ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 14, 2012

Ms. Julia Gannaway
For the City of Weatherford
Lynn Ross Smith & Gannaway, LLP
306 West Broadway Avenue
Fort Worth, Texas 76104

OR2012-12807

Dear Ms. Gannaway:

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# 462136.

The City of Weatherford (the "city"), which you represent, received a request for information pertaining to the city's animal shelter, including operating procedures, employees, euthanasia procedures and records, and surveillance video recordings. You state the requested surveillance video recordings were previously destroyed in accordance with the city's records retention schedule.[1] You state the city has released some of the requested information. You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.[2]

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[1]The Act does not require a governmental body to release information that did not exist when it received a request. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.–San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

[2]This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

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. This section 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 (Tex. 1976). To demonstrate the applicability of common-law privacy, both elements of the test must be established. *See id.* at 681-82. This office has also recognized that public employees may have a privacy interest in their drug test results. *See* Open Records Decision Nos. 594 (1991) (suggesting identification of individual as having tested positive for use of illegal drug may raise privacy issues), 455 at 5 (1987) (citing *Shoemaker v. Handel*, 619 F. Supp. 1089 (D.N.J. 1985), *aff'd*, 795 F.2d. 1136 (3rd Cir. 1986)). Generally, however, the public has a legitimate interest in information that relates to public employment and public employees. *See* Open Records Decision No. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern). 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. 470 (1987) (public employee's job performance does not generally constitute employee's private affairs), 455 (public employee's job performance or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (scope of public employee privacy is narrow).

In this instance, you seek to withhold the drug test results of an animal shelter employee. However, upon review, we find the information at issue is not highly intimate or embarrassing and a matter of no legitimate public interest. We therefore conclude the city may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.102 of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwanted 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 of the Government Code. *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 Third Court of Appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court 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. *See Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The supreme court then considered the applicability of section 552.102, and 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. *See id.* at 347-48. Upon review, we find the city must withhold the information we have marked under section 552.102(a) of the Government Code. However, we find no portion of the remaining information is subject to section 552.102(a), and the city may not withhold any of the remaining information on that basis.

Section 552.117 of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of current or former officials or employees of a governmental body who timely request this information be kept confidential under section 552.024 of the Government Code.[3] Gov't Code § 552.117(a). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the city may only withhold information under section 552.117 on behalf of current or former employees who made a request for confidentiality under section 552.024 prior to the date on which request for this information was made. The remaining information contains information subject to section 552.117 of the Government Code, which we have marked. To the extent the employee to whom the information relates timely elected to keep such information confidential, the city must withhold the information we have marked under section 552.117 of the Government Code.[4]

Section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle operator's or driver's license or permit issued by an agency of this state or another state or country. Gov't Code § 552.130(a)(1). Accordingly, the city must withhold the driver's license number we have marked under section 552.130 of the Government Code.

Section 552.136 of the Government Code provides, in pertinent part:

> (a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

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

[4]In the event the named employee's social security number is not excepted from disclosure under section 552.117 of the Government Code, we note 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(b).

> (1) obtain money, goods, services, or another thing of value; or
>
> (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.
>
> (b) 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(a)-(b). You assert the information you have marked in Exhibit C is subject to section 552.136 and generally state the information you have marked constitutes account numbers by which the city obtains goods. Upon review, we conclude the city must withhold the routing number and credit card number we have marked in Exhibit C under section 552.136 of the Government Code. You also seek to withhold a Drug Enforcement Administration form number and a Drug Enforcement Administration registration number. You state the city must have these numbers to enable it to place orders for euthanasia drugs. Based on your representations and our review, we agree these numbers, which we have marked, constitute access device numbers, and must be withheld under section 552.136 of the Government Code. However, we find you have not explained how the remaining information you have marked consists of access device numbers used to obtain money, good, or services, or any item of value, or used to initiate the transfer of funds. *See id.* § 552.136(a), .301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies). Therefore, we find you have failed to demonstrate the applicability of section 552.136 to the remaining information at issue, and the city may not withhold any of the remaining information you have marked on this ground.

In summary, the city must withhold the information we have marked under (1) section 552.102(a) of the Government Code; (2) section 552.117(a)(1) of the Government Code, to the extent the individual timely requested confidentiality; (3) section 552.130 of the Government Code; and (4) section 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,

Cynthia G Tynan

Cynthia G. Tynan
Assistant Attorney General
Open Records Division

CGT/ag

Ref: ID# 462136

Enc. Submitted documents

c: Requestor
(w/o enclosures)