



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 21, 1995

Ms. Elizabeth Elam
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3400 BankOne Tower
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Fort Worth, Texas 76102-3821

OR95-1567

Dear Ms. Elam:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 23309.

The City of Mansfield (the "city") received a request for (1) job applications for all police officers employed by the Mansfield Police Department; (2) letters relating to commendations, honors, and disciplinary actions for each police officer employed by the department; and (3) information regarding the employment of Officer Doug Fetters. You claim that a portion of the requested information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.111, and 552.117 of the Government Code. You have submitted to this office for review samples of the documents requested.¹ We have considered the exceptions you claimed and have reviewed the sample documents.

At the outset, we address your contention that part of the request is "incredibly broad" and that the city is uncertain as to what information the requestor seeks in category no. 4. You advise us that the city does not maintain the requested information in a manner consistent with what is requested. As a general matter, the Open Records Act applies only to existing information and does not require a governmental body to prepare new information or to prepare information in a form the requestor demands. See Open Records Decision No. 572 (1990) at 1.

¹In reaching our conclusion here, we assume that the "representative sample" of records 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 that those records contain substantially different types of information than that submitted to this office.

Other opinions of this office have addressed situations in which a governmental body has received either an "overbroad" written request for information or a written request for information that the governmental body is unable to identify. In Open Records Decision No. 561 (1990) at 8-9, this office summarized our policy with respect to such requests:

We have stated that a governmental body must make a good faith effort to relate a request to information held by it. Open Records Decision No. 87 (1975). It is nevertheless proper for a governmental body to require a requestor to identify the records sought. Open Records Decision Nos. 304 (1982), 23 (1974). For example, where governmental bodies have been presented with broad requests for information rather than specific records we have stated that the governmental body may advise the requestor of the types of information available so that he may properly narrow his request. Open Records Decision No. 31 (1974).

Moreover, section 552.227 of the Government Code expressly does not require an officer for public records or the officer's agent to perform general research. *See also* Open Records Decision Nos. 563 (1990), 555 (1990), 379 (1983), 347 (1982). In response to the request at issue here, you must make a good faith effort to relate the request to information in the city's possession and must help the requestor to clarify her request by advising her of the types of information available. Beyond these requirements, however, the city need not generate new information or answer factual questions to comply with the request.

The requested applications for employment include information that identifies the applicants' home addresses and home telephone numbers. The home address and home telephone number of a "peace officer" are excepted from disclosure by section 552.117 of the Open Records Act without regard to the individual's current employment status. Although the home address and home telephone number of an "applicant" for employment are not ordinarily deemed to be confidential by law, Open Records Decision No. 532 (1989), that information is excepted from disclosure when the applicant is a "peace officer" as defined in the statute. Likewise, every former home address and home telephone number of a "peace officer" are confidential. Open Records Decision No. 622 (1994). Therefore, the city must withhold this information under section 552.117.

You claim that section 552.101 excepts from disclosure criminal history report information ("CHRI"). You did not submit any such information for this office to review. However, we note that generally, such information is confidential and not subject to disclosure. Section 552.101 excepts from disclosure "information deemed confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given."),

(2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Section 411.083 provides that any CHRI maintained by the Department of Public Safety ("DPS") is confidential. Gov't Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *Id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Therefore, assuming that you have CHRI about the applicants and employees in your possession and it falls within the ambit of these state and federal regulations, you must withhold the CHRI from the requestor. Please note, however, that driving record information is not confidential under chapter 411, *see* Gov't Code § 411.082(2)(B), and must be disclosed.²

Federal law may prohibit disclosure of these applicants' and employees' social security numbers. A social security number is excepted from required public disclosure under section 552.101 of the act in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). Based on the information you have provided, we are unable to determine whether the social security numbers are confidential under this federal statute. We note, however, that section 552.352 of the Open Records Act imposes criminal penalties for the release of confidential information.³

You claim that section 552.101 excepts from disclosure the medical history submitted by the applicants. We have concluded that this issue warrants a more thorough analysis than is normally possible in the limited scope of an informal letter. Currently, there is an open records decision pending in our office, RQ-753, which we believe will be dispositive of this issue. Therefore, we are awaiting the issuance of this decision prior to issuing a ruling pertaining to whether you may withhold the applicants' medical history. Therefore, you may withhold this information pending our ruling in RQ-753. We will notify you of our ruling regarding your request as expeditiously as possible.⁴

²Similarly, CHRI provided by applicants on their applications is not excepted from public disclosure. This CHRI does not fall within the protection of either the federal and state statutes, and the individual providing the information, who may have a privacy interest in that information, has waived any privacy right by providing the information to the governmental body on his or her application.

³The Seventy-fourth Legislature has significantly amended the Open Records Act effective September 1, 1995. *See* Act of May 29, 1995, 74th Leg., R.S., ch. 1035, §§ 1 *et seq.*, 1995 Tex. Sess. Law Serv. 5127 (Vernon). Because these amendments apply only to a request for information made on or after Sept. 1, 1995, *id.* § 28, 1995 Tex. Sess. Law Serv. at 5142, we do not address in this ruling these recent amendments to the Open Records Act.

⁴You did not submit any information that appears to be a medical record within the scope of the Medical Practice Act. The Medical Practice Act (the "MPA"), article 4495b of V.T.C.S., protects from disclosure "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." V.T.C.S. art. 4495b, § 5.08(b). Access to medical records falling within the MPA is governed by provisions outside the Open Records Act. Open Records Decision No. 598 (1991). The MPA provides for both confidentiality of medical records and certain statutory access

You suggest that some of the information may be excepted from disclosure under the "false light" privacy doctrine. Since 1990, this office has held that "false light" privacy is not a proper consideration under the Open Records Act. Open Records Decision No. 579 (1990). Additionally, in *Cain v. Hearst Corp.*, 878 S.W.2d 577 (Tex. 1994), the Texas Supreme Court concluded that Texas does not recognize the tort of "false light" invasion of privacy. Therefore, the city may not withhold the requested information under the doctrine of "false light" privacy.

We note that a photograph of an officer is included with one of the sample applications submitted to this office for review.⁵ Pursuant to section 552.119 of the Government Code, you must withhold the photograph of the officer unless the officer has given the city written consent to its disclosure.

One of the files you submitted to this office for review includes an Employment Eligibility Verification, Form I-9. Form I-9 is governed by title 8, section 1324a of the United States Code, which provides that the form "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. 8 U.S.C. § 1324a(b)(5); *see* 8 C.F.R. § 274a.2(b)(4). Release of this document under the Open Records Act would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we conclude that Form I-9 is confidential under section 552.101 of the Open Records Act and may only be released in compliance with the federal laws and regulations governing the employment verification system.

You claim that information concerning the officers' relatives is protected from disclosure under section 552.101. Section 552.101 encompasses common-law privacy and excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1. In addition to common-law privacy, section 552.101 excepts from required public disclosure information protected by constitutional privacy. The *Industrial Foundation* court determined that constitutional privacy, and thus section 552.101, protects matters within previously recognized and protected "zones of privacy"; these zones include matters relating to marriage, procreation, contraception, family relationships, child rearing, and education. 540 S.W.2d at 678. Once a determination is made that a matter is within a constitutionally

(Footnote continued)

requirements. *Id.* at 2. If there are medical records that are responsive to the request, they may only be released as provided by the MPA.

⁵We note that you did not claim any exception for this photograph. However, this office will raise mandatory exceptions like sections 552.119 and 552.101 on behalf of a governmental body. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

protected zone of privacy, one must balance this privacy interest against the public's interest in access to such information. *See* Open Records Decision Nos. 628 (1994) at 5, 455 (1987) at 7. A determination of the applicability of constitutional privacy must be made on a case-by-case basis, weighing the individual's right to privacy against the public's interest in disclosure of the information. *See* Open Records Decision No. 455 (1987) at 7. We conclude that the information in the applications regarding the officers' relatives may not be withheld pursuant to section 552.101, as this information is not within their constitutional zone of privacy nor would release of this information invade their common-law right to privacy.⁶

We note that the sample employment applications submitted to this office for review contain personal financial information. This office has previously held that, absent special circumstances evidencing a legitimate public concern in the information, certain financial information in personnel files is protected from disclosure by common-law privacy. Information concerning the applicants' sources of income, salary, mortgage payments, assets, credit history, as well as other personal financial information is excepted from disclosure by common-law privacy. Open Records Decision No. 626 (1994). The information provided for our review does not indicate any special circumstances that would make the individual's personal financial information a matter of legitimate public concern. Therefore, we conclude that this information is excepted from disclosure under section 552.101. We have marked the information that must be withheld.

Section 51.14(d) of the Family Code, provides, in pertinent part:

Except as provided by Article 15.27, Code of Criminal Procedure, and except for files and records relating to a charge for which a child is transferred under Section 54.02 of this code to a criminal court for prosecution, the law-enforcement files and records [concerning a child] are not open to public inspection nor may their contents be disclosed to the public

One of the sample documents submitted to this office for review is a law enforcement record involving a juvenile. It appears that this record does not involve a charge for which the juvenile was transferred under section 54.02 of the Family Code. Additionally, none of the exceptions to section 51.14(d) apply here. We conclude that this document identifies a juvenile or furnishes a basis for a juvenile's identification and must therefore be withheld from required public disclosure under section 552.101 of the Government Code in conjunction with section 51.14(d) of the Family Code. We have marked that document for your information.⁷

⁶*See supra* note 3.

⁷The Seventy-fourth Legislature, in House Bill 327, has significantly amended portions of the Family Code governing access to juvenile records, including the repeal of section 51.14 and its substantial revision in chapter 58 of the Family Code, effective January 1, 1996. *See* Act of May 27, 1995, 74th Leg., R.S., ch. 262, §§ 53, 100, 105, 1995 Tex. Sess. Law Serv. 2549, 2590-91 (Vernon). We do not address in

The requestor also seeks "letters citing commendations or honors for, or disciplinary action against, current Mansfield police officers," and, more specifically, detailed information about a particular officer who is no longer employed by the city. You claim that this information is excepted by sections 552.102, 552.108, and 552.111 of the Government Code. We will address each of your claimed exceptions in turn.

Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 (1993) at 5-6. The information contained in these documents relates to internal administrative or personnel matters. Therefore, section 552.111 does not except this information from required public disclosure.

Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the act.⁸ We conclude that a portion of one of the Personnel Complainant Forms must be withheld under common-law privacy and have marked that information for your convenience. The remainder of the submitted information does not contain information protected by common-law privacy.⁹ However, as you only submitted a sample of the information requested, we are unable to determine whether any of the other responsive documents contain information protected by common-law privacy. We enclose for your information a list of the

(Footnote continued)

this ruling the extent to which these recent amendments to the Family Code will affect requests for this information that are made on or after January 1, 1996.

⁸To the extent that the city has claimed that both sections 552.101 and 552.102 except information from disclosure, as the test is the same under both sections, we need only address your section 552.101 claim.

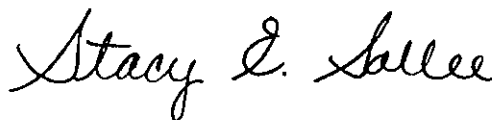
⁹You contend that because Officer Fetters is no longer employed by the city, there is a diminished public interest in his personnel record. We disagree. Officer Fetters' personnel record was created while he was an employee of the city and the public has a legitimate public interest in knowing how public employees perform their duties.

common types of information protected by common-law privacy. We note that this list is illustrative only and does not contain every type of information protected by section 552.101.

Section 552.108(a) excepts from disclosure records of law enforcement agencies or prosecutors that deal with criminal investigations and prosecutions. You claim that some of these documents may reveal investigative techniques and refer to ongoing criminal investigations. Where information is the subject of an active police investigation, the city may withhold everything except that information that generally appears on the first page of an offense report. *See generally Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 (1976). Once a case is closed, information may be withheld under section 552.108 only if its release "will unduly interfere with law enforcement or crime prevention." *See Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Attorney General Opinion MW-446 (1982); Open Records Decision Nos. 444 (1986), 434 (1986). Although you suggest that the records submitted to this office for review reveal "investigative techniques," you have not explained how they do so nor do those records so indicate on their face. Open Records Decision Nos. 444 (1986), 434 (1986). Therefore, the city may not withhold the requested information under section 552.108 unless it specifically relates to an ongoing criminal investigation and is not information that generally appears on the first page of an offense report.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



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Assistant Attorney General
Open Records Division

SES/rho

Ref.: ID# 23309

Enclosures: Confidentiality list
Marked documents

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