



November 25, 2002

Mr. Gordon Bowman  
Assistant County Attorney  
Travis County  
P.O. Box 1748  
Austin, Texas 78767

OR2002-6749

Dear Mr. Bowman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 172691.

The Travis County Sheriff's Office (the "sheriff") received a request for information relating to two particular cases. You claim that the requested information is excepted from disclosure under sections 552.101, 552.108, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.<sup>1</sup>

Initially, we note that some of the submitted information is subject to 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). In this instance, the submitted documents include a completed report. Thus, this information must be released under section 552.022(a)(1) unless it is expressly confidential under other law or excepted from disclosure under section 552.108.

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<sup>1</sup>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.

As you argue that this information is excepted under sections 552.101, 552.117, and 552.130, which are considered other law for purposes of section 552.022, and under section 552.108, we will address your arguments with respect to the entirety of the submitted information.

You claim that the submitted internal investigation files are protected from disclosure by section 552.108(a)(2) of the Government Code. Section 552.108(a)(2) excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication.

You state that the requested records "relate to a criminal and an internal law enforcement investigation that are closed." After carefully reviewing your arguments and the submitted documents, however, we believe that the submitted information concerns an internal investigation. Section 552.108(a)(2) does not apply to internal administrative investigations that deal with personnel matters. *See Morales v. Ellen*, 840 S.W.2d 519, 526 (Tex. App.—El Paso 1992, writ denied) (concluding that statutory predecessor to section 552.108 does not apply where there is evidence that no criminal investigation or prosecution resulted from an internal police department investigation). The purpose of the law enforcement exception is to prevent law enforcement and crime prevention techniques from being readily available to the public at large. *Id.* (quoting Open Records Decision Nos. 133 (1976), 127 (1976)). It is not, however, a catch-all provision that law enforcement offices can use to protect certain personnel matters from disclosure. "The public has an obvious interest in having access to information concerning the . . . performances of governmental employees, particularly employees who hold positions as sensitive as those held by members of a sheriff's department." Open Records Decision No. 444 at 3 (1986). In this instance, the internal investigations were made as a result of an allegation of "unbecoming conduct" by employees of the sheriff. Because these investigations deal only with internal personnel matters, we find that release of the information would not interfere with law enforcement operations. Therefore, the submitted information may not be withheld from disclosure under section 552.108(a)(2) of the Government Code.

You also claim that witness statements and identities in the submitted information are excepted from disclosure under section 552.108. Where it can be established from an examination of the facts of a particular case that disclosure of witness identities and statements might subject the witnesses to possible intimidation or harassment, that information may be excepted from disclosure under section 552.108. Open Records Decision Nos. 611 (1992), 297 (1981), 252 (1980); *see also* Open Records Decision Nos. 169 (1977) and 123 (1976) (information protected by common law right of privacy if disclosure presents tangible physical danger). You argue that the public release of witness names and statements might "either subject the witnesses/victims to intimidation or harassment or harm the prospects of future cooperation between witnesses and law enforcement authorities." However, after careful review of the submitted information, we find that the sheriff has not established that the public release of witness names and

statements would subject any individual to possible intimidation or harassment or harm the prospects of future cooperation between witnesses and law enforcement authorities. Therefore, you may not withhold witness names or statements under section 552.108 of the Government Code.

You next assert that the submitted information is excepted from disclosure under section 552.101 in conjunction with common-law privacy. The common-law right to privacy is incorporated into the Act by section 552.101, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Information is protected by common-law 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. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 931 (1977); *see also* Open Records Decision No. 611 at 1 (1992).

Most of the submitted documents relate solely to the work behavior and job performance of the sheriff's employees. This office has stated in numerous formal decisions that there is a legitimate public interest in how a public employee conducts himself while on-duty and how he performs his job functions. *See* Open Records Decision Nos. 484 (1987) (public's interest in knowing how police departments resolve complaints against police officers ordinarily outweighs officers' privacy interest), 470 at 4 (1987) (public has legitimate interest in job performance of public employees), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 423 at 2 (1984) (scope of public employee privacy is narrow), 329 (1982) (reasons for an employee's resignation are not ordinarily excepted from disclosure by constitutional or common-law privacy), 444 (1986) (concluding that public has obvious interest in having access to information concerning performances of governmental employees, particularly employees who hold positions as sensitive as those held by members of law enforcement). Since there is a legitimate public interest in the work behavior of public employees and the conditions for their continued employment, the sheriff may not withhold from disclosure all of the information that identifies sheriff employees based on the common-law right to privacy. However, some of the submitted information reflects sexual encounters between sheriff employees and inmates of a correctional facility. The identity of the inmates is confidential under common-law privacy. We have marked the documents accordingly.

You next argue that polygraph information is made confidential under section 552.101 in conjunction with chapter 1703 of the Occupations Code. Chapter 1703 of the Occupations Code codifies the Polygraph Examiners Act. *See* Occ. Code § 1703.001. Section 1703.306 of the Occupations Code provides as follows:

- (a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

(b) The [Polygraph Examiners B]oard or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

*Id.* § 1703.306. *See also* Open Records Decision No. 430 (1985) (results of examination, questions asked, and those marked as control questions confidential under predecessor statute). We find that certain information in the submitted files was obtained through a polygraph examination. Subsection (b) requires any governmental body that acquires information from a polygraph examination to keep the information confidential. Occ. Code § 1703.306(b). It appears that none of the exceptions to confidentiality in section 1703.306 applies. *See* Open Records Decision 565 (1990) (construing predecessor statute). Accordingly, the information we have marked is confidential pursuant to section 1703.306 of the Occupations Code, and is therefore excepted from disclosure under section 552.101 of the Government Code.

We next note that some of the information may be excepted from disclosure pursuant to section 552.117(2) 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. We note, however, that it is unclear whether the individuals whose information appears in the responsive material are presently employed by the sheriff. Furthermore, we are uncertain whether these individuals are still peace officers. If these individuals remain licensed peace officers as defined by article 2.12 of the Code of Criminal Procedure, then the information that we have marked must not be released by the sheriff pursuant to section 552.117(2) of the Government Code. However, if the individuals are no

longer licensed peace officers, then such information relating to them may still be excepted from disclosure under section 552.117(1). Furthermore, if these individuals are no longer peace officers, information relating to them may still be excepted from disclosure under section 552.1175. Accordingly, we address whether section 552.117(1) of the Government Code excepts any of this type of information regarding these individuals from disclosure. We will also address whether section 552.1175 of the Government Code excepts any of the information regarding these individuals from disclosure.

Section 552.117(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(1). However, information that is responsive to a request may not be withheld from disclosure under section 552.117(1) if the employee did not request confidentiality in accordance with section 552.024 or if the request for confidentiality under section 552.024 was not made until after the request for information at issue was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Accordingly, we conclude that the sheriff must withhold from disclosure the marked information regarding the individuals pursuant to section 552.117(1), if they made a request for confidentiality under section 552.024 of the Government Code for this information prior to the date on which the present request was received by the sheriff, regardless of the fact that they may not currently be peace officers. Otherwise, such information regarding these individuals may still be excepted from disclosure under section 552.1175 of the Government Code.

Section 552.1175 provides in pertinent part:

(a) This section applies only to:

...

(2) peace officers as defined by Article 2.12, Code of Criminal Procedure;

...

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(a), (b). We note that to the extent that the individuals are not currently peace officers and did not make a request for confidentiality under section 552.024 of the Government Code for this information prior to the date on which the present request was received by the sheriff, the sheriff must still withhold from disclosure the information that we have marked regarding these individuals pursuant to section 552.1175 of the Government Code, if they otherwise made a proper section 552.1175 election with the sheriff at a time when they were peace officers. Otherwise, we conclude that the sheriff may not withhold any portion of the marked information pursuant to section 552.1175 of the Government Code.

If the individuals at issue did not timely elect to withhold their social security numbers as prescribed by section 552.024 or section 552.1175, the social security numbers may nevertheless be confidential under federal law. A social security number may be withheld from disclosure in some circumstances under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the social security numbers in the submitted information are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 of the Act on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the sheriff pursuant to any provision of law enacted on or after October 1, 1990.

Finally, we note that some of the information in the internal investigation is subject to section 552.130. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

You must withhold from disclosure the motor vehicle information we have marked under section 552.130 of the Government Code.

In summary, the sheriff must withhold from disclosure the information we have marked under section 552.101 in conjunction with common-law privacy. The sheriff must withhold from disclosure the polygraph information we have marked under section 552.101 in conjunction with section 1703.306 of the Occupations Code. We have marked the information that must be withheld from disclosure under section 552.117(2), if the individuals at issue are peace officers as defined by article 2.12 of the Code of Criminal Procedure, or under section 552.117(1), if the individuals made timely elections under section 552.024 of the Government Code. We have marked information the sheriff must withhold from disclosure under section 552.1175 if the individuals have elected confidentiality for information about themselves in accordance with subsection 552.1175(b)(1) and (2). We note that social security numbers may nevertheless be confidential under federal law if these number were obtained or are maintained pursuant to any law enacted after October 1, 1990. Finally, we have marked motor vehicle information the sheriff must withhold from disclosure under section 552.130. The remaining information 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).

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,



V.G. Schimmel  
Assistant Attorney General  
Open Records Division

VGS/sdk

Ref: ID# 172691

Enc: Submitted documents

c: Mr. Derrick Taylor  
c/o Gordon Bowman  
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(w/o enclosures)