



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 30, 2006

Ms. Jo-Christy Brown
Brown & Carls L.L.P.
106 East 6th Street, Suite 550
Austin, Texas 78701

OR2006-07033

Dear Ms. Brown:

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# 253036.

The Lampasas Police Department (the "department"), which you represent, received a request for 17 categories of information relating to a named police officer. You state that a responsive videotape has been released. You have submitted information that you claim is exempted from disclosure under section 552.103 of the Government Code. You also seek to withhold some of the submitted information under sections 552.101, 552.117, 552.122, 552.130, and 552.147 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.

We first note that some of the submitted information falls within the scope of section 552.022 of the Government Code. Section 552.022(a) provides for the required public disclosure of "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). Thus, the officer's completed evaluations must be released under section 552.022 unless they are expressly confidential under other law or exempted from disclosure under section 552.108 of the Government Code. You do not raise section 552.108.

Although you seek to withhold the section 552.022 information under section 552.103 of the Government Code, that section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; *Dallas Area Rapid*

Transit v. Dallas Morning News, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (Gov't Code § 552.103 may be waived); Open Records Decision No. 665 at 2 n.5 (discretionary exceptions generally). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the department may not withhold any of the information that is subject to section 552.022 under section 552.103. Sections 552.101, 552.117, 552.130, and 552.147 of the Government Code, which you also raise, are confidentiality provisions for purposes of section 552.022.¹ However, none of the section 552.022 information falls within the scope of any of those exceptions. Therefore, the information that is subject to section 552.022, which we have marked, must be released to the requestor.

With respect to the rest of the information at issue, we address your claim under section 552.103. This exception provides in part:

(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), (c). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990).

¹We note that your claim under section 552.122 of the Government Code does not encompass the information that is subject to section 552.022.

You seek to withhold the remaining information on the basis of litigation that you state was pending in municipal court when the department received this request for information. Although you do not inform us that the department is a party to the pending litigation, we understand you to raise section 552.103 on behalf of the City of Lampasas. *See* Gov't Code § 552.103(a); Open Records Decision Nos. 575 at 2 (1990), 392 at 3 (1983). You state that the requestor is "an attorney [who] is attempting to avoid the rules of discovery." You have not explained, however, how or why any of the remaining information is related to the pending litigation. *See* Gov't Code § 552.103(a); Open Records Decision Nos. 551 at 5 (1990) (attorney general will determine whether governmental body has reasonably established that information at issue is related to litigation), 511 at 2 (1988) (information "relates" to litigation under section 552.103 if its release would impair governmental body's litigation interests); *see also* Open Records Decision No. 508 at 2 (1988) (motives of person seeking information under Act are irrelevant). We therefore conclude that the department may not withhold any of the submitted information under section 552.103 of the Government Code.

Next, we address the other exceptions you claim. Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential. Medical records are confidential under the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. Section 159.002 of the MPA provides in part:

(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.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Id. § 159.002(b)-(c). This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of the Act. *See* Open Records Decision No. 598 (1991). Medical records must be released on the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). We have marked the submitted information that is confidential under the MPA. The department must not release that information unless it has authorization under the MPA to do so.

We note that some of the remaining information is confidential under section 1701.306 of the Occupations Code. Chapter 1701 of the Occupations Code is applicable to the Texas Commission on Law Enforcement Officer Standards and Education. Section 1701.306 provides in part:

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

Section 552.101 also encompasses the common law right to privacy. Information must be withheld from the public under section 552.101 in conjunction with common law privacy when the information is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common law privacy encompasses the specific types of information that are held to be intimate or embarrassing in *Industrial Foundation*. *See* 540 S.W.2d at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has determined that other types of information also are private under section 552.101. *See generally* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private). We have marked the submitted information that the department must withhold under section 552.101 in conjunction with common law privacy.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home address, home telephone 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. Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. We have marked the information that the department must withhold under section 552.117(a)(2).²

Section 552.122 of the Government Code excepts from disclosure "a test item developed by a . . . governmental body[.]" Gov't Code § 552.122(b). 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. *Id.* at 6. The question of whether specific information falls within the scope of section 552.122(b) must be determined on a case-by-case basis. *Id.* 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). Section 552.122 also protects the answers to test questions when the answers might reveal the questions themselves. *See* Attorney General Opinion JM-640 at 3 (1987); Open Records Decision No. 626 at 8 (1994). You state that some of the submitted information consists of test items, the release of which would compromise the department's ability to evaluate the knowledge and ability of its police officers. Based on your representations, we conclude that the department may withhold the information that we have marked under section 552.122.

Section 552.130 of the Government Code excepts from public disclosure information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document. *See* Gov't Code § 552.130(a)(1), (3). We have marked Texas driver's license and personal identification information that the department must withhold under section 552.130.

In summary: (1) the department must not release the marked information that is confidential under the MPA unless it has authorization under the MPA to do so; (2) the department must withhold the marked declarations under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code; (3) the marked information that is protected by common law privacy also must be withheld under section 552.101; (4) the marked information that is excepted from disclosure under section 552.117(a)(2) of the Government Code must be withheld; (5) the department may withhold the marked information that is excepted from disclosure under section 552.122 of the Government Code;

²As we are able to make this determination, we need not address section 552.147 of the Government Code.

and (6) the marked Texas driver's license and personal identification information must be withheld under section 552.130 of the Government Code. The rest of the submitted 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 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).

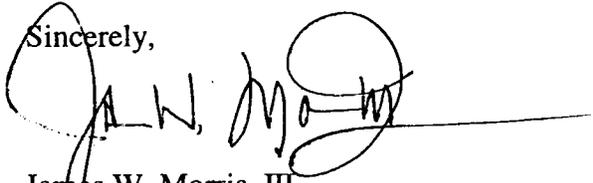
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,

A handwritten signature in black ink, appearing to read 'J.W. Morris, III', with a long horizontal line extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 253036

Enc: Submitted documents

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(w/o enclosures)