



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 21, 2008

Mr. David M. Swope
Assistant County Attorney
Harris County
1019 Congress, 15th Floor
Houston, Texas 77002

OR2008-11556

Dear Mr. Swope:

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# 319613.

The Harris County Sheriff's Office (the "sheriff") received a request for all information pertaining to the sheriff's Investigative Support Unit, also known as the "Super Secret Squad." You claim that the requested information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹You inform this office that some of the information at issue was the previously requested, but that the previous requestor has not reviewed any of the requested documents. Because this information has not been publically released, we will address your arguments regarding the previously requested documents. *See* Gov't Code § 552.007 (providing that information voluntarily released to the public may not be later withheld from disclosure unless that information is confidential by law).

²We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

We first note that a majority of the requested information is subject to section 552.022 of the Government Code. Section 552.022(a) provides in part:

(a) 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). Upon review, we find that the submitted information includes completed reports and investigations, which we have marked, that are subject to section 552.022(a)(1). The sheriff must release information subject to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code, or is expressly made confidential under other law. *See id.* You assert that the information subject to section 552.022 is excepted under sections 552.103 and 552.107 of the Government Code. We note that sections 552.103 and 552.107 are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *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); Open Records Decision No. 676 at 6 (2002) (section 552.107 is not other law for purposes of section 552.022); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). As such, sections 552.103 and 552.107 are not other law that makes information confidential for the purposes of section 552.022; therefore, the sheriff may not withhold the information at issue under these sections.

We note, however, that the reports and investigations subject to section 552.022(a)(1) (the "reports") contain information that is subject to section 552.101 of the Government Code.³ 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 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 provisions. Accordingly, we have marked the I-9 forms within one of the submitted

³The 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).

reports that are confidential under section 552.101 and may only be released in compliance with the federal laws and regulations governing the employment verification system.

Section 552.101 also encompasses former section 51.14 of the Family Code. Prior to its repeal by the Seventy-fourth Legislature, section 51.14(d) of the Family Code provided for the confidentiality of juvenile law enforcement records. Law enforcement records pertaining to juvenile criminal conduct occurring before January 1, 1996, are governed by the former section 51.14(d), which was continued in effect for that purpose. Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 100, 1995 Tex. Gen. Laws 2517, 2591. We have marked a report that concerns juvenile conduct that occurred prior to January 1, 1996. This report is confidential under the former section 51.14(d) of the Family Code and must be withheld under section 552.101 of the Government Code.

Section 552.101 also encompasses section 58.007 of the Family Code, which provides that juvenile law enforcement records relating to delinquent conduct and conduct indicating a need for supervision that occurred on or after September 1, 1997 are confidential. Section 58.007(c) provides as follows:

Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
- (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

Fam. Code § 58.007(c). For purposes of section 58.007, "child" means a person who is ten years of age or older and under seventeen years of age at the time of the reported conduct. *See id.* § 51.02(2). Upon review, we have marked the report that is confidential under section 58.007(c) of the Family Code. This report must be withheld under section 552.101 of the Government Code.

Section 552.101 also encompasses section 261.201(a) of the Family Code, which provides as follows:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). Upon review, we find that one of the submitted reports was used or developed in an investigation of alleged or suspected child abuse. *See id.* § 101.003(a) (defining "child" for purposes of this section as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes). Thus, we find that this report, which we have marked, is within the scope of section 261.201 of the Family Code. You have not indicated that the sheriff has adopted a rule that governs the release of this type of information. Therefore, we assume that no such regulation exists. Given that assumption, the report we marked is confidential pursuant to section 261.201 of the Family Code and must be withheld under section 552.101 of the Government Code.

Section 552.101 also encompasses Criminal History Record Information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Texas Department of Public Safety ("DPS") maintains, except that 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. Therefore, the sheriff must withhold the information we marked within the reports under section 552.101 in conjunction with section 411.083.

Section 552.101 also encompasses chapter 560 of the Government Code, which provides that a governmental body may not release a biometric identifier of an individual, such as fingerprints, except in certain limited circumstances. *See* Gov't Code §§ 560.001 (defining "biometric identifier" to include fingerprints), 560.002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), 560.003 (biometric identifiers in possession of governmental body exempt from disclosure under the Act). We have marked fingerprint information within the submitted reports that must be withheld under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information that (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). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. 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. *Id.* at 683. Furthermore, this office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate and embarrassing. *See* Open Records Decision No. 545 (1990). This office has also found that a compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U. S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Upon review, we find that the remaining reports contain information that is both highly intimate or embarrassing and not of legitimate concern to the public. This information, which we have marked, must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.1175 provides in part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure;

...

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

- (1) chooses to restrict public access to the information; and
- (2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(a), (b). The sheriff must withhold the information we have marked under section 552.1175 to the extent that the individuals at issue are currently licensed peace officers and elect to restrict access to this information in accordance with section 552.1175(b). If no election is made or if the individuals are not currently licensed peace officers, the sheriff may not withhold the information we have marked under section 552.1175.

Next, we note that many of the reports contain Texas issued motor vehicle and identification record information. Section 552.130 of the Government Code provides that information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. *Id.* § 552.130(a)(1), (2). This section also excepts from disclosure information that relates to a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document. *See id.* § 552.130(a)(3). Upon review, the sheriff must withhold the information we have marked under section 552.130 of the Government Code. We note that section 552.130 does not apply to out-of-state driver's license and motor vehicle record information. We also note that the submitted information contains video recordings that contain Texas-issued license plate numbers. Accordingly, the sheriff must withhold these portions of the videotapes under section 552.130 of the Government Code. We note, however, that if the sheriff lacks the technical capacity to redact the information that is subject to section 552.130 from the videos, the sheriff must withhold the videos in their entirety. *See* Open Records Decision No. 364 (1983).

Some of the reports contain account numbers that are subject to section 552.136 of the Government Code, which 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(b). We have marked the insurance policy numbers, bank account numbers, and routing numbers that must be withheld under section 552.136.

Some of the reports also contain e-mail addresses that are subject to section 552.137 of the Government Code, which requires a governmental body to withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See id.* § 552.137(b). You do not inform us that the owners of the e-mail addresses at issue affirmatively consented to their release. Therefore, the sheriff must withhold the e-mail addresses we have marked under section 552.137.

We note that some of the information to be released under section 552.022(a)(1) may be subject to copyright law. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See Open Records Decision No. 550 (1990).*

We now address your argument under section 552.103 of the Government Code for the information that is not subject to section 552.022(a)(1). 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.

Id. § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) that the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas 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.*); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

You state, and provide documentation showing, that prior to the sheriff's receipt of this request for information, the requestor filed a civil lawsuit against the sheriff and several of its employees. Based on this representation and our review of the submitted documents, we agree that litigation was pending when the sheriff received the request. You state that the requestor acknowledges that this information will be used in his lawsuit against the sheriff. Therefore, having reviewed your arguments and representations, we find that the remaining submitted information is related to the pending civil litigation for purposes of section 552.103. Therefore, the sheriff may withhold the information not subject to section 552.022, which we have marked, pursuant to section 552.103 of the Government Code.⁴

We note, however, that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103 interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We also note that section 552.103 is no longer applicable to this information once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the sheriff must generally release the reports we have marked under section 552.022(a)(1); however, it must withhold the information we have marked within these reports under section 552.101 of the Government Code in conjunction with federal law, section 51.14 of the Family Code, section 58.007(c) of the Family Code, section 261.201 of the Family Code, section 411.083 of the Government Code, section 560.003 of the Government Code, and common-law privacy. The sheriff must also withhold the information we have marked within the reports under sections 552.1175, 552.130, 552.136, and 552.137 of the Government Code, as well as any corresponding Texas motor vehicle registration information within the submitted videos. However, if the sheriff lacks the technical capacity to redact the information that is subject to section 552.130 from the videos, the sheriff must withhold the videos in their entirety. The remaining information that we have marked under section 552.022(a)(1) must be released to the requestor, but any copyrighted materials must be released in accordance with copyright law.⁵ The sheriff may

⁴As our ruling is dispositive, we need not address your argument under section 552.107 of the Government Code with regard to this information.

⁵We note that the information to be released contains social security numbers. Section 552.147(b) of the Government Code authorizes a government 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.

withhold all of the information that is not subject to section 552.022(a)(1) of the Government Code under section 552.103 of the Government Code.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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 challenge 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 "Reg Hargrove", with a long horizontal flourish extending to the right.

Reg Hargrove
Assistant Attorney General
Open Records Division

RJH/eeg

Ref: ID# 319613

Enc. Submitted documents

c: Mr. Lloyd E. Kelley
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(w/o enclosures)