



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 22, 2011

Ms. Katherine A. Tapley
Fulbright & Jaworski, L.L.P.
300 Convent Street, Suite 2100
San Antonio, Texas 78205-3792

OR2011-18888

Dear Ms. Tapley:

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# 440131.

The City of Schertz (the "city"), which you represent, received a request for six categories of information pertaining to six named Schertz Police Department (the "department") police officers. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.117, 552.130, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from public 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 doctrine of common-law 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. *See Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. This office has found some kinds of medical information or information indicating disabilities or specific illnesses 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).* This office also has found that personal financial information not relating to the financial transaction between an

individual and a governmental body is excepted from disclosure under common-law privacy. *See* Open Records Decision No. 600 (1992) (public employee's withholding allowance certificate, designation of beneficiary of employee's retirement benefits, direct deposit authorization, and employee's decisions regarding voluntary benefits programs, among others, protected under common-law privacy). We note information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and therefore generally not protected from disclosure under common-law privacy. *See* Open Records Decision Nos. 444 at 5-6 (1986) (public has interest in public employee's qualifications and performance and the circumstances of public employee's resignation or termination). Upon review, we find portions of the submitted information are highly intimate or embarrassing and not of legitimate public concern. Accordingly, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.¹ However, we find you have failed to demonstrate that any of the remaining information is highly intimate or embarrassing and not of legitimate public concern. Therefore, the city may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

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). You assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101, which is discussed above. *See Indus. Found.*, 540 S.W.2d at 685. In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court recently expressly disagreed with *Hubert's* interpretation of section 552.102(a) and held its privacy standard differs from the *Industrial Foundation* test under section 552.101. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163, at *5 (Tex. Dec. 3, 2010). The supreme court then considered the applicability of section 552.102, and has 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. *Id.* at *10. 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. However, none of the remaining information at issue is excepted under section 552.102(a). Accordingly, the city may not withhold any of the remaining information on that basis.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the current and former home addresses and telephone numbers, emergency contact information, social security number, and family member information of a peace officer, regardless of whether the peace officer made an election under section 552.024 or section 552.1175 of the

¹As our ruling is dispositive, we need not address your remaining arguments against the disclosure of portions of this information.

Government Code to keep such information confidential. Gov't Code § 552.117(a). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Section 552.117 only applies to information the city holds in its capacity as an employer. You inform us that the officers at issue are peace officers as defined in article 2.12. We note that some of the information you marked in red is not the type of information protected under section 552.117 of the Government Code. Accordingly, with the exception of the information we have marked for release, the city must withhold the information you have marked in red, as well as the additional information we have marked, under section 552.117(a)(2).²

We note that the submitted information may include information subject to section 552.1175 of the Government Code, which applies to information pertaining to peace officers that the city does not hold in an employment context and 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, emergency contact information, 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:

(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(a)(1), (b).³ We have marked addresses and telephone numbers that may belong to licensed peace officers not employed by the city or the department. The city

²As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

³The 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).

must only withhold the information we marked if it consists of the home addresses and telephone numbers of licensed peace officers and the peace officers elect to restrict access to the information pertaining to them in accordance with section 552.1175(b). If the information does not consist of the home addresses and telephone numbers of peace officers not employed by the city or the department or no elections are made, the city may not withhold the information we have marked under section 552.1175.

You raise section 552.130 of the Government Code for a portion of the remaining information. Section 552.130 provides information relating to a motor vehicle operator's or driver's license or permit, a motor vehicle title or registration, or a personal identification document issued by an agency of Texas, another state, or country is excepted from public release. *Id.* § 552.130(a). Upon review, we find the city must withhold the information you have marked under section 552.130.

Finally, you raise section 552.136 of the Government Code for portions of the remaining information. Section 552.136 states, "Notwithstanding 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." *Id.* § 552.136(b); *see also id.* § 552.136(a) (defining "access device"). This office has determined an insurance policy number is an access device for the purposes of section 552.136. Accordingly, the city must withhold the insurance policy numbers it has marked under section 552.136.

In summary, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy, as well as the information we have marked under section 552.102 of the Government Code. With the exception of the information we have marked for release, the city must withhold the information you have marked in red, as well as the additional information we have marked, under section 552.117(a)(2) of the Government Code. The city must withhold the information we marked under section 552.1175 of the Government Code, if it consists of the home addresses and telephone numbers of licensed peace officers and the peace officers elect to restrict access to their information in accordance with section 552.1175(b) of the Government Code. The city must withhold the information it has marked under sections 552.130 and 552.136 of the Government Code. The remaining information must be released.

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,

A handwritten signature in cursive script that reads "Cynthia G. Tynan".

Cynthia G. Tynan
Assistant Attorney General
Open Records Division

CGT/ag

Ref: ID# 440131

Enc. Submitted documents

c: Requestor
(w/o enclosures)