



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 24, 2013

Ms. Rachel L. Lindsay
For the City of McKinney
Brown & Hofmeister, L.L.P.
740 East Campbell Road, Suite 800
Richardson, Texas 75081

OR2013-10651

Dear Ms. Lindsay:

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# 490985 (ORR No. 10-7084).

The McKinney Police Department (the "department"), which you represent, received a request for information related to the employment application and/or personnel file of a named individual. You state the department will redact information pertaining to department police officers pursuant to 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.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.111, 552.130, 552.136, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We note the submitted information appears to have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2012-16046

¹Open 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 of the Government Code. ORD 670 at 6.

(2012). However, the requestor in the instant request is the attorney for the individual named in the request. Therefore, the circumstances on which Open Records Letter No. 2012-16046 was based have changed, and the department may not rely on that ruling as a previous determination. *See* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). You now raise section 552.103 of the Government Code for the information that may have been at issue in the previous ruling. Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential by law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the department may not now withhold any previously released information unless its release is expressly prohibited by law or the information is confidential by law. Although you raise section 552.103, this section does not prohibit the release of information or make information confidential. *See 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 Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Accordingly, to the extent any portion of the submitted information was released in accordance with Open Records Letter No. 2012-16046, the department may not now withhold such information under section 552.103. To the extent the submitted information was not previously ordered released in the prior ruling, we will address your argument under section 552.103, as well as your remaining arguments against its disclosure.

We note some of the submitted information, which we have marked, is subject to 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 contains a court-filed document that is subject to subsection 552.022(a)(17), which must be released unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(17). You seek to withhold the

court-filed document under section 552.103 of the Government Code. However, section 552.103 is a discretionary exception and does not make information confidential under the Act. *See Dallas Morning News*, 4 S.W.3d at 475-76; *see also* ORDs 665 at 2 n.5, 663 at 5. Therefore, the marked court-filed document may not be withheld under section 552.103 of the Government Code. You also seek to withhold portions of the court-filed document under section 552.101 of the Government Code in conjunction with common-law privacy. We note common-law privacy is not applicable to information contained in public court records. *See Star-Telegram v. Walker*, 834 S.W.2d 54 (Tex. 1992). Therefore, no portion of the submitted court-filed document may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. However, as sections 552.117, 552.130, 552.136, and 552.137 of the Government Code make information confidential for purposes of section 552.022(a)(17), we will consider your arguments under those sections for the submitted court-filed document. We will also consider your arguments against the release of the information not subject to section 552.022 of the Government Code.

The department raises section 552.103 of the Government Code for the information not subject to section 552.022(a)(17) of the Government Code. Section 552.103 provides in relevant 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). The purpose of section 552.103 is to protect the litigation interests of governmental bodies that are parties to the litigation at issue. *See id.* § 552.103(a); Open Records Decision No. 638 at 2 (1996) (section 552.103 only protects the litigation interests of the governmental body claiming the exception). A governmental body has the burden of providing relevant facts and documents to show section 552.103(a) is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex.

App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). ORD 551 at 4.

You inform us the submitted information relates to pending litigation before the district court. However, we note the department is not a party to the litigation and, therefore, does not have a litigation interest in the matter for purposes of section 552.103. *See* Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990) (stating that predecessor to section 552.103 only applies when governmental body is party to litigation). In such a situation, we require an affirmative representation from the governmental body with the litigation interest that the governmental body wants the information at issue withheld from disclosure under section 552.103. However, you have not provided this office with an affirmative representation from a governmental body with a litigation interest explaining that it seeks to withhold the information at issue pursuant to section 552.103. Accordingly, the department may not withhold any of the submitted information under section 552.103 of the Government Code.

Section 552.111 of the Government Code excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” Gov't Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist.*

v. Tex. Attorney Gen., 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *see* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

This office has also concluded a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

You claim Exhibit C consists of internal department notes and a memorandum containing the advice, opinion, and recommendations of department employees. Further, you assert Exhibit C consists of draft documents, and any factual information in the draft will be included in the final form of the document, which the department acknowledges must be released in its final form. Upon review, however, we find the information at issue is general administrative and purely factual information, and a personnel matter. We find you have failed to show how the information at issue consists of advice, opinions, or recommendations on policymaking matters of the department, or personnel matters of broad scope that affect the department's mission. Accordingly, the department may not withhold Exhibit C under section 552.111 of the Government Code.

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. Section 552.101 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 department must withhold under section 552.101 in conjunction with section 411.083 of the Government Code.² However, none of the remaining information constitutes CHRI. Accordingly, the department may not withhold any of the remaining information under section 552.101 of the Government Code on this basis.

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 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 (1992) (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). Upon review, we find the information we have marked 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 that although the remaining information you seek to withhold contains information which would ordinarily be protected by common-law privacy, the requestor is the attorney of the individual whose privacy interests are at issue. Accordingly, the requestor has a special right of access to his client's information under section 552.023 of the Government Code. *See Gov't Code* § 552.023 (person has a special right of access to information excepted from public disclosure under laws intended to protect person's privacy interest as subject of the

²We note that an individual may obtain his own CHRI from DPS. *See Gov't Code* § 411.083(b)(3).

information); *see also* Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself). Furthermore, we find you have not demonstrated how any of the remaining information pertaining to individuals other than the requestor's client is highly intimate or embarrassing and not of legitimate public concern. Thus, the remaining information may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

We note portions of the remaining information may be subject to section 552.1175 of the Government Code.³ Section 552.1175 protects the home address, home telephone number, emergency contact information, date of birth, social security number, and family member information of certain individuals, when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential. *See* Act of May 26, 2013, 83rd Leg., R.S., H.B. 1632, § 3 (to be codified as an amendment to Gov't Code § 552.1175). Section 552.1175 applies, in part, to "peace officers as defined by Article 2.12, Code of Criminal Procedure." Gov't Code § 552.1175(a)(1). The remaining information contains information pertaining to peace officers not employed by the department. Upon review, we find the department must withhold the information we have marked under section 552.1175 of the Government Code if the individuals to whom this information concerns elect to restrict access to the 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). Upon review, we find portions of the submitted information consist of motor vehicle record information. We note section 552.130 protects personal privacy. Therefore, the requestor has a right of access to his client's motor vehicle record information under section 552.023 of the Government Code and it may not be withheld under section 552.130. *See id.* § 552.023(a); ORD 481 at 4. Accordingly, the department must withhold the motor vehicle record information pertaining to an individual other than the requestor's client, which we have marked, under section 552.130 of the Government Code.

Section 552.136 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." Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). We note section 552.136 also protects privacy interests. As noted above, the requestor is the authorized representative of the individual whose information is at issue. Thus, he has a right of access to that individual's information. *See id.* § 552.023; ORD 481. Accordingly, the department may not withhold the named individual's information from this requestor under section 552.136

³The 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, 480 (1987), 470 (1987).

of the Government Code. The department must withhold the remaining account numbers, which we have marked, under section 552.136 of the Government Code.

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 owner of the e-mail address consents to its release or the e-mail address falls within the scope of section 552.137(c). *See* Gov’t Code § 552.137(a)-(c). The information at issue is not within the scope of section 552.137(c). Therefore, the department must withhold the e-mail addresses we have marked under section 552.137 of the Government Code unless the owners affirmatively consent to their public disclosure.⁴

We note the remaining information contains a military veteran’s Department of Defense Form DD-214 that is subject to section 552.140 of the Government Code. Section 552.140 of the Government Code provides in part:

(a) This section applies only to a military veteran’s Department of Defense Form DD-214 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.

(b) The record is confidential for the 75 years following the date it is recorded with or otherwise first comes into the possession of a governmental body. During that period the governmental body may permit inspection or copying of the record or disclose information contained in the record only in accordance with this section or in accordance with a court order.

(c) On request and the presentation of proper identification, the following persons may inspect the military discharge record or obtain from the governmental body free of charge a copy or certified copy of the record:

(1) the veteran who is the subject of the record[.]

Id. § 552.140(a), (b), (c). Section 552.140 provides that 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 only be disclosed in accordance with section 552.140 or in accordance with a court order. *See id.* § 552.140(a)-(b). We note the submitted

⁴We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold specific 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.

DD-214 form came into the department's possession after September 1, 2003. Section 552.140(c)(1) provides that a governmental body must release a discharge form to the veteran who is the subject of the record. *Id.* § 552.140(c)(1). Accordingly, we find the requestor, as the attorney for the veteran to whom the military discharge record pertains, has a right of access to his client's DD-214 form under section 552.140(c)(1) of the Government Code.

You state the department will redact social security numbers pursuant to section 552.147(b) of the Government Code, which 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. *Id.* § 552.147(b). However, upon review, we find the remaining information contains the named individual's social security number. Accordingly, in this instance, the requestor has a right of access to his client's social security number and it must be released to the requestor. *See generally id.* § 552.023(b).

We note some of the information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, to the extent any portion of the submitted information was released in accordance with Open Records Letter No. 2012-16046, the department may not now withhold such information under section 552.103 of the Government Code. The department must withhold the information we have marked pursuant to (1) section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code; (2) section 552.101 of the Government Code in conjunction with common-law privacy; (3) section 552.1175 of the Government Code, if the individuals at issue elect to restrict access to their information in accordance with section 552.1175(b); (4) section 552.130 of the Government Code; (5) section 552.136 of the Government Code; and (6) section 552.137 of the Government Code, unless the individuals whose e-mail addresses are at issue consent to disclosure. The department must release the remaining information to the requestor; however, any information that is subject to copyright may be released only in accordance with copyright law.⁵

⁵We note that the requestor has a special right of access to some of the information being released in this instance. Because such information is confidential with respect to the general public, if the department receives another request for this information from a different requestor, the department must again seek a ruling from this office.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Cynthia G. Tynan
Assistant Attorney General
Open Records Division

CGT/akg

Ref: ID# 490985

Enc. Submitted documents

c: Requestor
(w/o enclosures)