ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 5, 2012

Mr. Jason M. Rammel
For City of Hutto
Sheets & Crossfield, P.C.
309 East Main Street
Round Rock, Texas 78664-5246

OR2012-19612

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# 472808.

The Hutto Police Department (the "department"), which you represent, received a request for the personnel file of a named officer. You state the department is releasing some of the requested information. You indicate the department will redact an insurance policy number under section 552.136 of the Government Code.[1] You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.102, 552.108, 552.117, 552.119, 552.122, and 552.130 of the Government Code.[2] We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the requestor excluded social security and driver's license numbers and home addresses from the scope of her request for information. Accordingly, we find these types of information are not responsive to the present request. This ruling does not address the public availability of non-responsive information, and the department need not release any such information in response to this request.

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[1]Section 552.136 of the Government Code permits a governmental body to redact the information described in section 552.136(b) without the necessity of requesting a decision from this office. *See* Gov't Code § 552.136(c)-(e) (providing procedures for redaction of information).

[2]Although you raise section 552.1175 of the Government Code, section 552.117 is the proper exception to raise for information the department holds in its capacity as an employer.

Next, we note a portion of Exhibit G is subject to section 552.022 of the Government Code, which provides in pertinent part:

> (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under [the Act] unless they are expressly confidential under other law:
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> > (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). Exhibit G contains completed personnel evaluations. Pursuant to section 552.022(a)(1) of the Government Code, a completed evaluation is expressly public unless it is either excepted under 552.108 of the Government Code or expressly confidential under the Act or other law. Section 552.122 of the Government Code, which you claim for Exhibit G, is a discretionary exception that does not make information confidential under the Act. *See* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Consequently, the completed evaluations, which we have marked, may not be withheld under section 552.122 of the Government Code. As you raise no further exceptions for the completed evaluations, they must be released. However, we will address section 552.122 for the information not subject to section 552.022 in Exhibit G.

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. This section encompasses information protected by other statutes. Section 182.052 of the Utilities Code provides in relevant part the following:

> (a) Except as provided by Section 182.054, a government-operated utility may not disclose personal information in a customer's account record, or any information relating to the volume or units of utility usage or the amounts billed to or collected from the individual for utility usage, if the customer requests that the government-operated utility keep the information confidential. However, a government-operated utility may disclose information related to the customer's volume or units of utility usage or amounts billed to or collected from the individual for utility usage if the primary source of water for such utility was a sole-source designated aquifer.
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> (b) A customer may request confidentiality by delivering to the government-operated utility an appropriately marked form provided under Subsection (c)(3) or any other written request for confidentiality.

Util. Code § 182.052(a)-(b). "Personal information" under section 182.052(a) means an individual's address, telephone number, or social security number, but does not include the

individual's name. *See id.* § 182.051(4); *see also* Open Records Decision No. 625 (1994) (construing statutory predecessor). Water, sewer, and garbage collection services are included in the scope of utility services covered by section 182.052. Util. Code § 182.051(3). Section 182.054 of the Utilities Code provides six exceptions to the disclosure prohibition found in section 182.052. *See id.* § 182.054.

You state some of the submitted information pertains to utility customers of the City of Hutto ("the city"). You state that none of the exceptions to confidentiality under section 182.054 apply in this instance. You inform us that the primary source of water for the city's utility services is not a sole-source designated aquifer. However, you do not inform us whether the customers whose information is contained in Exhibits B and D timely requested confidentiality. Therefore, if these customers timely requested confidentiality, the department must withhold the information we have marked in Exhibits B and D under section 552.101 in conjunction with section 182.052 of the Utilities Code. If these customers did not timely request confidentiality, the department may not withhold the marked information in Exhibits B and D on that basis.

Section 552.101 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." Gov't Code § 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* 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). 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. However, 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). We also note that the term CHRI does not include driving record information. *See id.* § 411.082(2)(B). Accordingly, the department must withhold the CHRI we have marked under section 552.101 in conjunction

with federal law and chapter 411 of the Government Code.[3] However, we find none of the remaining information constitutes confidential CHRI for the purposes of chapter 411. As such, the department may not withhold any of the remaining information under section 552.101 on this basis.

Section 552.101 also encompasses common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) 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 satisfied. *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* Open Records Decision Nos. 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). This office also has found 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. United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) Furthermore, we have found a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. However, we note criminal history information obtained by a law enforcement agency in the process of hiring a peace officer is a matter of legitimate public interest. We also note information relating to routine traffic violations does not implicate privacy concerns. *Cf.* Gov't Code § 411.081(b).

We note the submitted information pertains to a peace officer employed by the department. As this office has stated on many occasions, the public generally has a legitimate interest in public employment and public employees, particularly those who are involved in law enforcement. *See* Open Records Decision No. 444 at 6 (1986) (public has genuine interest in information concerning law enforcement employee's qualifications and performance and circumstances of his termination or resignation); *see also* Open Records Decision Nos. 562 at 10 (1990) (personnel information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 473 at 3 (1987) (fact that public employee received less than perfect or even very bad evaluation not private), 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs). We find the personal financial information we have marked is highly intimate or embarrassing and of no legitimate public interest. The department must withhold the marked information under section 552.101 of the Government Code in conjunction with common-law privacy.[4] However, none of the remaining information is highly intimate or embarrassing and not of

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[3]As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

[4]As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

legitimate public interest, and it may not be withheld under section 552.101 on the basis of 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). The Texas Supreme Court 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. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336, 348 (Tex. 2010). Therefore, with the exception of the information we have marked for release, the department must withhold the dates of birth you and 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 department may not withhold any of the remaining information on that basis.

Section 552.108(b)(1) of the Government Code excepts from disclosure the internal records and notations of law enforcement agencies and prosecutors when their release would interfere with law enforcement and crime prevention. Gov't Code § 552.108(b)(1); *see also* Open Records Decision No. 531 at 2 (1989). Section 552.108(b)(1) is intended to protect "information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State." *See City of Ft. Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.). To demonstrate the applicability of this exception, a governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). This office has concluded section 552.108(b)(1) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (section 552.108 is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). Section 552.108(b)(1) is not applicable, however, to generally known policies and procedures. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known). Upon review, we find you have failed to demonstrate how release of the information you have marked under section 552.108 would interfere with law enforcement and crime prevention. Accordingly, the department may not withhold this information under section 552.108(b)(1) of the Government Code.

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. *See* Gov't Code §§ 552.117(a)(2); .024. Section 552.117(a)(2)

applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Accordingly, the department must withhold the responsive information we have marked under section 552.117(a)(2). However, we find none of the remaining responsive information consists of the home address and telephone number, emergency contact information, social security number, or family member information of a peace officer, and the department may not withhold any of the remaining responsive information under section 552.117(a)(2).

You claim the submitted photographs of the named officer are excepted from disclosure under section 552.119 of the Government Code. Section 552.119 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:
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> > (1) the officer is under indictment or charged with an offense by information;
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> > (2) the officer is a party in a civil service hearing or a case in arbitration; or
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> > (3) the photograph is introduced as evidence in a judicial proceeding.
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> (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. After review of your arguments, we find you have not demonstrated, and it is not apparent from our review of the submitted information, that release of the photographs at issue would endanger the life or physical safety of the peace officer depicted. Therefore, the department may not withhold the submitted photographs under section 552.119.

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 state the information in Exhibit G that is not subject to section 552.022 consists of questions used by the department "as a standard means by which the knowledge and ability of the members of the [department] are evaluated." Having considered your arguments and reviewed the information at issue, we find the information we have marked constitutes "test items" under section 552.122(b) of the Government Code. Therefore, the department may withhold the marked test questions under section 552.122 of the Government Code. However, we find none of the remaining information in Exhibit G 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 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. Gov't Code § 552.130(a)(1)-(2). Therefore, the department must withhold the information we have marked under section 552.130. However, we find none of the remaining responsive information consists of information related to a motor vehicle operator's or driver's license, title, or registration for the purposes of section 552.130 of the Government Code, and the department may not withhold any of the remaining responsive information on that basis.

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).[5] *Id.* § 552.137(a)-(c). The e-mail addresses we have marked are not one of the types specifically excluded by section 552.137(c). Accordingly, the department must withhold the marked e-mail addresses under section 552.137, unless the owner of the addresses affirmatively consents to their release.

In summary, the department must withhold the information we have marked in Exhibits B and D under section 552.101 of the Government Code in conjunction with section 182.052 of the Utilities Code if the customers at issue timely requested confidentiality. The department must withhold the CHRI we have marked under section 552.101 in conjunction with federal law and chapter 411 of the Government Code, and the financial information we have marked under section 552.101 in conjunction with common-law privacy. With the exception of the information we have marked for release, the department must withhold the date of birth you and we have marked under section 552.102(a) of the Government Code. The department must withhold the information we have marked under section 552.117(a)(2)

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[5]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 (1987).

of the Government Code. The department may withhold the test questions we have marked under section 552.122 of the Government Code. The department must withhold the information we have marked under section 552.130 of the Government Code. The department must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owner consents to their disclosure. 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,

Kristi L. Wilkins
Assistant Attorney General
Open Records Division

KLW/ag

Ref: ID# 472808

Enc. Submitted documents

c: Requestor
(w/o enclosures)