ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

March 16, 2006

Mr. David K. Walker
County Attorney
207 West Phillips, 1st Floor
Conroe, Texas 77301

OR2006-02636

Dear Mr. Walker:

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# 244154.

The Montgomery County Sheriff's Department (the "department") received a request for eight categories of information relating to department policies and four named officers. You state that you have released portions of the requested information to the requestor. You claim that portions of the submitted information are excepted from disclosure pursuant to sections 552.101, 552.103, 552.107, 552.108, 552.111, 552.115, 552.117, 552.1175, 552.130, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We begin by noting that some of the submitted information is not responsive to the instant request. We have marked this information, which the department need not release in response to this request and this ruling will not address that information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd).

Next, we must address the department's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply not later than the tenth business day after the date of receiving the written request. Additionally, pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business

days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. You state that the department received the present request on December 1, 2005. The department did not request a decision from this office until January 6, 2006. Consequently, the department failed to request a decision within the ten-business-day period mandated by section 552.301(b) of the Government Code. Additionally, you did not provide this office with the required documents within the fifteen-business-day period mandated by section 552.301(e) of the Government Code. Based on the foregoing, we conclude that you failed to comply with section 552.301.

You argue that, because the department provided the requestor with an estimate of charges for responding to the request, the department's deadlines under section 552.301 were tolled until the department received a response to its estimate. Thus, we understand you to argue that the department's deadlines under section 552.301 were tolled pursuant to section 552.2615 of the Government Code. Section 552.2615 requires a governmental body to provide a requestor with an estimate of charges when a request to inspect a paper record will result in imposition of a charge that will exceed forty dollars. *See* Gov't Code § 552.2615; *see also* id. § 552.271 (providing that governmental body may charge for anticipated personnel costs for making available for inspection information that exists in paper records only if information specifically requested is older than five years or will completely fill six or more archival boxes and more than five hours will be required to make information available for inspection). You also state that the department submitted an estimate of costs pursuant to section 552.263 of the Government Code to the requestor on December 15, 2005. *See id.* § 552.263 (providing that officer for public information or officer's agent may require deposit or bond for payment of anticipated costs for preparation of copy of public information if officer or officer's agent has provided requestor with required written itemized statement detailing estimated charge for providing copy and if charge is estimated to exceed $100, if governmental body has more than 15 full-time employees or $50, if governmental body has fewer than 16 full-time employees).

You advise us that the department received a letter from the requestor indicating that he would pay the costs associated with copying expenses on December 23, 2005. Thus, you contend that the department timely submitted the request for decision to us. However, the provision of an itemized estimate of charges to a requestor under section 552.2615 does not excuse a governmental body from complying with its deadlines under section 552.301. *See* Gov't Code § 552.2615(g) (deadlines imposed by section 552.2615 do not affect application of time deadline imposed on governmental body under subchapter G of the Government Code). Further, we note that section 552.263 provides, in relevant part, that "[f]or purposes of *Subchapter E*, a request for a copy of public information is considered to have been received by a governmental body on the date the governmental body receives the deposit or

bond for payment of anticipated costs or unpaid amount . . .." Gov't Code § 552.263(e) (emphasis added). Section 552.301 of the Government Code is found in subchapter G of chapter 552 of the Government Code. While the legislature expressly indicated that the requirements of subchapter E do not take effect until the governmental body requesting a deposit or bond under section 552.263 receives the deposit or bond, the legislature did not specifically provide for the same result regarding the deadlines found in subchapter G of section 552.301. We find that the legislature's inclusion of a specific provision allowing for the tolling of the requirements in subchapter E coupled with its omission of a specific provision allowing for the tolling of deadlines under subchapter G reveals that the legislature did not intend for the deadlines of subchapter G, and specifically section 552.301, to be tolled until a governmental body receives a deposit or bond required under section 552.263. *See Maley v. 7111 Southwest Freeway, Inc.*, 843 S.W.2d 229, 231 (Tex. App.—Houston [14th Dist.] 1992, writ denied) ("an express listing of certain persons, things, consequences, or classes is equivalent to an express exclusion of all others"); *see also Tex. Real Estate Comm'n v. Century 21 Security Realty, Inc.*, 598 S.W.2d 920, 922 (Tex. Civ. App.—El Paso 1980, writ ref'd n.r.e.) (same); *State v. Jones*, 570 S.W.2d 122, 123 (Tex. App.—Austin 1978, no pet.). Consequently, we find that a governmental body is required to request a decision from this office within ten business days of the date it receives a request for information, even if the governmental body has not yet received a deposit or bond required of the requestor under section 552.263 of the Government Code. Therefore, the department's deadlines were not tolled by providing the requestor with an estimate of charges.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). You claim sections 552.103, 552.107, 552.108, and 552.111 of the Government Code. However, these exceptions are discretionary exceptions under the Act and do not constitute compelling reasons sufficient to overcome the presumption of openness. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision Nos. 676 at 11-12 (2002) (claim of attorney-client privilege under section 552.107 or Texas Rule of Evidence 503 does not provide compelling reason for purposes of section 552.302 if it does not implicate third-party rights), 663 at 5 (1999) (governmental body may waive sections 552.103, 552.107, and 552.111), 665 at 2 n.5 (2000) (discretionary exceptions in general), 470 (1987) (statutory predecessor to section 552.111 is discretionary exception). Therefore, you may not withhold the requested information under sections 552.103, 552.107, or 552.111 of the Government Code. Normally, a compelling interest is demonstrated when some other source of law makes the information at issue confidential or third-party interests are at stake. *See* Open

Records Decision No. 150 at 2 (1977). The need of a governmental body, other than the agency that is seeking an open records decision, to withhold information under section 552.108 of the Government Code can provide a compelling reason to withhold information from disclosure. Open Records Decision No. 586 (1991). Because you inform us that the Montgomery County District Attorney's Office (the "district attorney") objects to the release of the requested information, we will consider your claim regarding section 552.108. Additionally, you claim sections 552.101, 552.115, 552.117, 552.1175, 552.130, and 552.147 of the Government Code as exceptions to disclosure. These exceptions can provide compelling reasons for overcoming the presumption of openness. *See* Open Records Decision No. 150 at 2 (1977). Accordingly, we will address your arguments under these sections.

Section 552.108 provides in pertinent part:

> (a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:
>
> > (1) release of the information would interfere with the detection, investigation or prosecution of crime;

Gov't Code § 552.108(a)(1). We note that where an incident involving allegedly criminal conduct is under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information that relates to the incident. *See* Open Records Decision Nos. 474 (1987), 372 (1983); *see also* Open Records Decision No. 586 (1991) (need of another governmental body to withhold requested information may provide compelling reason for nondisclosure under section 552.108).

In this case, the department informs us that the submitted information pertains to a pending criminal investigation. Further, the district attorney states the submitted information relates to a case "currently pending in the 9th Judicial District Court of Montgomery County" and that the "release of any information complied to date would hamper the prosecution of the alleged offense." You have not demonstrated, however, how the requested personnel file in Exhibit I relates to the pending prosecution nor how the release of the submitted information in Exhibit I would interfere with law enforcement or crime enforcement. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases); Open Records Decision No. 562 at 10 (1990) (statutory predecessor to section 552.108 normally not applicable to general personnel information or information concerning complaints filed against law enforcement officer). We therefore find that none of the submitted information in Exhibit I may be withheld under section 552.108(a)(1) of the Government Code.

Next, section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This provision encompasses information made confidential by federal law. An I-9 Form is governed by title 8, section 1324a of the United States Code, which provides that the form "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. 8 U.S.C. § 1324a(b)(5). Release of this document under the Act would be "for purposes other than for enforcement" of the referenced federal statute. Accordingly, we conclude that the submitted I-9 Form is confidential for purposes of section 552.101 of the Government Code and may only be released in compliance with the federal laws and regulations governing the employment verification system.

The submitted information contains an F-5 form (Report of Separation of License Holder), which is made confidential by section 1701.454 of the Occupations Code. Section 1701.454 provides in relevant part that "[a] report or statement submitted to [Texas Commission on Law Enforcement Officer Standards and Education (the "commission")] under this subchapter is confidential and is not subject to disclosure under Chapter 552 of the Government Code. Occ. Code § 1701.454(a). The department must withhold the F-5 forms pursuant to section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

Section 552.101also encompasses criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center. Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. 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). After reviewing the information at issue, we agree that some of it consists of CHRI. Accordingly, we have marked the CHRI that must be withheld under section 552.101 of the Government Code. The remaining information at issue is not CHRI and may not be withheld on that basis.

You also argue that the submitted fingerprint information is excepted from disclosure under section 552.101 in conjunction with chapter 560 of the Government Code. Chapter 560 of

the Government Code provides that a governmental body may not release fingerprint information except in certain limited circumstances. *See* Gov't Code §§ 560.001 (defining "biometric identifier" to include fingerprints), .002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), .003 (providing that biometric identifiers in possession of governmental body are exempt from disclosure under Act). You do not inform us and the submitted information does not indicate that section 560.002 permits the disclosure of the submitted fingerprint information. Therefore, we agree that the fingerprint information we have marked is confidential under section 560.003 and must be withheld under section 552.101.

The submitted information includes an L-2 Declaration of Medical Condition and an L-3 Declaration of Psychological and Emotional Health required by the commission. These declarations are confidential pursuant to section 1701.306 of the Occupations Code, which 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. Therefore, the department must withhold the L-2 and L-3 declarations under section 552.101 in conjunction with section 1701.306 of the Occupations Code.

You claim that a portion of the remaining information is protected by common law privacy, which is also encompassed by section 552.101. The common law right of privacy protects information that is 1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and 2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (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. 540 S.W.2d at 683.

In addition, this office has found that the following types of information are excepted from required public disclosure under common law 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, specific illnesses, procedures, and physical disabilities); and personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision No. 600 (1992) (designation of beneficiary of employee's retirement benefits and optional insurance coverage). However, there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See, e.g.,* Open Record Decision 545 at 4 (1990) (attorney general has found kinds of financial information not excepted from public disclosure by common law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities); Gov't Code § 552.022(a)(2) (providing for required public disclosure of name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of governmental body). We have marked the information that is confidential under common law privacy and excepted from release under sections 552.101.

The department also asserts that the submitted birth certificates must be withheld under section 552.115 of the Government Code. This section provides that a birth record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official is excepted from required public disclosure except that "a birth record is public information and available to the public on and after the 75th anniversary of the date of birth as shown on the record filed with the bureau of vital statistics or local registration official." Since section 552.115 only applies to a birth certificate maintained by the bureau of vital statistics or local registration official, the department may not withhold the certificates of birth registration pursuant to that provision. *See* Open Records Decision No. 338 (1982).

You claim that the documents contain information that is excepted from disclosure pursuant to section 552.117 of the Government Code. Section 552.117(a)(2) excepts from disclosure the current and former home addresses and telephone numbers, pager number, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 or 552.1175.[1] Section 552.117(a)(1) protects the current and former home addresses and telephone numbers, social security number, and family member information of a current or former employee of a governmental body who requests that the information be kept

---

[1]Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure.

confidential under section 552.024. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not make a timely election under section 552.024 to keep the information confidential.

To the extent that the information that we have marked under section 552.117 relates to an individual who was a peace officer when the department received this request for information, the marked information must be withheld under section 552.117(a)(2). To the extent that the marked information does not relate to a peace officer, the information must be withheld under section 552.117(a)(1) if the individual to whom it relates requested confidentiality for the information under section 552.024 prior to the departments's receipt of this request.[2]

You claim that some of the remaining information is confidential under section 552.130 of the Government Code, which provides, in relevant part:

> (a) Information is excepted from the requirements 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. We have marked the Texas motor vehicle record information that must be withheld under section 552.130.

Next, the submitted information contains insurance policy numbers. Section552.136 of the Government Code states that "[n]otwithstanding 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, therefore, withhold the marked insurance policy number under section 552.136.

---

[2]As section 552.117 of the Government Code is dispositive, we do not address section 552.1175 for this information.

We note that the remaining submitted information contains military discharge information. Section 552.140 of the Government Code provides in relevant part:

> (a) This section applies only to a military veteran's Department of Defense Form DD-214 or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003.

Gov't Code § 552.140(a). Section 552.140 provides that a military veteran's DD-214 form or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003 is confidential for a period of seventy-five years and may only be disclosed in accordance with section 552.140 or in accordance with a court order. *See* Gov't Code § 552.140(a), (b). You do not indicate when the department first came into possession of the submitted DD-214 form. Therefore, if this form came into the department's possession on or after September 1, 2003, we conclude that the department must withhold this information, which we have marked, under section 552.140. Otherwise, the form must be released, subject to the markings we have made under sections 552.117 and 552.147.

The submitted information contains social security numbers. Section 552.147 of the Government Code provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. Therefore, the department must withhold the social security numbers we have marked in the submitted information under section 552.147.[3]

In summary: (1) the submitted I-9 Form is confidential for purposes of section 552.101 of the Government Code and may only be released in compliance with the federal laws and regulations governing the employment verification system; (2) the department must withhold the F-5 form pursuant to section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code; (3) we have marked information that must be withheld under section 552.101 in conjunction with section 411.083 of the Government Code; (4) the fingerprint information we have marked must be withheld under section 552.101 in conjunction with section 560.003 of the Government Code; (5) the submitted Declaration of Medical Condition and Declaration of Psychological and Emotional Health are confidential under 1701.306 of the Occupations Code and must be withheld under section 552.101; (6) we have marked information that must be withheld under section 552.101 in conjunction with common law privacy; (7) to the extent that the information that we have marked under section 552.117 relates to an individual who was a peace officer when the department received this request for information, the marked information must be withheld

---

[3]We 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.

under section 552.117(a)(2), and to the extent that the marked information does not relate to a peace officer, the information must be withheld under section 552.117(a)(1) if the individual to whom it relates requested confidentiality for the information under section 552.024 prior to the departments's receipt of this request; (8) the department must withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code; (9) the department must withhold the insurance policy number we have marked under section 552.136 of the Government Code; (10) the military discharge record which we have marked must be released or withheld in compliance with section 552.140 of the Government Code; and (11) the department must withhold the social security numbers we have marked in the submitted information under section 552.147. 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, 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,

James Forrest
Assistant Attorney General
Open Records Division

JF/sdk

Ref: ID# 244154

Enc. Submitted documents

c: Mr. Erik Berglund
Attorney at Law
300 West Davis, Suite 515
Conroe, Texas 77301
(w/o enclosures)