



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 6, 2011

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

OR2011-00363

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# 405068.

The McKinney Police Department (the "department"), which you represent, received a request for all records added to a named former department officer's personnel file during a specified period. You state the department has provided some responsive information to the requestor. You also state the department will redact social security numbers pursuant to section 552.147(b) of the Government Code.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that a portion of the submitted personnel file was in the named officer's personnel file at the time of the requestor's last request for this information on May 10, 2010. However, the requestor only seeks the records that have been added to the personnel file since the department's receipt of his last request. Thus, the information dated before May 10, 2010, which we have marked, is not responsive to the request for information. Additionally, in his request for information, the requestor agrees to the redaction of all

¹Section 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. *See* Gov't Code § 552.147.

information identifying family members, social security numbers, and other personal information such as home addresses. Thus, we understand the requestor to agree to the redaction of information protected by section 552.117 of the Government Code.² Accordingly, any such information within the responsive 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 department need not release non-responsive information in response to this request.³

We note the submitted information includes information that is excepted from disclosure under section 552.102(a) of the Government Code.⁴ Section 552.102(a) excepts from 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). The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex. & The Dallas Morning News, Ltd.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010) (Dec. 20, 2010, motions for reconsideration and rehearing pending). Having carefully reviewed the information at issue, we have marked the information that must be withheld under section 552.102(a) of the Government Code.

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 made confidential by other statutes, such as section 1701.454 of the Occupations Code, which governs the release of reports or statements submitted to the Texas Commission on Law Enforcement Officers Standards and Education ("TCLEOSE"). Section 1701.454 provides as follows:

(a) A report or statement submitted to [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.

²Section 552.117 of the Government Code applies to a peace officer as defined by Article 2.12 of the Code of Criminal Procedure or a public official or employee who elects for confidentiality pursuant to section 552.024 of the Government Code, and excepts the home address, home telephone number, social security number, and information that reveals whether the person has family members. Gov't Code § 552.117(a)(1), (2).

³As we are able to make this determination, we need not address your arguments against disclosure of the submitted non-responsive information.

⁴The Office of the Attorney General will raise a mandatory exception like section 552.102 on behalf of a governmental body, but ordinarily will not raise other exceptions.

(b) Except as provided by this subchapter, a [TCLEOSE] member or other person may not release the contents of a report or statement submitted under this subchapter.

Occ. Code § 1701.454. The responsive information contains an F-5 ("Report of Separation of Licensee") report, which does not indicate the deputy at issue resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses. Therefore, the department must withhold the F-5 report we marked pursuant to section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

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. 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 an employee's voluntary financial choices are highly intimate and embarrassing for purposes of common-law privacy. *See Open Records Decision Nos. 600 (1992) (personal financial information protected by common-law privacy includes designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax 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).* In addition, this office has found that information compiled by a law enforcement agency that depicts a particular individual as a criminal suspect, arrestee, or defendant takes on a character that implicates the individual's right to privacy in a manner that the same information in an uncompiled state does not. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). Furthermore, a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. This office has also concluded information that either identifies or tends to identify a victim of sexual assault or other sex-related offense must be withheld under common-law privacy. *See Open Records Decision No. 393 at 2 (1983); see also Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information).

You contend the information pertaining to internal affairs investigation number 10-0033 is confidential pursuant to common-law privacy. Upon review, we have marked the portions

of this information we find to be highly intimate or embarrassing and of no legitimate public interest. The department must withhold this marked information under section 552.101 of the Government Code in conjunction with common-law privacy. However, the remaining information pertains to allegations against the named former officer of misconduct on the job and the circumstances surrounding his resignation from the department. This office has stated in numerous opinions that the public has a legitimate interest in knowing the reasons for the resignation or dismissal of public employees. Open Records Decision No. 444 at 6 (1986); *see* Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow). Additionally, the work behavior of a public employee and the conditions for the employee's continued employment are generally matters of legitimate public interest not protected by the common-law right of privacy. *See* Open Records Decision Nos. 438 (1986), 405 at 2-3 (1983) (public has interest in manner in which public employee performs his job), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former section 552.101), 208 at 2 (1978) (information relating to complaint against public employee and disposition of the complaint is not protected under either the constitutional or common-law right of privacy). Thus, because the remaining submitted information is of legitimate public interest, it is not confidential pursuant to common-law privacy and may not be withheld under section 552.101 on that basis.

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.⁵ *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

⁵Although you assert release of a portion of the submitted information is prohibited by section 411.085 of the Government Code, that provision merely provides the penalties for the "Unauthorized Obtaining, Use, or Disclosure of Criminal History Record Information." Gov't Code § 411.085. Section 411.083 is applicable to the dissemination of CHRI.

Code chapter 411, subchapter F. However, we note that driving record information is not made confidential by the confidentiality provisions that govern CHRI. *See id.* § 411.082 (2)(B) (definition of CHRI does not include driving record information). Upon review, we conclude the department must withhold the CHRI we marked under section 552.101 in conjunction with section 411.083 and federal law. 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 552.130 of the Government Code 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.” *Id.* § 552.130(a). The department must withhold the Texas driver’s license and license plate numbers and other information we marked under section 552.130 of the Government Code.

The submitted information also contains personal e-mail addresses that are subject to section 552.137 of the Government Code. Section 552.137 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 at issue are not specifically excluded by section 552.137(c). Accordingly, the department must withhold the e-mail addresses we marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure.

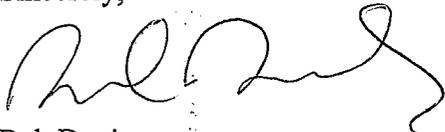
In summary, the department must withhold the information we marked under section 552.102 of the Government Code. The department must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code, common-law privacy, and section 411.083 of the Government Code and federal law. The department must also withhold the information we marked under section 552.130 of the Government Code and the e-mails we marked under section 552.137 of the Government Code unless their owners consent to their disclosure.⁶ The department must release the remaining responsive information.

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.

⁶We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas driver’s license and license plate numbers under section 552.130 of the Government Code; and private e-mail addresses under section 552.137, without the necessity of requesting an attorney general decision.

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,

A handwritten signature in black ink, appearing to read 'Bob Davis', written in a cursive style.

Bob Davis
Assistant Attorney General
Open Records Division

RSD/tf

Ref: ID# 405068

Enc. Submitted documents

c: Requestor
(w/o enclosures)