



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 22, 2012

Mr. B. Chase Griffith  
Counsel for the City of McKinney  
Brown & Hofmeister, L.L.P.  
740 East Campbell Road, Ste. 800  
Richardson, Texas 75081

OR2012-13293

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# 462950 (ORR# 10-5578).

The City of McKinney (the "city"), which you represent, received a request for (1) the personnel files of all city police officers assigned to the SWAT team since January 1, 2006, and (2) all "after action reports or officer reports/statements" from SWAT raids conducted during a specified time period. You state the city will release some information upon receipt of payment for the costs of production. You also state the city will redact information pursuant to section 552.147(b) of the Government Code and Open Records Decision No. 670 (2001), which is a previous determination by this office authorizing a governmental body to redact information subject to section 552.117(a)(2) of the Government Code.<sup>1</sup> You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103,

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<sup>1</sup>Section 552.147(b) of the Government Code authorizes a government 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). Open Records Decision No. 670 allows a governmental body to withhold home addresses and telephone numbers, personal cellular telephone numbers, personal pager numbers, social security numbers, and family member information of peace officers under section 552.117 of the Government Code without the necessity of requesting an attorney general decision under section 552.301. ORD 670 at 6.

552.108, 552.130, 552.137, and 552.140 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

Initially, we note some of the submitted information falls within the scope of section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(17). The submitted information includes a document filed with a court. A document that has been filed with a court is expressly public under section 552.022(a)(17) of the Government Code and may not be withheld unless it is confidential under other law. *See id.* § 552.022(a)(17). Section 552.103 of the Government Code, which you claim, is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Section 552.103 does not make information confidential under the Act. Therefore, the city may not withhold any of the information encompassed by section 552.022 under section 552.103. Additionally, we note information that has been filed with a court is not protected by common-law privacy. *See Star-Telegram v. Walker*, 834 S.W.2d 54 (Tex. 1992) (common-law privacy not applicable to court-filed document). You also claim sections 552.130 and 552.136 of the Government Code, which make information confidential under the Act. Further, we note some of the information at issue is subject to section 552.117 of the Government Code, which also makes information confidential under the Act.<sup>3</sup> Accordingly, we will address the applicability of these sections to the information encompassed by section 552.022. Additionally, we will consider your claim under section 552.103, and the remaining exceptions you claim, for the remaining information at issue, which is not subject to section 552.022.

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov't Code § 552.101.

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<sup>2</sup>We assume the “representative sample” of information 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 those records contain substantially different types of information than those submitted to this office.

<sup>3</sup>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).

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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate or embarrassing. *See generally* Open Records Decision Nos. 600 at 9-10 (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, 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). Furthermore, this office has noted the public has a legitimate interest in information that relates to public employees and their conduct in the workplace. *See, e.g.*, Open Records Decision Nos. 562 at 10 (personnel file information does not involve most intimate aspects of human affairs but in fact touches on matters of legitimate public concern), 470 at 4 (job performance does not generally constitute public employee's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of government employees), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest), 329 (1982) (reasons for employee's resignation ordinarily not private).

Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the city must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. However, we find no portion of the remaining information is highly intimate or embarrassing and of no legitimate public interest. Accordingly, no portion of the remaining information may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses section 1701.306 of the Occupations Code, which provides:

(a) The [Texas Commission on Law Enforcement Officer Standards and Education ("TCLEOSE")] may not issue a license to a person unless the person is examined by:

- (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 blood test or other medical test.

(b) An agency hiring a person for whom a license 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.

Occ. Code § 1701.306(a)-(b). Upon review, we find the city must withhold the L-2 and L-3 declarations we have marked under section 552.101 in conjunction with section 1701.306 of the Occupations Code.

Section 552.101 of the Government Code also encompasses section 1701.454 of the Occupations Code, which governs the public availability of information submitted to TCLEOSE under subchapter J of chapter 1701 of the Occupations Code. Section 1701.454 provides as follows:

(a) All information submitted to [TCLEOSE] under this subchapter is confidential and is not subject to disclosure under [the Act], unless the person resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses.

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

*Id.* § 1701.454. Upon review, however, we find none of the remaining information consists of an F-5 form. Therefore, the city may not withhold any of the remaining information under section 552.101 in conjunction with section 1701.454 of the Occupations Code.

Section 552.101 of the Government Code also encompasses section 560.003 of the Government Code, which exempts a biometric identifier from disclosure the Act. Gov't Code § 560.003. "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry. *Id.* § 560.001. Therefore, the city must withhold the fingerprints we marked under section 560.003.

Section 552.101 of the Government Code also encompasses laws that make criminal history record information ("CHRI") confidential. CHRI generated by the National Crime Information Center or by the Texas Crime Information Center is confidential under federal and state law. CHRI means "information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions." *Id.* § 411.082(2). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI obtained from the National Crime Information Center network or other states. *See* 28 C.F.R. § 20.21. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. Open Records Decision No. 565 at 7 (1990). *See generally* Gov't Code ch. 411, subch. F. Section 411.083 of the Government Code deems confidential CHRI the Texas Department of Public Safety ("DPS") maintains, except DPS may

disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See id.* § 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 not release CHRI except to another criminal justice agency for a criminal justice purpose. *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. Thus, 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. We note section 411.083 does not apply to active warrant information or other information relating to one's current involvement with the criminal justice system. *See id.* § 411.081(b) (police department allowed to disclose information pertaining to person's current involvement in the criminal justice system). Further, CHRI does not include driving record information. *See id.* § 411.082(2)(B). We have marked the CHRI the city must withhold under section 552.101 in conjunction with section 411.083 of the Government Code.

Section 552.102(a) of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *Id.* § 552.102(a). The Texas Supreme Court 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.*, 354 S.W.3d 336 (Tex. 2010). The city must withhold the date of birth we marked under section 552.102(a) of the Government Code.

Section 552.103 of the Government Code provides, in part, as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information

and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990).

You state a lawsuit styled *John Gerard Quinn v. Jesus Damian Guerrero, et. al.*, Cause No. 4:09-cv-00166-RAS-DDB, was pending in the United States District Court for the Eastern District of Texas, Sherman Division, on the date the city received the present request for information. We note the lawsuit alleges the city police officers at issue committed civil rights violations and claims the city is liable for certain acts or failures to act related to police activity. Further, you state the remaining information in the personnel files at issue relates to this lawsuit. Based on your representations and our review of the information at issue, we find the remaining information in the personnel files at issue relates to litigation involving the city that was pending prior to the date the city received the request for information. *See* Gov't Code 552.103(c) (litigation must be pending or reasonably anticipated at time governmental body receives request for information). Thus, the city may withhold the information we have marked under section 552.103 of the Government Code.<sup>4</sup>

We note, however, once the information at issue has been obtained by all parties to the pending litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, any information obtained from or provided to all other parties in the pending litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

You assert portions of the remaining information are subject to section 552.108 of the Government Code. Section 552.108(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov't Code § 552.108(a)(1). A governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state the information you have marked relates to criminal investigations that are open and pending. Based on this representation and our review, we determine the release of the information you have marked would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of*

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<sup>4</sup>As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

*Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Accordingly, the city may withhold the information you have marked pursuant to section 552.108(a)(1) of the Government Code.

Section 552.108(a)(2) of the Government Code 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). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A). You state the information you have marked pertains to incidents that did not result in conviction or deferred adjudication. Based on your representation and our review, we find section 552.108(a)(2) applies to the information at issue. Therefore, the city may withhold the information you have marked under section 552.108(a)(2).

As noted above, you state the city will redact information under section 552.117(a)(2) of the Government Code pursuant to the previous determination issued to all governmental bodies in Open Records Decision No. 670. However, you failed to mark portions of the submitted information that are subject to section 552.117(a)(2). Therefore, we will address the applicability of section 552.117 to the submitted information. Section 552.117(a)(2) excepts from disclosure the home address, home telephone number, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the officer has family members, regardless of whether the officer complies with section 552.024 or section 552.1175 of the Government Code. *Id.* § 552.117(a)(2). Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. Accordingly, we conclude the city must withhold the information we have marked under section 552.117(a)(2).

Section 552.1175 of the Government Code provides, in part, the following:

Information that relates to the home address, home telephone number, emergency contact information, 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:

- (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(b). The remaining information contains information pertaining to a peace officer not employed by the city's police department. Upon review, we find the city must withhold the information we have marked under section 552.1175 if the individual to whom this information concerns elects to restrict access to his information in accordance with section 552.1175(b).

Section 552.130 of the Government Code excepts from disclosure information that relates to a motor vehicle operator's or driver's license, title, or registration, issued by an agency of this state or another state or country. *Id.* § 552.130(a)(1)-(2). Accordingly, the city must withhold the information marked under section 552.130 of the Government Code.

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"). This office has concluded insurance policy numbers constitute access device numbers for purposes of section 552.136. Open Records Decision No. 684 at 9 (2009). Therefore, the city must withhold the information we have marked under section 552.136 of the Government Code.

You assert some of the remaining information is excepted under 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 Gov't Code* § 552.137(a)-(c). The remaining information does not contain an e-mail address. Therefore, the city may not withhold any of the remaining information under section 552.137.

Section 552.140 of the Government Code provides 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 be disclosed only in accordance with section 552.140 or a court order. *Id.* § 552.140(a)-(b). We note that section 552.140 applies to only the DD-214 form itself or other military discharge records and not references to the form or records. Based on the submitted information, it appears the city came into possession of the submitted military discharge record after September 1, 2003. Accordingly, we conclude the city must withhold the military discharge record we have marked under section 552.140 of the Government Code.

In summary, the city must withhold the information we have marked pursuant to (1) section 552.101 of the Government Code in conjunction with common-law privacy; (2) section 552.101 in conjunction with section 1701.306 of the Occupations Code; (3) section 552.101 in conjunction with section 560.003 of the Government Code; (4) section 552.101 in conjunction with section 411.083 of the Government Code; (5) section 552.102(a) of the Government Code; (6) section 552.117(a)(2) of the Government Code; (7) section 552.1175 of the Government Code if the individual to whom this

information concerns elects to restrict access to his information in accordance with section 552.1175(b); (8) section 552.130 of the Government Code; (9) section 552.136 of the Government Code; and (10) section 552.140 of the Government Code. The city may withhold the information we have marked under section 552.103 of the Government Code. The city may withhold the information you have marked pursuant to sections 552.108(a)(1) and 552.108(a)(2) of the Government Code. The remaining information must be released.<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,



Sean Opperman  
Assistant Attorney General  
Open Records Division

SO/som

Ref: ID# 462950

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>5</sup>We note the remaining information includes a social security number. 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. See Gov't Code § 552.147(b).