, arrest, transport, and booking of a named individual on the specified date; (3) all reports in connection with the detention, arrest, transport, and booking of the named individual; (4) summary data of all complaints of use of excessive force from January 1, 2006 to the date to of the request and all responses to the complaints; (5) the personnel files of officers who responded to the specified address on the specified date; and (6) information pertaining to the number of officers employed by the McKinney Police Department (the "department"). You state the city released some information to the requestor. We understand the city does not possess summary data of complaints of excessive use of force information.[1] You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.117, 552.130, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

[1]The Act does not require a governmental body that receives a request for information to create responsive information or obtain information that is not held by or on behalf of the department. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986).

Initially, we note in his request for information, the requestor states financial data, insurance information, social security numbers, driver's license numbers, and residential information may be redacted. We are unable to determine which specific financial and insurance information the requestor refers to in his request; therefore, we address your raised exceptions for any information that may be deemed financial or insurance information. However, we understand the requestor to specifically exclude social security numbers, driver's license numbers, and residential addresses from his request. Thus, any such information within the submitted documents is not responsive to the present request for information. This ruling does not address the public availability of any information that is not responsive to the request, and the city need not release non-responsive information in response to this request.

Next, we address your argument under section 552.108 of the Government Code for the responsive information pertaining to the incident related to the arrest of the named individual. Section 552.108(a)(2) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . 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[.]" Gov't Code § 552.108(a)(2). Section 552.108(a)(2) is applicable only if the information at issue relates to a concluded criminal case that did not result in a conviction or deferred adjudication. A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information that the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You explain the incident at issue is closed, no charges were filed with respect to the incident, and no further action will be taken. Based on your representations and our review, we agree section 552.108(a)(2) is applicable to the incident report and audio recording pertaining to this incident.

However, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle*. *See* Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). Thus, with the exception of basic information, the city may withhold the submitted incident report and audio recording under section 552.108(a)(2).[2]

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, such as section 611.002(a) of the Health and Safety Code. Section 611.002(a) provides "[c]ommunications between a patient and a professional, and records of the identity,

[2]As our ruling is dispositive for this information, we do not address your remaining arguments against its release.

diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential." Health & Safety Code § 611.002(a). Section 611.001 defines a "professional" as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See id.* § 611.001(2). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). These sections permit disclosure of mental health records to a patient, a person authorized to act on the patient's behalf, or a person who has the written consent of the patient. *See* Health & Safety Code §§ 611.004, .0045. Upon review, we find portions of the remaining responsive information consist of mental health records. Accordingly, the city must withhold the mental health records, which we have marked, pursuant to section 552.101 in conjunction with section 611.002(a).[3]

We note the remaining responsive information contains L-2 Declaration of Medical Condition and L-3 Declaration of Psychological and Emotional Health forms 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. Section 1701.306 provides the following:

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

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[3]As our ruling is dispositive for this information, we do not address your arguments against its release.

Occ. Code § 1701.306(a), (b). Upon review, we find the city must withhold the L-2 and L-3 declaration forms we marked under section 552.101 in conjunction with section 1701.306.[4]

Section 552.101 of the Government Code also encompasses section 1703.306 of the Occupations Code. Section 1703.306 provides as follows:

> (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:
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> > (1) the examinee or any other person specifically designated in writing by the examinee;
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> > (2) the person that requested the examination;
> >
> > (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
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> > (4) another polygraph examiner in private consultation; or
> >
> > (5) any other person required by due process of law.
>
> (b) The [Polygraph Examiners B]oard or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.
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> (c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Id. § 1703.306. A portion of the remaining information, which we have marked, consists of information acquired from polygraph examinations subject to section 1703.306. The requestor does not appear to fall into any of the categories of individuals who are authorized to receive the polygraph information under section 1703.306(a). Accordingly, the city must withhold the marked polygraph information under section 552.101 in conjunction with section 1703.306.

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[4]As our ruling is dispositive for this information, we do not address your arguments against its release.

Section 552.101 of the Government Code also encompasses section 411.083 of the Government Code which pertains to 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. *See* Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *See id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except 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. *See 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. 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. Upon review, we conclude the city must withhold the CHRI we have marked under section 552.101 in conjunction with section 411.083 and federal law. *See id.* § 411.083(b)(3). However, we find no portion of the remaining responsive information constitutes CHRI and none of it may be withheld under section 552.101 in conjunction with chapter 411.

Section 552.101 of the Government Code also encompasses section 411.192 of the Government Code. Section 411.192 governs the release of all information maintained by DPS concerning the licensure of individuals to carry a concealed handgun, and provides as follows:

> (a) [DPS] shall disclose to a criminal justice agency information contained in its files and records regarding whether a named individual or any individual named in a specified list is licensed under this subchapter. Information on an individual subject to disclosure under this section includes the individual's name, date of birth, gender, race, zip code, telephone number, e-mail address, and Internet website address. Except as otherwise provided by this section and by Section 411.193, all other records maintained under this subchapter are confidential and are not subject to mandatory disclosure under the open records law, Chapter 552.
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> (b) An applicant or license holder may be furnished a copy of disclosable records regarding the applicant or license holder on request and the payment of a reasonable fee.

Id. § 411.192(a), (b), (d). It appears the city received the concealed handgun license information we marked under section 411.192 from DPS. In this instance, the requestor is not a criminal justice agency, nor is the requestor a license holder whose information is at issue. Further, we note section 411.193 is not applicable in this instance. *See id.* § 411.193 (making statistical report including number of licenses issued, denied, revoked, or suspended during the preceding month available to the public). Therefore, the city must withhold the information we have marked pursuant to section 552.101 in conjunction with section 411.192.

We note the remaining information contains fingerprints. Section 552.101 of the Government Code also encompasses chapter 560 of the Government Code, which provides that a governmental body may not release fingerprint information except in certain limited circumstances. *See id.* §§ 560.001 (defining "biometric identifier" to include fingerprints), .002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), .003 (biometric identifiers in possession of governmental body exempt from disclosure under the Act). You do not inform us, and the submitted information does not indicate, that section 560.002 permits the disclosure of the submitted fingerprints. Therefore, the city must withhold the fingerprints we have marked under section 552.101 in conjunction with section 560.003.

Section 552.101 of the Government Code also encompasses the common-law right of privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *See id.* at 681-82. This office has found personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from public disclosure under common-law privacy. *See* Open Records Decision Nos. 600, 545 (1990). Upon review, we find the information we have marked is highly intimate or embarrassing and of no legitimate concern to the public. Accordingly, the city must withhold the information we have marked under section 552.101 in conjunction with common-law privacy.

You claim portions of the remaining information are protected under section 552.117 of the Government Code. Section 552.117(a)(2) 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 sections 552.024 and 552.1175 of the Government Code.[5] Gov't Code § 552.117(a)(2). We note section 552.117 also encompasses a personal cellular telephone or pager number, unless the cellular or pager service is paid for by a

[5]"Peace officer" is defined by article 2.12 of the Texas Code of Criminal Procedure.

governmental body. *See* Open Records Decision Nos. 670 at 6 (2001), 506 at 5-7 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). We have marked responsive personal information pertaining to the peace officers the city must withhold under section 552.117(a)(2). However, the city may only withhold the marked cellular telephone numbers if the officers pay for the cellular telephone services with personal funds.

We note some telephone numbers within the remaining documents may be subject to section 552.1175 of the Government Code.[6] Section 552.1175 provides in part:

> (b) Information that relates to the home address, home telephone number, or social security number of [a peace officer as defined by article 2.12 of the Code of Criminal Procedure], 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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> > (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.

Gov't Code § 552.1175(b). We have marked telephone numbers associated with peace officers not currently employed by the city. If the marked telephone numbers are the home or cellular telephone numbers of those officers, the city must withhold them if the officers elect to restrict access to their information in accordance with section 552.1175(b). However, if the marked telephone numbers are cellular telephone numbers, the city may only withhold them if the officers pay for the cellular telephone services with personal funds. If no election is made, the city may not withhold the telephone numbers under section 552.1175.

You raise section 552.130 of the Government Code for the remaining responsive information. 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(a). We note section 552.130 does not apply to out-of-state motor vehicle record information. *Id.* The city must withhold the responsive information we marked under section 552.130.

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[6]The Office of the Attorney General will raise 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).

Next, we note the remaining responsive information contains bank account and insurance policy numbers. Section 552.136(b) of the Government Code provides "[n]otwithstanding any other provision of [the Act], 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(b); *see id.* § 552.136(a) (defining "access device"). Thus, the city must withhold the bank account and insurance policy numbers we have marked pursuant to section 552.136.

Lastly, you seek to withhold personal e-mail addresses from the remaining responsive information. 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 id.* § 552.137(a)-(c). The e-mail addresses we marked are not specifically excluded by section 552.137(c). Accordingly, the city must withhold the marked e-mail addresses under section 552.137, unless the owners of the addresses have affirmatively consented to their release. *See id.* § 552.137(b).

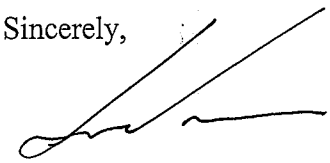
In summary, except for basic information, the city may withhold the submitted incident report and audio recording under section 552.108(a)(2) of the Government Code. The city must withhold pursuant to section 552.101 of the Government Code: (1) the marked mental health records in conjunction with section 611.002 of the Health and Safety Code; (2) the L-2 and L-3 declaration forms we marked in conjunction with section 1701.306 of the Occupations Code; (3) the marked polygraph information in conjunction with section 1703.306 of the Occupations Code; (4) the CHRI we marked in conjunction with section 411.083 of the Government Code and federal law; (5) the concealed handgun information we marked in conjunction with section 411.192 of the Government Code; (6) the fingerprints we marked in conjunction with section 560.003 of the Government Code; and (7) the information we marked in conjunction with common-law privacy. The city must also withhold the information we marked pursuant to section 552.117(a)(2) of the Government Code; however, the city may only withhold the marked personal cellular telephone numbers if the officers pay for the cellular telephone services with personal funds. The city must withhold the telephone numbers we marked of officers not employed by the city under section 552.1175 of the Government Code if the numbers are home or cellular telephone numbers and the officers elect to restrict public access to their personal information. However, if the marked telephone numbers are cellular telephone numbers, they may only be withheld if the cellular telephone services are paid for with personal funds. The city must withhold: (1) the Texas motor vehicle record information we marked pursuant to section 552.130 of the Government Code; (2) the bank account and insurance policy numbers we marked under section 552.136 of the Government Code; and (3) unless the owners of the addresses have affirmatively consented to their release, the e-mail addresses we marked

under section 552.137 of the Government Code.[7] The city must release the remaining responsive information to the requestor.

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, 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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/eeg

Ref: ID# 387253

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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[7]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: L-2 and L-3 declarations under section 552.101 in conjunction with section 1701.306 of the Occupations Code; fingerprints under section 552.101 in conjunction with section 560.003 of the Government Code; a copy of a Texas driver's license and Texas license plate numbers under section 552.130 of the Government Code; bank account and insurance policy numbers under section 552.136 of the Government Code; and personal 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.