



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 3, 2004

Ms. Susan Camp-Lee
Sheets & Crossfield, P.C.
309 East Main Street
Round Rock, Texas 78664

OR2004-3595

Dear Ms. Camp-Lee:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 200570.

The Round Rock Police Department (the "department"), which you represent, received four requests from the same requestor for the following information regarding a specified case: (1) a named officer's "Affidavit For Warrant Of Arrest," (2) the "Supplement," as referenced on page two of the incident report, and (3) information regarding two named officers' personnel files. You state that there are no documents responsive to item number one of the request. The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. See *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983). You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.117, 552.122, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that section 552.022 of the Government Code governs some of the submitted information. Section 552.022 provides in relevant part:

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). The submitted information contains completed reports and investigations made of, for, or by the department. Accordingly, you must release this information under section 552.022(a)(1) unless the information is excepted from disclosure under section 552.108 or is expressly confidential under other law. You argue that the requested information is excepted from disclosure under section 552.103. This section is a discretionary exception to disclosure that protects the governmental body's interests and is therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (government body may waive section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (governmental body may waive litigation exception, section 552.103); 522 at 4 (1989) (discretionary exceptions in general). Therefore, you may not withhold the information that is subject to section 552.022(a)(1) under section 552.103 of the Government Code. We note, however, that the information subject to section 552.022(a)(1) in Exhibit D is confidential by law pursuant to section 552.101 of the Government Code. Because section 552.101 constitutes other law for the purposes of section 552.022, we will address this claim with regard to this particular information, as well as the remaining submitted information in Exhibit D and a portion of the submitted information in Exhibit E.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses information made confidential by other statutes. Section 58.007 of the Family Code, which makes confidential juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997, provides in part:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;

- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are

separate and distinct from controls to access electronic data concerning adults; and

(3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

Fam. Code § 58.007(c). Exhibit D and a portion of the submitted information in Exhibit E pertain to allegations of juvenile conduct that occurred after September 1, 1997. Thus, this information is subject to section 58.007, and it does not appear that any of the exceptions in section 58.007 apply. Therefore, the submitted information found in Exhibit D and the information we have marked in Exhibit E are confidential in their entirety under section 58.007(c) of the Family Code and must be withheld from disclosure pursuant to section 552.101 of the Government Code.¹ The remaining section 552.022 information found in Exhibit E must be released except as noted below.

Next, we address your section 552.103 of the Government Code claim with regard to the remaining submitted information not subject to section 552.022. Section 552.103 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.

Gov't Code § 552.103. 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 was 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,

¹ As our ruling on the information found in Exhibit D is dispositive, we do not address your section 552.108 of the Government Code claim for this information.

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 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.² Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You assert that the department reasonably anticipates litigation relating to the subject of the present requests. Upon review of your comments and the submitted information, however, we find that you have not sufficiently established that the department reasonably anticipated litigation on the date the department received the present requests. Consequently, we conclude the department may not withhold the information at issue pursuant to section 552.103 of the Government Code.

We note, however, that among the remaining submitted information is the psychological evaluation of a named police officer. The release of this information is governed by chapter 611 of the Health and Safety Code. Section 611.002 of the Health and Safety Code makes confidential "[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." *See also* Health & Safety Code § 611.001 (defining "patient" and "professional"). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals, including "a person who has the written consent of the patient." Health & Safety Code § 611.004(a)(4). We conclude that the department may release the psychological evaluation that we have marked in Exhibit E only in accordance with the access provisions of chapter 611. Health & Safety Code § 611.002(b); *see id.* §§ 611.004, 611.0045.

² In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

You also assert that a portion of the submitted information is confidential under the Medical Practices Act ("MPA"). The MPA governs the disclosure of medical records. Section 159.002 of the MPA provides in part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

Occ. Code § 159.002(a)-(b). In this instance, the department has not demonstrated that any of the remaining submitted information consists of either a communication between a physician and a patient or a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that was created or is maintained by a physician. We therefore conclude that the MPA is not applicable to the submitted information.

You also claim that a portion of the submitted information is confidential under section 1701.306 of the Occupations Code, which provides as follows:

(a) The commission may not issue a license to a person as an officer or county jailer unless the person is examined by:

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test.

(b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to the commission. A declaration is not public information.

Occ. Code § 1701.306. However, the submitted information does not contain any information that is protected under section 1701.306. Thus, section 1701.306 is not applicable to the remaining submitted information.

Next, criminal history record information ("CHRI") is confidential and not subject to disclosure. 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). Furthermore, when a law enforcement agency compiles information that depicts an individual as a criminal suspect, arrestee, or defendant, the compilation of information takes on a character that implicates the individual's right to privacy in a manner that the same information in an uncompiled state does not. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); Open Records Decision No. 616 at 2-3 (1993). However, the definition of CHRI does not include driving record information maintained by DPS under chapter 521 of the Transportation Code. *See* Gov't Code § 411.082(2)(B). The department must withhold any CHRI falling within the ambit of these state and federal regulations pursuant to section 552.101 of the Government Code.

Section 552.101 also encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types 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 the following types of information are excepted from required public disclosure under common-law privacy: personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 545 (1990), 523 (1989) (individual's mortgage payments, assets, bills, and credit history), certain personal choices relating to financial transactions between the individual and the governmental body, *see* Open Records Decision No. 600 (1992) (designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care), some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review of

the submitted information, we find that a portion of the information is protected by common-law privacy. We have marked the information in Exhibit E that must be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.117(a)(2) excepts from disclosure the present and former home addresses and telephone numbers, social security number, and family member information of a peace officer regardless of whether the officer requests confidentiality for that information under section 552.024 or 552.1175 of the Government Code.³ We note, however, that an individual's personal post office box number is not a "home address" and therefore may not be withheld under section 552.117. *See* Gov't Code § 552.117; Open Records Decision No. 622 at 4 (1994) ("The legislative history of section 552.117(1)(A) makes clear that its purpose is to protect public employees from being harassed at *home*. *See* House Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985); Senate Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985)." (Emphasis added.)); *see also* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express and cannot be implied), 478 at 2 (1987) (language of confidentiality statute controls scope of protection), 465 at 4-5 (1987) (statute explicitly required confidentiality). Thus, the department must withhold the information we have marked under section 552.117(a)(2).

We now address your claim under section 552.122 of the Government Code for a portion of the submitted information highlighted in blue. Section 552.122 excepts from disclosure test items developed by a licensing agency or governmental body. In Open Records Decision No. 626 (1994), this office determined that the term "test item" in section 552.122 includes any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated, but does not encompass evaluations of an employee's overall job performance or suitability. Whether information falls within the section 552.122 exception must be determined on a case-by-case basis. Open Records Decision No. 626 at 6 (1994). Traditionally, this office has applied section 552.122 where release of "test items" might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Additionally, when answers to test questions might reveal the questions themselves, the answers may be withheld under section 552.122(b). *See* Open Records Decision No. 626 at 8 (1994). Upon review, we find that some of the interview questions and answers you have highlighted in blue are test items for the purposes of section 552.122. Thus, the department may withhold the questions and the corresponding responses to these questions that we have marked pursuant to section 552.122. We find, however, that the remaining interview questions and answers are not test items for purposes of section 552.122. Thus, the department may not withhold these questions or the corresponding preferred and actual responses to these questions pursuant to section 552.122.

³ "Peace Officer" is defined by article 2.12 of the Code of Criminal Procedure.

You argue that portions of the submitted information are excepted under section 552.130 of the Government Code. Section 552.130(a) excepts from disclosure information that relates to: “(1) a motor vehicle operator’s or driver’s license or permit issued by an agency of this state; (2) a motor vehicle title or registration issued by an agency of this state; or (3) a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document.” Gov’t Code § 552.130(a)(1)-(3). Thus, the department must withhold the Texas motor vehicle information we have marked pursuant to section 552.130.

The remaining submitted information also contains information that is subject to section 552.136 of the Government Code. Section 552.136 provides:

(a) In this section, “access device” means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov’t Code § 552.136. The department must withhold the information we have marked pursuant to section 552.136.

Finally, we note that a portion of the remaining submitted information is copyrighted. 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). A governmental body must allow inspection of copyrighted materials unless an exception 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. In making such copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the department must withhold the information we have marked in Exhibits D and E pursuant to section 552.101 in conjunction with section 58.007 of the Family Code. Absent the applicability of an access provision, the department must also withhold the mental

health record that we have marked in Exhibit E pursuant to chapter 611 of the Health and Safety Code. To the extent that the requested records contain CHRI, the department must withhold that information pursuant to section 552.101 of the Government Code. The department must withhold the information that we have marked pursuant to sections 552.101 in conjunction with the common-law right to privacy, 552.117(a)(2), 552.130 and 552.136 of the Government Code. The department may withhold the information we have marked pursuant to section 552.122(b) of the Government Code. The remaining submitted information must be released to the requestor in accordance with copyright law.

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,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/seg

Ref: ID# 200570

Enc. Submitted documents

c: Mr. Schon Connaker
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(w/o enclosures)