



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 21, 2012

Ms. L. Carolyn Nivens
Counsel for the City of Friendswood
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2 Riverway, Suite 700
Houston, Texas 77056-1918

OR2012-15065

Dear Ms. Nivens:

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# 466797 (City File No. W001781-071212).

The City of Friendswood (the "city"), which you represent, received a request for the personnel file of a named police officer. You state that some information will be released with redactions as permitted by Open Records Decision No. 670 (2001).¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.117, 552.119, and 552.122 of the Government Code.² We have considered the claimed exceptions and reviewed the submitted information.

¹Open Records Decision No. 670 is a previous determination to all governmental bodies authorizing them to withhold the home addresses and telephone numbers, personal pager and cellular telephone numbers, social security numbers, and family member information of their peace officers under section 552.117(a)(2) of the Government Code without the necessity of requesting an attorney general decision.

²Although you raise section 552.023 of the Government Code, we note this section is not an exception to disclosure under the Act. *See* Gov't Code § 552.023. We next note that although you raise section 552.1175 of the Government Code, section 552.117 is the proper exception to raise for information the city holds in its capacity as an employer. Finally, although you raise section 552.108 of the Government Code, you have not presented arguments explaining how this exception applies to the submitted information, as required by section 552.301. Thus, this ruling does not address section 552.108. *See* Gov't Code §§ 552.301(e)(1)(A), .302.

Section 552.101 of the Government Code exempts 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 chapter 411 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. *See id.* § 411.083(a). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual laws with respect to the CHRI it generates. *See id.* 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* 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 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. Similarly, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 in conjunction with chapter 411, subchapter F of the Government Code. Upon review, we find none of the submitted information constitutes CHRI, and it may not be withheld under section 552.101 on that basis.

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:

(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.

Occ. Code § 1701.454. You have not marked any information you seek to withhold under section 1701.454 and, upon review, we find none of the submitted information is subject to this section. Therefore, none of the submitted information may be withheld under section 552.101 in conjunction with section 1701.454.

Section 552.101 of the Government Code also encompasses the common-law right to 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 met. *Id.* at 681-82. A compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (finding significant privacy interest in compilation of individual's criminal history by recognizing distinction between public records found in courthouse files and local police stations and compiled summary of criminal history information). Furthermore, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. We find no portion of the submitted information consists of a compilation of any individual's criminal history. Accordingly, none of the submitted information may not be withheld under section 552.101 of the Government Code as a compilation of an individual's criminal history. You also seek to withhold a telephone number of a member of the public under common-law privacy. This office has concluded public disclosure of home addresses, telephone numbers, and dates of birth of private citizens is not an invasion of privacy. *See Open Records Decision No. 554 at 3* (1990) (telephone numbers and home addresses not private), 455 at 7, 9 (1987) (home addresses, telephone numbers, and dates of birth generally not private). Therefore, this information is not private and may not be withheld under section 552.101 on that basis.

You also generally raise section 552.101 of the Government Code for some of the remaining information. However, you have not directed us to a provision of law, nor are we aware of any, that makes this information confidential for purposes of section 552.101. Thus, none of the remaining information may be withheld under section 552.101.

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." Gov't Code § 552.102(a). 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, discussed above. 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. *Texas Comptroller of Public Accounts v. Attorney General of Texas*, 354 S.W.3d 336, 342-43 (Tex.). The supreme court then considered the applicability of section 552.102, not *Industrial Foundation*, 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. *Id.* at 347-48. Upon review, we find none of the submitted information is confidential under section 552.102, and it may not be withheld on that basis.

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

information confidential. Gov't Code § 552.117(a); *see also id.* § 552.024. Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Accordingly, the city must withhold the information we have marked under section 552.117(a)(2).

Section 552.119 of the Government Code provides:

(a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, the release of which would endanger the life or physical safety of the officer, is excepted from [required public disclosure] unless:

- (1) the officer is under indictment or charged with an offense by information;
- (2) the officer is a party in a civil service hearing or a case in arbitration; or
- (3) the photograph is introduced as evidence in a judicial proceeding.

(b) A photograph excepted from disclosure under Subsection (a) may be made public only if the peace officer gives written consent to the disclosure.

Id. § 552.119. Under section 552.119, a governmental body must demonstrate, if the documents do not demonstrate on their face, that release of the photograph would endanger the life or physical safety of a peace officer. Upon review, we find that you have failed to establish that release of the submitted photograph would endanger the life or physical safety of the peace officers depicted. Therefore, the city may not withhold the submitted photograph under section 552.119 of the Government Code.

Section 552.122 of the Government Code excepts from disclosure “a test item developed by a . . . governmental body[.]” *Id.* § 552.122(b). In Open Records Decision No. 626 (1994), this office determined the term “test item” in section 552.122 includes “any standard means by which an individual’s or group’s knowledge or ability in a particular area is evaluated,” but does not encompass evaluations of an employee’s overall job performance or suitability. ORD 626 at 6. The question of whether specific information falls within the scope of section 552.122(b) must be determined on a case-by-case basis. *Id.* Traditionally, this office has applied section 552.122 where release of “test items” might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Section 552.122 also protects the answers to test questions when the answers might reveal the questions themselves. *See* Attorney General Opinion JM-640 at 3 (1987); ORD 626 at 8.

You seek to withhold some of the remaining information under section 552.122 of the Government Code. You state the questions at issue were prepared by the city's police department, and we understand the department anticipates reusing these questions in future examinations. Upon review, we find the information we have marked evaluates an individual's knowledge or ability in particular areas. The marked information qualifies as test items for the purposes of section 552.122(b), and the city may withhold the marked information on that basis. We find, however, the remaining information does not test any specific knowledge of an applicant. Accordingly, the remaining information does not constitute test items under section 552.122(b) and may not be withheld on this basis.

In summary, the city must withhold the information we marked under section 552.117(a)(2) of the Government Code and may withhold the information we marked under section 552.122(b) of the Government Code. The remaining information must be released 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,



Misty Haberer Barham
Assistant Attorney General
Open Records Division

MHB/som

Ref: ID# 466797

Enc. Submitted documents

c: Requestor
(w/o enclosures)