



February 29, 2000

Ms. Paige D. Scherr
Hayes, Coffey & Berry
P.O. Box 50149
Denton, Texas 76206

OR2000-0747

Dear Ms. Scherr:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 132539.

The Town of Hickory Creek (the "town"), which you represent, received a request for information pertaining to an officer of the Hickory Creek Police Department, including "personal" records, "all training records, certificates, etc.," and internal affairs records and/or discipline letters, including any suspensions or written reprimands. You state that the town has released some of the requested information.¹ You claim that other responsive information is excepted from disclosure under sections 552.101, 552.117 and 552.119 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.²

¹You inform us that some of the requested information was released in accordance with Open Records Letter Ruling No. 98-2996 (1998).

²In numerous instances, you have redacted portions of the documents that you submitted to this office for our review. The Public Information Act reserves to this office the role of determining whether any of the submitted information is excepted from required public disclosure. *See* Gov't Code §§ 552.301(a), (b), (e); 552.303(a); 552.306. Your markings have made it nearly impossible for this office to make a legal determination as to the public nature of the submitted information. In the future, we expect the town to mark submitted documents appropriately. If you have any questions regarding the town's responsibilities under the Public Information Act, please contact the Open Government Hotline at 1-877-673-6839. Please note that failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information at issue is public. *See* Gov't Code § 552.302.

You state that the town has withheld the documents submitted as Exhibit "B," which you describe as disciplinary records, under section 552.101 of the Government Code. As the submitted documents are personnel records, the relevant exception is section 552.102. Section 552.102 protects "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 protection that section 552.102(a) affords to personnel records generally corresponds to that which section 552.101 provides to information made confidential by common law privacy. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546 (Tex. App. – Austin 1983, writ ref'd n.r.e.). Information may be withheld under section 552.101 in conjunction with common law privacy if (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. *Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); *see* Open Records Decision No. 611 (1992). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* include information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimacy, psychiatric treatment, attempted suicide, and injuries to reproductive organs. *See* 540 S.W.2d at 683. Employee privacy under section 552.102 is significantly narrower than common law privacy under section 552.101, however, because of the greater public interest in the disclosure of information relating to public employees. *See* Open Records Decision Nos. 470 (1987), 444 (1986), 423 (1984). Section 552.102 generally protects only information that reveals "intimate details of a highly personal nature." *See* Open Records Decision No. 315 (1982).

There is a legitimate public interest in the job performance of a public employee, such as the police officer to whom the requested records pertain. As the disciplinary records in Exhibit "B" pertain directly to the police officer's job performance, most of the submitted information is not excepted from disclosure under section 552.102 and must be released. *See* Open Records Decision Nos. 484 (1987) (interest in knowing how police departments resolve complaints against officers ordinarily outweighs officer's privacy interests); 473 (1987) (unfavorable evaluation is not highly intimate or embarrassing fact about public employee's personal affairs); 470 (1987) (public employee's job performance generally does not constitute private affairs); 444 (1986) (public has obvious interest in information about qualifications and performances of law enforcement personnel). We have marked a small amount of information in Exhibit "B" that is confidential under section 552.101 and must be withheld.

We also have marked a traffic citation in Exhibit "B" that the town must release if it has been filed with a court. *See Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57-58 (Tex. 1992) (documents filed with a court are public documents and must be released). If the citation has not been filed with a court, portions of it must be withheld under section 552.130 of the Government Code. Section 552.130 protects information relating to "a motor vehicle

operator's or driver's license or permit issued by an agency of this state" and "a motor vehicle title or registration issued by an agency of this state." Gov't Code § 552.130(a)(1), (2). Section 552.130(a)(2) includes license plate and vehicle identification numbers. We have marked the information in the citation that is encompassed by section 552.130.

You assert that Exhibit "C" contains medical information that the town must withhold under section 552.101. Section 552.101 protects information that is made confidential by statute. Statutory confidentiality under section 552.101 requires express language making certain information confidential or stating that information shall not be released to the public. *See* Open Records Decision No. 478 at 2 (1987) (construing predecessor statute). Chapter 611 of the Health and Safety Code provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002 provides in relevant part that "[c]ommunications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential." Health and Safety Code § 611.002(a). Section 611.001 defines a "professional" as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat any mental or emotional condition or disorder, or (3) a person the patient reasonably believes is authorized, licensed, or certified. Health & Safety Code § 611.001(2). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). We have marked a document in Exhibit "C" that is confidential under section 552.101 in conjunction with section 611.002 of the Health and Safety Code. The town may release it only as provided by sections 611.004 and 611.0045 of the Health and Safety Code.

You state that Exhibit "D" is a representative sample of responsive documents which contain information that the town must withhold under section 552.117 of the Government Code.³ Section 552.117 protects "[i]nformation that relates to the home address, home telephone number, or social security number" of a peace officer, "or that reveals whether the [officer] has family members . . . regardless of whether the officer complies with Section 552.024." Gov't Code § 552.117(2). We agree that the town must not release any information about a peace officer that is encompassed by section 552.117(2).

You state that the town has released two of the commendation letters in Exhibit "E" after redacting information relating to third parties that you claim is confidential under section 552.101. As a general proposition, the contents of a letter of commendation of a public employee are not confidential. We have reviewed the documents in Exhibit "E," including

³We assume that the information in the "representative sample" of documents that you submitted as Exhibit "D" is truly representative of responsive information that the town seeks to withhold. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This letter ruling does not reach, and therefore does not authorize the town to withhold, any responsive information that is substantially different than that contained in the representative sample of records that you submitted to this office.

the commendation and other records that you submitted with your letter of December 22, 1999, and find that none of the submitted information is confidential. The town must release the entire contents of Exhibit "E," including the information that you redacted from the commendation letters. *See* Open Records Decision No. 284 (1981).

You state that the town has released the document submitted as Exhibit "F" after redacting photographs of a peace officer that you assert are protected under section 552.119 of the Government Code. We agree that section 552.119 excepts from disclosure "[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." Gov't Code § 552.119(a). This office has held that a claim under section 552.119 does not require a threshold showing that release of a photograph would endanger the officer depicted. *See* Open Records Decision No. 502 (1988).

Lastly, you state that the documents submitted as Exhibit "G" pertain to an ongoing investigation of a complaint against the officer whose personnel records are the subject of the request. You claim that records relating to the investigation "are in active use at this time" and are otherwise confidential under section 552.101. You have not demonstrated that the requested documents are in "active use," as that term is used in section 552.221(c) of the Government Code. The narrow "active use" exception to the general requirement that information be promptly released is intended only to enable a governmental body to avoid an *unreasonable* disruption of its *immediate* business. *See* Open Records Decision Nos. 148 at 2 (1976), 121 at 3 (1976). Furthermore, a complaint about a police officer's conduct is a matter of legitimate public interest. *See generally* Open Records Decision Nos. 484 (1987), 444 (1986). The mere fact that an investigation is in progress does not enable information relating to it to be withheld from public disclosure. Therefore, except for certain information protected by section 552.117(2), which we have marked, the documents in Exhibit "G" must be released.

In summary, most of the submitted information is not excepted from public disclosure under sections 552.101 and 552.102. We have marked the information that the town must withhold under sections 552.101, 552.117, 552.119, and 552.130. The balance of the requested information, including information you redacted that is not excepted from disclosure, must be released to the requestor. This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by

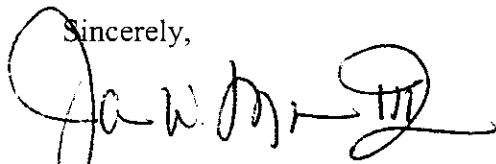
filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'James W. Morris, III', with a stylized flourish at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/ch

Ref: ID# 132539

Encl. Submitted documents

cc: Mr. Charles F. Robertson
2513 Skiles Drive
Plano, Texas 75075
(w/o enclosures)