



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 5, 2006

Mr. Robert J. Davis  
Matthews, Stein, Shiels, Pearce, Knott, Eden & Davis, L.L.P.  
8131 LBJ Freeway, Suite 700  
Dallas, Texas 75251

OR2006-05861

Dear Mr. Davis:

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# 251034.

The Collin County Sheriff's Office (the "sheriff's office"), which you represent, received a request for the personnel file and an investigation file regarding the requestor's client. You state that the sheriff's office is releasing the personnel file to the requestor but claim that the submitted investigation file is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the submitted internal investigation is subject to section 552.022 of the Government Code. Specifically, section 552.022(a)(1) provides that

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 completed internal investigation was made of, for, or by the sheriff's office. Completed investigations must be released under section 552.022(a)(1)

unless excepted from disclosure under section 552.108 or expressly confidential under other law. Although you claim this information is excepted from disclosure under section 552.103 of the Government Code, we note that this exception is a discretionary exception to disclosure that does not constitute "other law" for the purposes of section 552.022.<sup>1</sup> Accordingly, the sheriff's office may not withhold the submitted information under section 552.103 of the Government Code. You also raise the common-law informer's privilege, as incorporated by section 552.101 of the Government Code. The common-law informer's privilege is "other law" for the purpose of section 552.022. See *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); *Tex. Comm'n on Envtl. Quality v. Abbott*, No. GN-204227 (126th Dist. Ct., Travis County, Tex.). Thus, we will consider your arguments under the common-law informer's privilege. Additionally, because information subject to section 552.022(a)(1) can be excepted from disclosure under section 552.108, we will address your arguments under this exception as well.

Prior to reaching your arguments, however, we note that the submitted investigation contains information relating to polygraph examinations. Section 552.101 of the Government Code exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information made confidential by other statutes and is considered "other law" for purposes of section 552.022. Access to information obtained during the course of a polygraph examination is governed by section 1703.306 of the Occupations Code. Section 1703.306 provides as follows:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;

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<sup>1</sup>Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. See, e.g., Open Records Decision Nos. 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 522 at 4 (1989) (discretionary exceptions in general); see also *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). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential for purposes of section 552.022.

- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

(b) The [Polygraph Examiners B]oard or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Occ. Code § 1703.306. The requestor's client is one of the polygraph examinees. Accordingly, under section 1703.306(a)(1), the requestor has a specific right of access to the information that relates to his client's polygraph examination and it must be released to him. *See id.* However, the requestor does not have a right of access to the polygraph information of the other examinee. We have marked the polygraph information of the other examinee, which must be withheld under section 552.101 of the Government Code in conjunction with 1703.306 of the Occupations Code.

We next address your claim under section 552.108 of the Government Code with respect to the remaining information at issue. You claim this information is subject to subsections 552.108(a)(1) and 552.108(b)(1), which provide as follows:

(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[.]

...

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

- (1) release of the internal record or notation would interfere with law enforcement or prosecution[.]

Gov't Code § 552.108(a)(1), (b)(1). Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* § 552.301(e)(1)(a); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). However, section 552.108 is generally not applicable to internal administrative records that do not involve the investigation or prosecution of crime. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex.

App.—Austin 2002, no pet.); *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution).

The information at issue consists of an internal investigation into the alleged misconduct of the requestor's client. As mentioned above, section 552.108 does not generally apply to internal administrative records that do not involve the investigation or prosecution of crime. Although you assert that "there is still the possibility that other agencies may be investigating this matter for possible criminal conduct[,] you have not stated that the information at issue pertains to any specific criminal investigation or prosecution being conducted by any law enforcement agency. Further, we also find you have not adequately explained how the release of any of this information would interfere in some way with the detection, investigation, or prosecution of crime. Thus, we conclude that you have not met your burden under section 552.108, and the sheriff's office may therefore not withhold any of the remaining submitted information on that basis.

We next address your claim under the common-law informer's privilege. The informer's privilege, incorporated into the Act by section 552.101, has long been recognized by Texas courts. See *Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). This privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). It protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. See Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988).

In support of your informer's privilege claim, you state that "[b]ecause of the very nature of the allegations discussed in the investigation, its disclosure would necessarily reveal the identity of the complainant(s) and/or witnesses, regardless of whether such identities and statements were redacted or entirely excluded [and that the] investigation file clearly contains information protected under the informer's privilege [that] should be exempted entirely from disclosure." The submitted investigation indicates that it involves the alleged violation of a sheriff's office policy regarding employee conduct, specifically "Policy 110.180 Personal Conduct (b) General Orders." You have not identified any criminal or civil statute involved in the submitted report. Moreover, the submitted investigation indicates that the requestor's client, who is the subject of the investigation, already knows the identities of some of the complainants. See Open Records Decision Nos. 515 at 3, 208 at 1-2. Upon review of your arguments and the information at issue, we conclude that you have not demonstrated the applicability of the informer's privilege in this instance, and none of the remaining submitted information may be withheld under section 552.101 on that basis.

We note that some of the remaining submitted information is subject to sections 552.101 and 552.130 of the Government Code.<sup>2</sup> Section 552.101 encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. We have marked the information that the sheriff's office must withhold under section 552.101 and common-law privacy.

Section 552.130 excepts from disclosure information that relates to a driver's license or motor vehicle title or registration issued by an agency of this state. Gov't Code § 552.130. Therefore, the sheriff's office must withhold the Texas license plate number that we have marked pursuant to section 552.130.

In summary, the sheriff's office must (1) release the information that relates to the polygraph examination of the requestor's client in accordance with section 1706.306(a)(1) of the Occupations Code; (2) withhold the information that relates to the polygraph examination of the other examinee, which we have marked, under section 552.101 of the Government Code in conjunction with 1706.306 of the Occupations Code; (3) withhold the private information we have marked under section 552.101 in conjunction with common-law privacy; (4) withhold the Texas license plate number that we have marked under section 552.130 of the Government Code; and (5) release the remaining submitted information.<sup>3</sup>

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

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<sup>2</sup>Section 552.130 is also considered "other law" for purposes of section 552.022 of the Government Code.

<sup>3</sup>Because some this information would not be releasable with respect to the general public, if the sheriff's office receives a future request for this information from a person other than the requestor or his client, the sheriff's office should again seek our decision.

full benefit of such an appeal, the governmental body must file suit within ten 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); *Tex. 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 ten calendar days of the date of this ruling.

Sincerely,



Robert B. Rapfogel  
Assistant Attorney General  
Open Records Division

RBR/eb

Ref: ID# 251034

Enc. Submitted documents

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