



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 20, 2005

Mr. F. C. Schneider
Criminal District Attorney
Caldwell County
P. O. Box 869
Lockhart, Texas 78644

OR2005-11451

Dear Mr. Schneider:

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# 238552.

The Caldwell County Sheriff (the "sheriff") received a request for records relating to three named employees involved in two specific incidents. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the sheriff's obligations under section 552.301 of the Government Code. Subsections (a) and (b) of section 552.301 require a governmental body requesting an open records ruling from this office to "ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request." Gov't Code § 552.301(a), (b). While you raised sections 552.101 and 552.102 within the ten-business-day time period as required by subsection 552.301(b), you did not raise section 552.108 until after the ten-business-day deadline had passed. Section 552.108 is a discretionary exception to disclosure that protects a governmental body's interests and is generally waived by the governmental body's failure to comply with section 552.301 of the Government Code. *See* Open Records Decision No. 177 (1977) (governmental body may waive statutory predecessor to section 552.108); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the sheriff may not withhold any of the submitted information under section 552.108 of the Government Code.

The sheriff claims section 552.102 for all of the requested information. Section 552.102 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 (Tex. 1976), for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Therefore, information must be withheld from the public 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. *Id.* at 685; Open Records Decision No. 611 at 1 (1992).

The submitted records relate solely to the work behavior and job performance of county employees, and, as such, cannot be deemed to be outside the realm of public interest. *See* Open Records Decision Nos. 470 (1987) (public employee’s job performance does not generally constitute his private affairs), 455 (1987) (public employee’s job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (statutory predecessor applicable when information would reveal intimate details of highly personal nature), 405 at 2 (1983) (manner in which employee performed his job cannot be said to be of minimal public interest), 400 at 5 (1983) (statutory predecessor protected information only if its release would lead to clearly unwarranted invasion of privacy). Therefore, based on our review of the information, we conclude that the personnel records of the employees are not protected from disclosure under common law privacy, and the sheriff may not withhold the information on this basis.

However, some of the submitted information may be subject to section 552.117. Section 552.117(a)(2) of the Government Code excepts from disclosure the home address, home telephone number, personal cellular telephone number, social security number, and family member information of a peace officer, regardless of whether the peace officer complies with sections 552.024 or 552.1175. Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. However, we note that section 552.117 only encompasses a personal cellular telephone or pager number that is not paid for by a governmental body. *See* Open Records Decision Nos. 670 (section 552.117 includes personal pager numbers), 506 at 5-6 (1988) (section 552.117 not applicable to cellular mobile phone numbers paid for by governmental body and intended for official use). Therefore, to the extent the information we have marked pertains to the home telephone number or personal cellular telephone or pager number of a peace officer that is not paid for with government funds, this information must be withheld under section 552.117(a)(2).

To the extent that the individuals whose information is at issue are not currently licensed peace officers, but are current or former employees of the sheriff, section 552.117(a)(1) may apply. Section 552.117(a)(1) excepts from disclosure the home address, home telephone number, personal cellular phone number, social security numbers, and family member information of current or former official or employee of a governmental body who requests

that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 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(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the employees timely elected to keep their home telephone number confidential, the sheriff must withhold the home telephone or personal cellular or pager number under section 552.117(a)(1), provided the service was not paid for with government funds. The sheriff may not withhold the home telephone number or personal cellular telephone number under section 552.117(a)(1) if the employees did not make timely elections to keep the information confidential.

Some of the submitted information may also be excepted under section 552.1175 of the Government Code. This exception provides in relevant part:

(a) This section applies only to:

...

(2) county jailers as defined by Section 1701.001, Occupations Code[.]

(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). Thus, pursuant to section 552.1175(a), the sheriff must withhold the home telephone number or personal cellular telephone or pager number we have marked under section 552.1175 if the service was not paid for with government funds and the number relates to a commissioned county jailer who elects to restrict access to the information in accordance with section 552.1175(b).

Section 552.130 excepts from disclosure certain motor vehicle information. 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[.]

Gov't Code § 552.130. Therefore, the sheriff must withhold from disclosure the Texas drivers' license numbers under section 552.130.

Finally, the submitted information contains social security numbers. Section 552.147 of the Government Code¹ provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. Therefore, the sheriff must withhold the social security numbers we have marked under section 552.147.²

In summary, to the extent the information we have marked pertains to the home telephone number or personal cellular telephone number of a peace officer, this information must be withheld under section 552.117(a)(2). If the employees timely elected to keep their home telephone number confidential, the sheriff must withhold the home telephone or personal cellular or pager number under section 552.117(a)(1), provided the service was not paid for with government funds. The sheriff must withhold the home telephone number or personal cellular telephone number we have marked under section 552.1175 if it relates to a commissioned county jailer who elects to restrict access to the information in accordance with section 552.1175(b). The sheriff must withhold the marked Texas drivers' license numbers under section 552.130. The sheriff must withhold the social security numbers we have marked. The remaining information must be released.

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

¹Added by Act of May 23, 2005, 79th Leg., R.S., S.B. 1485, § 1, sec. 552.147(a) (to be codified at Tex. Gov't Code § 552.147).

²We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,



José Vela III
Assistant Attorney General
Open Records Division

JV/krl

Ref: ID# 238552

Enc. Submitted documents

c: Laura J. Adair
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(w/o enclosures)