



March 20, 2002

Ms. Pamela Smith
Assistant General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2002-1391

Dear Ms. Smith:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID#159994.

The Texas Department of Transportation (the "department") received a request for copies of information pertaining to a specified department trooper. You state that the requestor subsequently clarified that he was seeking a copy of the specified trooper's personnel file. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also* Open Records Decision No. 31 (1974) (stating that when governmental bodies are presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed). You claim that the submitted information or portions thereof are excepted from disclosure pursuant to sections 552.101, 552.103, and 552.117 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

Initially, we note that some of the documents are encompassed by section 552.022 of the Government Code. Section 552.022 provides that:

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(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),(16). The completed reports and evaluations that we have marked must be released under section 552.022(a)(1), unless they are confidential under other law or are excepted from disclosure under section 552.108 of the Government Code. Although you claim that these documents are excepted from disclosure pursuant to section 552.103 of the Government Code, this exception is a discretionary exception to disclosure under the Public Information Act (the "Act") that does not constitute "other law" for purposes of section 552.022.¹ Accordingly, the department may not withhold the marked reports and evaluations from disclosure pursuant to section 552.103 of the Government Code.

Next, we address your section 552.103 claim with respect to the remaining information. Section 552.103 of the Government Code was intended to prevent the use of the Act as a method of avoiding the rules of discovery in litigation. *See* Attorney General Opinion JM-1048 at 4 (1989). The purpose of section 552.103 is to protect a governmental body's position in litigation by forcing parties to obtain information relating to the litigation through the discovery process. *See* Open Records Decision No. 551 (1990). Further, section 552.103 only applies where the litigation involves or is expected to involve the governmental body which is claiming the exception. *See* Open Records Decision No. 392 (1983) (finding predecessor to section 552.103 only applicable to governmental body who has the litigation interest). Section 552.103 provides in pertinent part:

(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

¹ Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.,* Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general).

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 department maintains the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date that the governmental body receives the request for information and (2) the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *see also 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). The department must meet both prongs of this test for information to be excepted under section 552.103(a).

You state that the information pertains to a pending criminal case known as Cause #9146, *The State of Texas vs. Tyrone Abron Walker*, in the 63rd Judicial District Court in Val Verde county. Based on our review of your arguments and the remaining information, we conclude that the department has demonstrated that litigation was pending on the date that the department received the request for information. However, as you acknowledge, the department is not a party to this litigation. Consequently, the department has no section 552.103 interest with respect to the information related to that litigation. *See* Open Records Decision No. 392 (1983). In this type of situation, our office requires an affirmative representation from the governmental body that would be a party to the litigation that it seeks to have the requested information withheld from disclosure under section 552.103. You have not provided us with this affirmative representation. Accordingly, we conclude that the department may not withhold any portion of the remaining information from disclosure pursuant to section 552.103 of the Government Code.

You claim that portions of the information are excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy.² Information is protected by the common-law right of privacy 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. *See Industrial Foundation v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert denied*, 430 U.S. 931 (1977); *see also* Open Records Decision No. 611 at 1 (1992). We note that prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy. *See* Open Records Decision Nos. 545 (1990) (common-law privacy protects personal financial information), 523 (1989) (information related to individual's mortgage payments, assets, bills, and credit history excepted under the common-law right to privacy). We also

² Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Section 552.101 encompasses information protected by the common-law right to privacy.

note that where an individual's criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual's right to privacy. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). Based on our review of your arguments and the entirety of the information, we conclude that the department must withhold the information that we have marked from disclosure pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy.

You also claim that portions of the information are excepted from disclosure pursuant to section 552.117 of the Government Code. Section 552.117(2) excepts from disclosure a peace officer's home address, home telephone number, social security number, and information indicating whether the peace officer has family members, regardless of whether the peace officer made an election under section 552.024 of the Government Code. Section 552.117(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Thus, the department must withhold the information that we have marked from disclosure pursuant to section 552.117(2) of the Government Code.

We note that portions of the information contain driver's license numbers. Section 552.130 of the Government Code excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. *See Gov't Code § 552.130*. We have marked the Texas driver's license numbers that the department must withhold from disclosure pursuant to section 552.130. We also note that one of the Texas driver's license numbers contained within the information is the requestor's client's number. Therefore, we conclude that the department may not withhold this number from disclosure pursuant to section 552.130 of the Government Code. *See Gov't Code § 552.023* (providing that individual has limited special right of access to information when only basis for excepting information from disclosure involves protection of same individual's privacy interest); *see also* Open Records Decision No. 481 (1987).

Finally, we note that a portion of the information appears to be protected by copyright law. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *See Attorney General Opinion JM-672* (1987). However, a governmental body must allow inspection of copyrighted materials, unless an exception to disclosure applies to the information. *See id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. We note that in making such copies the member of the public assumes a duty of compliance with the copyright law and the risk of a copyright infringement suit. *See Open Records Decision No. 550* (1990). Accordingly, the department must allow the requestor to inspect the copyrighted information. However, if the requestor wishes to make copies of such materials, the requestor assumes a duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the department must withhold the information that we have marked from disclosure pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy. The department must withhold the information that we have marked from disclosure pursuant to section 552.117(2) of the Government Code. The department must withhold the Texas driver's license numbers that we have marked from disclosure pursuant to section 552.130 of the Government Code. The department must release the remaining information to the requestor in accordance with copyright law, where applicable.

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).

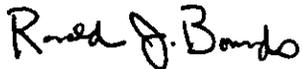
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/seg

Ref: ID# 159994

Enc. Marked documents

cc: Mr. Jeffrey S. Mahl
Attorney at Law
P.O. Box 1191
Del Rio, Texas 78841
(w/o enclosures)