



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 29, 2003

Ms. Marva Gay
Assistant County Attorney
Harris County
1019 Congress, 15th Floor
Houston, Texas 77002-1700

OR2003-7778

Dear Ms. Gay:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 190242.

The Harris County Sheriff's Department (the "department") received a request for any and all complaints or allegations made during the employment of a named officer and all files, including but not limited to his personnel files. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108, 552.115, 552.117, 552.1175, 552.119, and 552.130 of the Government Code. We have reviewed the representative sample of information you submitted and considered the exceptions you claim.¹

Initially, we note that the submitted information labeled as "Exhibit B-1" constitutes a completed investigation made of, for, or by the department, which is specifically made public under section 552.022 of the Government Code. Section 552.022(a) provides in pertinent part as follows:

¹We assume 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 those records contain substantially different types of information than that submitted to this office.

(a) Without limiting the amount or kind of information that is public information under this chapter, 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). Because the submitted information is subject to section 552.022(a), the department must release it, unless the information is expressly confidential under other law or excepted under section 552.108 of the Government Code. You claim that the submitted information is excepted under section 552.103 of the Government Code. This section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived; as such, it is not other law that makes information confidential for the purposes of section 552.022. *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 section 552.103); Open Records Decision No. 542 at 4 (1990) (litigation exception does not implicate third party rights and may be waived). Consequently, none of the submitted information in exhibit B-1 may be withheld on the basis of section 552.103. However, you also claim that section 552.108 is applicable to the information in exhibit B-1. We will address your arguments regarding this section.

Section 552.108(b)(2) excepts from disclosure “[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution... if... the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]” A governmental body claiming section 552.108(b)(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. However, section 552.108 is inapplicable to a police department's internal administrative investigation that does not involve the investigation or prosecution of crime. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.); *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied).

The information at issue relates to an administrative investigation into charges of criminal conduct by the named police officer against the requestor, another police officer at the time of the incident. Because the administrative investigation did not involve an investigation or prosecution of crime, the department may not withhold the internal investigation information in exhibit B-1 from disclosure pursuant to section 552.108 of the Government Code.

However, we note that a portion of exhibit B-1 contains information that is confidential under section 552.117 or 552.1175 of the Government Code. Section 552.117(a)(2) excepts

from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of a peace officer regardless of whether the officer made an election under section 552.024 of the Government Code.² Section 552.1175 excepts the present and former home addresses and telephone numbers, social security numbers, and family member information of a county jailer who elected to withhold this information as required by subsection (b).³ To the extent that the submitted information in exhibit B-1 pertains to individuals who are licensed police officers or county jailers it must be withheld under section 552.117(a)(2) or 552.1175.

If these individuals are no longer licensed officers or county jailers, their information is still excepted under section 552.117(a)(1) if they elected, prior to the date the department received the request for information, to keep their information confidential under section 552.024. *See* Open Records Decision No. 530 at 5 (1989) (whether information is protected by section 552.117(a)(1) must be determined at time request for it is made). We have marked the information that must be withheld if section 552.117(a)(1) applies. We note that some of the information you have marked in exhibit B-1 is not excepted under section 552.117 and may not be withheld on that basis because the requestor has a special right of access to his own confidential information. *See* Gov't Code § 552.023(a) (a person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and is protected from public disclosure by laws intended to protect that person's privacy interests). Likewise, the requestor has a special right of access to his own confidential polygraph examination information. *See* Occ. Code § 1703.306(a)(1) (an examinee or any other person specifically designated in writing by the examinee has a specific right of access to information acquired from a polygraph examination). Thus, the department must only withhold the information we have marked if section 552.117 or section 552.1175 applies.

In the event that section 552.117 or section 552.1175 does not apply and a section 552.024 election to keep information confidential was not made, the social security numbers found in exhibit B-1 may be still withheld. Section 552.101 encompasses amendments to the Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), that 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* Open Records Decision No. 622 (1994). We have no basis for concluding that the social security numbers at issue are confidential under section 405(c)(2)(C)(viii)(I) and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing any social security

² "Peace Officer" is defined by article 2.12 of the Code of Criminal Procedure.

³ "County Jailer" is defined by section 1701.001 of the Occupations Code.

number information, you should ensure that such information is not obtained or maintained by the department pursuant to any provision of law, enacted on or after October 1, 1990.

The submitted information in exhibit B-1 also contains information that is confidential under section 552.130 of the Government Code. Section 552.130 excepts from disclosure information related to a motor vehicle operator's or driver's license or permit issued by an agency of this state. *See Gov't Code § 552.130*. Accordingly, the department must withhold the Texas driver's license information we have marked in exhibit B-1.

Finally, exhibit B-1 contains information that is excepted from disclosure under section 552.101 of the Government Code and the doctrine of common-law privacy. Common-law privacy protects information when (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the public has no legitimate interest in the information. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. In addition, this office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See Open Records Decision No. 455 (1987)* (prescription drugs, illnesses, operations, and physical handicaps). Having reviewed the information in exhibit B-1, we find that some of the information is protected by common-law privacy and must therefore be withheld pursuant to section 552.101. We have marked this information.

Finally, we will address your arguments in regard to the non-section 552.022 information found in exhibit B. Section 552.103 of the Government Code provides 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.

A governmental body has 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 the governmental body received the request for information, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas 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).

You inform this office, and provide documentation showing, that the information in exhibit B directly relates to litigation between the requestor and the department that was pending on the date the department received the request for information. The requestor is appealing the termination of his employment by the department. You show that the submitted information is also being sought through discovery in the pending litigation. Based on your representations and our review of the submitted information, we conclude that you have demonstrated that the requested information in exhibit B relates to the pending litigation. Thus, the information in exhibit B is excepted from disclosure pursuant to section 552.103 of the Government Code.⁴

We note that, absent special circumstances, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information and it must be disclosed. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, to the extent that all opposing parties have seen or had access to these records, the department may not now withhold them from disclosure under section 552.103(a). If, however, all opposing parties have not had access to the responsive records, we conclude that the department may withhold these records during the pendency of the litigation under section 552.103(a). See Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982) (stating that applicability of Gov't Code § 552.103(a) ends once litigation has been concluded).

In summary, we conclude that the information in exhibit B may be withheld under section 552.103 of the Government Code. In regards to the submitted information in exhibit B-1, the department must withhold the information we have marked under section 552.117 or 552.1175 if it applies. The department must also withhold the Texas driver's license information we have marked under section 552.130 of the Government Code. Private information we have marked under section 552.101 in conjunction with common-law privacy must be withheld by the department. The remaining submitted information in exhibit B-1 must be released to the requestor.

⁴As section 552.103 is dispositive to the information in exhibit B, we need not address your other claimed exceptions.

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 Dep't of Pub. 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,

A handwritten signature in black ink, appearing to read "Debbie K. Lee". The signature is fluid and cursive, with a long horizontal stroke at the end.

Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/seg

Ref: ID# 190242

Enc. Submitted documents

c: Mr. Robert Amboree
Afro-American Sheriff's Deputy League
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(w/o enclosures)