



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 10, 2004

Ms. Mary E. Reveles
Assistant County Attorney
Fort Bend County
301 Jackson Street, Suite 728
Richmond, Texas 77469-3108

OR2004-4722

Dear Ms. Reveles:

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# 203170.

The Fort Bend County Sheriff (the "sheriff") received a request for thirteen categories of information related to several named individuals, including specified internal affairs investigations, and the sheriff's document retention policy. You state that some information has been released but that some of the requested information does not exist. We note that the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹ We have also considered comments submitted by the requestor. See Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

¹We 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.

Initially, we note that portions of the submitted information consist of completed reports and evaluations made of, for, or by the sheriff. Section 552.022 of the Government Code provides that “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body” constitutes “public information . . . not excepted from required disclosure . . . unless . . . expressly confidential under other law” or excepted from disclosure under section 552.108 of the Government Code. Gov’t Code § 552.022(a)(1). You raise section 552.103 as an exception to disclosure of this information. Section 552.103 is a discretionary exception under the Act and does not constitute “other law” for 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); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Therefore, we do not consider your claims under section 552.103 for this information, which we have marked. However, because information subject to section 552.022(a)(1) may be withheld as provided by sections 552.101, 552.102, 552.108, 552.117, and 552.130, we will address these exceptions for this information, along with the remaining submitted information.

You contend that the information submitted in Exhibits E and F is excepted from disclosure under 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. Section 552.108 is generally not applicable to the records of an internal affairs investigation that is purely administrative in nature. *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, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor not applicable to internal investigation that did not result in criminal investigation or prosecution); *see also* Open Records Decision Nos. 562 at 10 (1990) (predecessor to section 552.108(b) inapplicable to employment information in police officer’s file), 361 at 2-3 (1983) (statutory predecessor to section 552.108(b) inapplicable to background information collected on unsuccessful applicant for employment with sheriff’s department), 350 at 3-4 (1982). You do not inform us, and the submitted information does not otherwise indicate, that the investigations to which the information at issue relates have resulted in any criminal investigations or charges. We therefore conclude that the sheriff has not demonstrated that the information at issue is excepted from disclosure under section 552.108, and Exhibits E and F may not be withheld on that basis.

We next address your claim that the remaining submitted information not subject to section 552.022 is excepted from disclosure pursuant to section 552.103 of the Government Code. 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 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, 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).

You indicate that the information at issue is related to litigation that is currently pending, but to which the sheriff is not a party. Because the sheriff is not a party to the pending litigation, the sheriff may not withhold the information at issue under section 552.103. See Open Records Decision No. 392 (1983) (litigation exception only applies where litigation involves or is expected to involve governmental body that is claiming exception).

You claim that portions of the submitted information are excepted from public disclosure under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information another statute makes confidential. Section 1701.306 of the Occupations Code governs certain declarations of medical condition and of psychological and emotional health and provides:

(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 (emphasis added). We have marked the information that must be withheld under section 552.101 in conjunction with section 1701.306 of the Occupations Code.

The submitted information also includes a Report of Resignation or Separation of License Holder addressed to the Texas Commission on Law Enforcement (“the commission”). This form, commonly referred to as an “F-5,” is made confidential by section 1701.454 of the Occupations Code. Section 1701.452 requires that a law enforcement agency submit a report to the commission regarding an officer licensed under chapter 1701 who resigns or is terminated from the law enforcement agency. *See* Occ. Code § 1701.452. Section 1701.454 provides in relevant part:

(a) A report or statement submitted to the commission under this subchapter is confidential and is not subject to disclosure under Chapter 552 of the Government Code.

Occ. Code § 1701.454. Therefore, the sheriff must withhold the F-5 pursuant to section 552.101 in conjunction with section 1701.454 of the Occupations Code.

We note that the submitted records contain fingerprint information, the public availability of which is governed by sections 560.001, 560.002, and 560.003 of the Government Code. These sections provide as follows:

Sec. 560.001. DEFINITIONS. In this chapter:

(1) “Biometric identifier” means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.

(2) “Governmental body” has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 560.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

(1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:

(A) the individual consents to the disclosure;

(B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or

(C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and

(2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 560.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

Gov't Code §§ 560.001, 560.002, 560.003. There is no indication that the requestor has a right of access to this information under section 560.002. Therefore, the sheriff must withhold the fingerprint information that we have marked under section 552.101 in conjunction with section 560.003 of the Government Code.

We note that some of the submitted records pertain to juveniles. Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential under section 58.007. The relevant language of section 58.007(c) reads as follows:

(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(e)(1)-(3). A portion of the submitted information involves juvenile conduct that occurred after September 1, 1997. It does not appear that any of the exceptions in section 58.007 apply; therefore, the information that we have marked is confidential pursuant to section 58.007(c) of the Family Code. You must withhold the marked information from disclosure under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code.

You next assert that portions of the submitted information are excepted from disclosure under section 552.102 of the Government Code, which excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.— Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 683-85 (Tex. 1976) for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101 of the Act. See *Industrial Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). Accordingly, we will consider your section 552.101 and section 552.102 privacy claims together.

For information to be protected from public disclosure by the common law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation*. In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. 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. 540 S.W.2d at 683.

This office has since concluded that the following types of information are also excepted from disclosure under section 552.101 in conjunction with the common law right to privacy: 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); personal financial information not relating to a 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); identities of juvenile offenders, *see* Open Records Decision No. 394 at 4-5 (1983); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

However, the work behavior of a public employee is a matter of legitimate public interest not protected by the common law right of privacy. Open Records Decision No. 438 (1986). Similarly, information about a public employee's qualifications, disciplinary action and background is not protected by common law privacy. Open Records Decision No. 444 (1986) (public has obvious interest in having access to information concerning qualifications and performances of governmental employees, particularly employees who hold positions as sensitive as those held by members of sheriff's department); *see also* Open Records Decision No. 562 at 9, n.2 (1990) (public has interest in preserving credibility and effectiveness of police force).

Based on our review of your arguments and the submitted information, we find that portions of the submitted information are protected by the common-law right to privacy and, thus, must be withheld pursuant to sections 552.101 and 552.102 of the Government Code. We have marked this information accordingly.

You also assert that the submitted records contain information that is excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(2) excepts from required public disclosure the home address, home telephone number, social security number, and the family member information of a peace officer as defined by article 2.12 of the Code of Criminal Procedure. *See* Open Records Decision No. 622 (1994). The sheriff must withhold those portions of the records that reveal peace officers' home addresses, home telephone numbers, and social security numbers. The sheriff must also withhold the officers' *former* home addresses and telephone information from disclosure. *See* Open Records Decision No. 622 (1994). We have marked the information in the submitted records that the sheriff must withhold under section 552.117(a)(2).

Section 552.117(a)(1) may also be applicable to some of the submitted information. Section 552.117(a)(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. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the sheriff may only withhold information

under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. For those employees who timely elected to keep their personal information confidential, the sheriff must withhold the employees' home addresses and telephone numbers, social security numbers, and any information that reveals whether these employees have family members. The sheriff may not withhold this information under section 552.117(a)(1) for those employees who did not make a timely election to keep the information confidential.

We also note that the sheriff may be required to withhold some of the submitted information pursuant to section 552.1175 of the Government Code. Section 552.1175 also applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure and provides in pertinent part:

(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(b). The submitted information contains personal information of other "officers" who do not work for the sheriff. If any of these individuals are currently peace officers and elect to restrict access to this information in accordance with section 552.1175, the sheriff must withhold the information we have marked. Otherwise, the sheriff must release this information.

We note that social security numbers that are not otherwise excepted from disclosure under sections 552.117 or 552.1175 might nevertheless be excepted from disclosure 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 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 Act imposes criminal penalties for the release of confidential

information. Prior to releasing any social security number, the sheriff should ensure that it did not obtain or maintain the social security number pursuant to any provision of law enacted on or after October 1, 1990.

The submitted document also contains information that is subject to section 552.130 of the Government Code. Section 552.130 excepts information relating to a Texas motor vehicle driver's license and information relating to a Texas motor vehicle title or registration. Gov't Code § 552.130. The sheriff must withhold the Texas motor vehicle record information that we have marked pursuant to section 552.130 of the Government Code.

In summary, we have marked the information that must be withheld under section 552.101 of the Government Code in conjunction with sections 1701.306 and section 1701.454 of the Occupations Code. The sheriff must withhold the fingerprint information that we have marked under section 552.101 in conjunction with section 560.003 of the Government Code. We have marked information pertaining to juveniles that the sheriff must withhold from disclosure under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code. Portions of the submitted information, which we have marked, are protected by the common law right to privacy and must be withheld pursuant to sections 552.101 and 552.102 of the Government Code. The sheriff must withhold the information that we have marked pursuant to sections 552.117(a)(2) and 552.130 of the Government Code. For those employees who timely elected to keep their personal information confidential, the sheriff must withhold the employees' home addresses and telephone numbers, social security numbers, and any information that reveals whether these employees have family members under section 552.117(a)(1). The sheriff must withhold the information we have marked for individuals who are currently peace officers and elect to restrict access to this information in accordance with section 552.1175 of the Government Code. Social security numbers that are not otherwise excepted from disclosure under sections 552.117 or 552.1175 may be excepted from disclosure under section 552.101 in conjunction with federal law. The remaining submitted 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 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 203170

Enc. Submitted documents

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