



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 30, 2012

Mr. Jason M. Rammel
Sheets & Crossfield, P.C.
309 East Main Street
Round Rock, TX 78664-5246

OR2012-19338

Dear Mr. Rammel:

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# 472379.

The Hutto Police Department (the "department"), which you represent, received a request for the civil service personnel file of a named police officer. You state the department has released some information to the requestor. We note you have redacted a personal e-mail address in accordance with Open Records Decision No. 684 (2009).¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.1175, 552.119, 552.122, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information is not responsive to the present request for information because it was created after the present request for information was received.² This ruling does not address the public availability of any information that is not

¹Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general opinion.

²The Act does not require a governmental body to release information that did not exist when it received a request, create responsive information, or obtain information that is not held by the governmental body or on its behalf. See *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

responsive to the request, and the department need not release such information in response to this request.

Section 552.108(a) 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: (1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108 must reasonably explain how and why release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Exhibit F pertains to an internal affairs administrative investigation of an incident. Section 552.108 is generally not applicable to the records of an investigation that is purely administrative in nature and that does not involve the investigation or prosecution of crime. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.); *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution); *see also* Open Records Decision No. 350 at 3-4 (1982). However, you explain that Exhibit F also relates to an ongoing criminal investigation and prosecution, and release of the information would interfere with the investigation and prosecution of the incident at issue. Based upon your representations and our review, we conclude that the release of Exhibit F would interfere with the investigation or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of 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).

We note section 552.108 does not except from disclosure “basic information about an arrested person, an arrest, or a crime.” Gov’t Code § 552.108(c). Section 552.108(c) refers to the basic “front-page” information held to be public in *Houston Chronicle*. *See* 531 S.W.2d at 186-88. Basic information must be released, even if it does not literally appear on the front page of the report. *See* Open Records Decision No. 127 (1976) (summarizing types of information deemed public by *Houston Chronicle*). Therefore, with the exception of basic information, the department may withhold Exhibit F under section 552.108(a)(1) 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 of the Government Code encompasses section 1701.454 of the Occupations Code. This section provides, in relevant part, “[a]ll information submitted to the [Texas Commission on Law Enforcement Officer Standards and Education] 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.” Occ. Code § 1701.454(a). We agree the F-5 Report of Separation of License Holder forms in Exhibit D are subject to

section 1701.454 of the Occupations Code. The submitted information does not reflect the officer at issue 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 forms in Exhibit D under 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 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 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 (prescription drugs, illnesses, operations, and physical handicaps). This office has also 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). We find the information we have marked in Exhibits B and C is highly intimate or embarrassing and not of legitimate public concern. Therefore, the department 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 you have failed to demonstrate any of the remaining information is highly intimate or embarrassing and not of legitimate public concern. Therefore, the department may not withhold the remaining information under section 552.101 in conjunction with common-law privacy.

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). 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, 347-48 (Tex. 2010). Having reviewed the information at issue, the department must withhold the employee's date of birth we have marked under section 552.102(a) of the Government Code. Although you also seek to withhold the remaining information in the employee's birth certificate under section 552.102, we conclude section 552.102 of the Government Code does not except any of the remaining information from disclosure.

We note the submitted records contain information that is excepted from disclosure under section 552.117(a)(2).³ 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 Government Code to keep such information confidential. Gov't Code § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Upon review, we find the department must withhold the information we have marked under section 552.117(a)(2) of the Government Code.

The submitted information also includes information that may be subject to section 552.1175 of the Government Code, which applies to information the department does not hold in an employment context that concerns the individuals enumerated in subsection 552.1175(a). Section 552.1175 provides, in part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure;

...

(9) current and former employees of the office of the attorney general who are or were assigned to a division of that office the duties of which involve law enforcement.

(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.

³Although you raise section 552.1175 of the Government Code for information pertaining to the officer whose personnel file is at issue, we note the correct exception to raise for information pertaining to an officer employed by the department is section 552.117.

Gov't Code § 552.1175(a)(1), (9), (b). The department must withhold the information we have marked under section 552.1175 to the extent it belongs to licensed peace officers or current or former employees of the office of the attorney general who are or were assigned to a division of that office the duties of which involve law enforcement who elect to restrict access to the information in accordance with section 552.1175(b).

You assert the photographs you have marked in orange are excepted from disclosure under section 552.119, which provides the following:

(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.

Gov't Code § 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. You state release of the submitted pictures "could endanger the life or physical safety of the officer[] . . . if this officer was ever placed in undercover assignments[.]" You also argue release of the submitted pictures would be dangerous "if individuals with criminal intent were to obtain the photographs and use them to their advantage[.]" Upon review, we find you have not explained how release of the officer's photographs would endanger the officer's life or physical safety at this time. Therefore, the submitted photographs of the peace officer you have marked may not be withheld 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.

The department seeks to withhold the submitted interview and test questions in Exhibit E under section 552.122 of the Government Code. Having reviewed the information at issue, we find the questions we have marked in Exhibit E are test items under section 552.122(b) of the Government Code. We also find the answers would tend to reveal the questions. Therefore, the department may withhold the information we have marked in Exhibit E under section 552.122 of the Government Code. However, we find none of the remaining information in Exhibit E consists of "test items" for the purposes of section 552.122 and the department may not withhold the remaining information under section 552.122 of the Government Code.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's or driver's license, title, or registration issued by an agency of Texas or another state or country is excepted from public release. Gov't Code § 552.130(a). Upon review, we agree the department must withhold the motor vehicle record information we have marked under section 552.130. You also seek to withhold numbers under section 552.130 identified in the documents as "TCLEOSE ID" and "State ID." These numbers do not consist of information relating to a personal identification document issued by a Texas agency, or an agency of another state or country or a local agency authorized to issue an identification document for purposes of section 552.130, and they may not be withheld under section 552.130.

Section 552.137 of the Government Code 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).⁴ *See* Gov't Code § 552.137(a)-(c). We have marked email addresses subject to section 552.137 of the Government Code. The e-mail addresses at issue are not specifically excluded by section 552.137(c). As such, these e-mail addresses must be withheld under section 552.137, unless the owners of the addresses have affirmatively consented to their release. *See id.* § 552.137(b).

The remaining information contains photocopies of the named officer's identification cards. Section 552.139(b)(3) of the Government Code provides, "a photocopy or other copy of an identification badge issued to an official or employee of a governmental body" is

⁴The 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).

confidential. *Id.* § 552.139(b)(3). Therefore, the department must withhold the photocopies of the identification cards, which we have marked, under section 552.139(b)(3) of the Government Code.

In summary, with the exception of basic information, the department may withhold Exhibit F under section 552.108(a)(1) of the Government Code. The department must withhold Exhibit D under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code, the information that we have marked under section 552.101 of the Government Code in conjunction with common-law privacy, the birth dates we have marked under section 552.102 of the Government Code, and the information we have marked under section 552.117(a)(2) of the Government Code. The department must also withhold the information we have marked under section 552.1175 if the individuals to whom the information pertains are individuals who are covered by section 552.1175(a) and they elect to restrict access to their information. The department may withhold the information we have marked in Exhibit E under section 552.122 of the Government Code. The department must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code, and the email addresses we have marked under section 552.137 of the Government Code, unless the owners of the email addresses have affirmatively consented to their release. The department must also withhold the photocopies of the identification cards, which we have marked, under section 552.139 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,



Jasmine D. Wightman
Assistant Attorney General
Open Records Division

JDW/tch

Ref: ID# 472379

Enc. Submitted documents

c: Requestor
(w/o enclosures)