



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 17, 2006

Ms. Pam Guenther
Attorney at Law
P.O. Box 107
Edna, Texas 77957

OR2006-12210

Dear Ms. Guenther:

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# 262170.

The Edna Police Department (the "department"), which you represent, received a request for information pertaining to the arrest of the requestor's client on October 29, 2005. You state that the department has released the requested Use of Force policy from the department's procedure manual and the cover page from the Taser handbook used by the department. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, 552.117, and 552.1175, of the Government Code.¹ We understand that you have notified the interested third parties of the request and of their opportunity to submit comments to this office. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received correspondence from three individuals. We have considered the submitted arguments and reviewed the submitted information.

¹ Although you also claim that some of the submitted information is excepted under section 552.305 of the Government Code, this section is not an exception to disclosure under the Act; rather, it is a procedural provision permitting a governmental body to decline to release information that may implicate a person's privacy or proprietary interests for the purpose of requesting a decision from this office as provided under the Act. *See* Gov't Code § 552.305; Open Records Decision No. 542 (1990).

We first address your claim under section 552.103 of the Governmental Code, as it is potentially the broadest exception to disclosure you claim. Section 552.103 provides in relevant part 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.

Gov't Code § 552.103(a), (c). The department 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 is pending or reasonably anticipated on the date the governmental body received the request, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. 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). The department must meet both prongs of this test for information to be excepted under 552.103(a). To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

In this instance, you state that the department anticipates litigation because the requestor's client has publicly and privately threatened to sue the department and because of the type of information requested. We note, however, you have not demonstrated that, at the time of the request, the requestor's client had taken concrete steps towards litigation. *See* Open Records Decision No. 361 (1983) (finding the fact that a potential opposing party has hired an

attorney who makes a request for information does not establish that litigation is reasonably anticipated). You further state that the department also anticipates litigation by a former department officer based on this same incident and his subsequent dismissal. You inform us that the former officer in question has filed a grievance against the department. You do not explain, however, how the grievance process is considered litigation. See Open Records Decision No. 588 (1991) (discussing factors used by the attorney general in determining whether an administrative proceeding not subject to the Administrative Procedure Act may be considered litigation); see also Gov't Code § 552.301(e)(1) (requiring the governmental body to explain the applicability of the raised exception). Thus, we find that you have failed to establish that the department reasonably anticipated litigation when it received the request for information. Accordingly, we conclude that none of the submitted information may be withheld under section 552.103.

Next, we address your claim under section 552.107(1) of the Government Code, which protects information coming within the attorney-client privilege. See Gov't Code § 552.107(1). When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). Therefore, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. See *Huie v. DeShazo*, 922

S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

In this instance, you have not explained how any of the documents at issue constitute or document communications made “for the purpose of facilitating the rendition of professional legal services” to the department. Thus, you have failed to demonstrate how section 552.107 is applicable to this information. Accordingly, the department may not withhold any of the remaining information under section 552.107.

Next, you claim that some of the responsive information is not subject to release pursuant to the Privacy Rule adopted by the United States Department of Health and Human Services, Office for Civil Rights, to implement the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”). At the direction of Congress, the Secretary of Health and Human Services (“HHS”) promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* HIPAA, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 (“Privacy Rule”); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, excepted as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

This office has addressed the interplay of the Privacy Rule and the Act in Open Records Decision No. 681 (2004). In that decision, we noted that section 164.512 of title 45 of the Code of Federal Regulations provides that a covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See id.*; *see also* 45 C.F.R. § 164.512(a)(1). We further noted that the Act “is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public.” *See* Open Records Decision No. 681 at 8; *see also* Gov’t Code §§ 552.002, .003, .021. We therefore held that disclosures under the Act come within section 164.512(a). The Third Court of Appeals has also held that disclosures under the Act come within section 164.512(a). *See Abbott v. Tex. Dep’t of Mental Health & Mental Retardation*, No. 03-04-00743-CV, 2006 WL 1649003 (Tex. App.—Austin, June 16, 2006, no. pet. h.). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. Open Records Decision No. 681 at 9; *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the department may withhold protected health information from the public only if the information is confidential under other law or an exception in subchapter C of the Act applies.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses the doctrine of common law privacy. 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 Tex. 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(a) is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101 of the Act. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). Accordingly, we will consider your privacy claims under section 552.101 and section 552.102(a) together.

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 as types of information considered intimate and embarrassing. *Id.* at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under common law privacy: personal financial information not relating to the financial transaction between an individual and a governmental body, see Open Records Decision Nos. 600 (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), 545 (1990); and 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). We note, however, that the work behavior of a public employee and the conditions for his or her continued employment are matters of legitimate public interest not protected by the common law right of privacy. Open Records Decision Nos. 438 (1986). Similarly, information about a public employee’s qualifications, disciplinary action and background is not protected by common law privacy. See Open Records Decision Nos. 444 at 5-6 (1986) (public has interest in public employee’s qualifications and performance and the circumstances of his resignation or termination), 405 at 2-3 (1983) (public has interest in manner in which public employee performs his job), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former section 552.101 or 552.102), 208 at 2 (1978) (information relating to complaint against public employee and

disposition of the complaint is not protected under either the constitutional or common law right of privacy).

Upon review, we find that some of the submitted records contain medical and financial information that is protected under common law privacy. Accordingly, the department must withhold the information we have marked under section 552.101 in conjunction with common law privacy.

We have received comments from three individuals who have requested that their names and identifying information be withheld from the submitted records. One of these individuals asserts that "there is no legitimate public interest in the release of" her identifying information. We note, however, that the individuals' names appear in records from investigations into the alleged misconduct of a police officer. We find that there is a legitimate public interest in this information as it pertains to complaints against a peace officer. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute employee's private affairs), 455 (public employee's job performance or abilities generally not protected by privacy), 444 (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (scope of public employee privacy is narrow); *cf.* Open Records Decision No. 484 (1987) (public's interest in knowing how police departments resolve complaints against police officer ordinarily outweighs officer's privacy interest). Thus, we find that none of the information pertaining to these individuals is confidential under the doctrine of common law privacy. Accordingly, the department may not withhold any of the remaining information under section 552.101 on this basis.

Section 552.101 also encompasses information protected by other statutes. Section 1324a of title 8 of the United States Code provides that an Employment Eligibility Verification Form I-9 "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. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). Release of this form under the Act would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we find that the I-9 form in Exhibit 12 is confidential under section 552.101 and must be withheld pursuant to the federal laws and regulations governing the employment verification system.

Section 6103(a) of Title 26 of the United States Code provides that tax return information is confidential. *See* 26 U.S.C. § 6103(a)(2), (b)(2)(A), (p)(8); *see also* Open Records Decision No. 600 (1992); Attorney General Opinion MW-372 (1981). Accordingly, we conclude that the department must withhold the W-4 forms submitted as Exhibits 8-11 pursuant to section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code.

Next, we note that the submitted information includes 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 [the Texas Commission on Law Enforcement Officer Standards and Education] under this subchapter is confidential and is not subject to disclosure under Chapter 552[.]” Occ. Code § 1701.454(a). Therefore, the department must withhold the submitted F-5 form in Exhibit 5 pursuant to section 552.101 in conjunction with section 1701.454 of the Occupations Code.

Next, we address your claims under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code. Criminal history record information (“CHRI”) generated by the National Crime Information Center (“NCIC”) or by the Texas Crime Information Center (“TCIC”) is confidential. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *See* Gov’t Code § 411.083. 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 id.* 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.* §§ 411.083(b)(1), .089(a). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from the 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 the DPS or any other criminal justice agency must be withheld under section 552.101 in conjunction with Government Code chapter 411, subchapter F. The information in Exhibits 60 and 78 contains CHRI generated by TCIC and NCIC. Therefore, the department must withhold the CHRI we have marked under section 552.101 in conjunction with chapter 411 of the Government Code.²

We next address your claim that portions of the submitted information are subject to section 552.117 of the Government Code. Section 552.117(a)(2) excepts the home address and telephone number, social security number, and family member information of a peace officer as defined by article 2.12 of the Code of Criminal Procedure, regardless of whether the officer made an election under section 552.024 of the Government Code. Gov’t Code § 552.117(a)(2); *see* Open Records Decision No. 622 (1994). Accordingly, we have marked information that the department must withhold under section 552.117(a)(2).³

² We note that the requestor’s client can obtain his own CHRI from the DPS. Gov’t Code § 411.083(b)(3).

³ As our ruling on this issue is dispositive, we need not reach your remaining arguments against disclosure of this information.

Finally, we note that some of the remaining information, including a portion of the videotape in Exhibit 82, is excepted from disclosure under section 552.130 of the Government Code.⁴ 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; or
- (3) a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document.

Gov't Code § 552.130(a)(1)-(3). We note that the requestor has a right of access to his client's driver's license and motor vehicle record information under section 552.023 of the Government Code, and this information may not be withheld from him. *See id.* § 552.023(a) (person or person's authorized representative has special right of access to records that contain information related to that person that are protected from public disclosure by laws intended to protect that person's privacy interests); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when an individual or authorized representative asks governmental body to provide information concerning that individual). Accordingly, the department must withhold the information we have marked, as well as the Texas license plate numbers in the submitted videotape, pursuant to section 552.130. However, if the department lacks the technical capability to redact the license plate number in the videotape, it must withhold the videotape in its entirety. *See* Open Records Decision No. 364 (1983).

In summary, in conjunction with section 552.101 of the Government Code, the department must withhold (1) the information we have marked under common law privacy, (2) the submitted I-9 form pursuant to the federal laws and regulations governing the employment verification system, (3) the submitted W-4 forms pursuant to section 6103(a) of title 26 of the United States Code, (4) the submitted F-5 form pursuant to section 1701.454 of the Occupations Code, and (5) the CHRI we have marked under chapter 411 of the Government Code. The department must also withhold the information we have marked under sections 552.117(a)(2) and 552.130 of the Government Code. Finally, the department must withhold the Texas license plate numbers in the submitted videotape pursuant to section 552.130 of the Government Code; the remaining submitted videotape must be released. However, if the

⁴ The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

department lacks the technical capability to redact the license plate number in the videotape, it must withhold the videotape in its entirety under section 552.130. The remaining information must be released to the requestor.⁵

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

⁵ We note that the requestor in this instance has a special right of access to some information pertaining to his client that would otherwise be protected. Therefore, if the department receives a future request for this information from a person other than the requestor, the department should again seek a ruling from this office.

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,



Shelli Egger
Assistant Attorney General
Open Records Division

SE/sdk

Ref: ID# 262170

Enc. Submitted documents

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