



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 6, 2008

Ms. Pamela Smith
Assistant General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2008-13642

Dear Ms. Smith:

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# 323663.

The Texas Department of Public Safety (the "department") received a request for (1) the recorded interviews of employees in a specified office conducted during audits that occurred in 2004 and 2006, (2) all records regarding the transfer of a named employee from a specified office and the subsequent investigation of that employee, and (3) the work hours of a named employee in a specified office. You state you have no responsive information for the request for recorded interviews. You also state you will provide to the requestor, upon clarification of the time period, the information responsive to the request for a named employee's work hours. You claim the submitted information related to the transfer and investigation of a named employee is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the department's obligations under the Act. Pursuant to section 552.301(b) of the Government Code, the governmental body must state the exceptions to disclosure that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(b). Pursuant to section 552.301(e) of the Government Code, the governmental body is required to submit to this office, within fifteen business days of receiving the request, general written comments stating the reasons why the stated exceptions

apply that would allow the information to be withheld. *See id.* § 552.301(e)(1)(A). You have marked portions of the submitted information and indicated those portions are excepted under sections 552.101, 552.117, and 552.130 of the Government Code.¹ You did not, however, claim these exceptions by the ten-business-day deadline. You also have not submitted any comments explaining how these exceptions apply to the submitted information. Thus, we find the department failed to comply with the requirements of section 552.301 with respect to its claims under sections 552.101, 552.117, and 552.130. Generally, a governmental body's failure to comply with section 552.301 results in the waiver of its claims under the exceptions at issue. However, because sections 552.101, 552.117, and 552.130 are mandatory exceptions to disclosure, we will consider the applicability of these exceptions, along with your timely-raised claims under sections 552.103 and 552.108, to the submitted information.

Next, we note some of the submitted information is subject to section 552.022(a)(1) of the Government Code, which provides:

the following categories of information are public information and not excepted from required disclosure under [the Act] 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[.]

Id. § 552.022(a)(1). The submitted information contains documents pertaining to a completed investigation. Completed investigation information must be released under section 552.022(a)(1), unless the information is excepted from disclosure under section 552.108 or expressly confidential under other law. Section 552.103 of the Government Code is a discretionary exception to public 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.) (governmental body may waive section 552.103); 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 the submitted investigation documents under section 552.103. However, because information subject to section 552.022(a)(1) may be withheld under sections 552.101, 552.108, 552.117, and 552.130, we will consider your arguments under these exceptions.

¹ We note you have also marked social security numbers to be withheld under section 552.147(b) of the Government Code, which 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.

Section 552.108(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime.” Gov’t Code § 552.108(a)(1). 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.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). We note section 552.108 generally is not applicable to an internal administrative investigation that did not result in a criminal investigation or prosecution. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App. 2002, no pet.); Open Records Decision No. 562 at 10 (1990); *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor not applicable to internal investigation that did not result in criminal investigation or prosecution); Open Records Decision No. 350 at 3-4 (1982). You claim the submitted investigation documents are protected by section 552.108(a)(1). These documents, however, pertain to an internal administrative investigation conducted by the department. Furthermore, you have not demonstrated, and the information at issue does not indicate, the internal investigation to which the documents pertain resulted in a criminal investigation or prosecution. Accordingly, the department may not withhold any portion of the submitted internal investigation documents under section 552.108(a)(1) of the Government Code.

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 section encompasses laws that make criminal history record information (“CHRI”) confidential. CHRI generated by the National Crime Information Center or by the Texas Crime Information Center is confidential under federal and state law. 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 at 7 (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 the Department of Public Safety (“DPS”) maintains, except 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. Similarly, 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. Accordingly, you must withhold the criminal history record information you have marked in the submitted investigation documents under section 552.101 of the Government Code in conjunction with federal law and chapter 411 of the Government Code.

We note portions of the remaining investigation documents are protected by common-law privacy. 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 established. *Id.* at 681-82. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review of the remaining investigation documents, we find some of the information is highly intimate or embarrassing and is not of legitimate public concern. Thus, the department must withhold the medical information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

You indicate portions of the remaining investigation documents may be protected under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that such information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The department may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. The remaining investigation documents contain the home address, home telephone number, and family member information of the department employee named in the request. If this department employee has timely elected to withhold her information under section 552.024, the marked information in the remaining investigation documents must be withheld under section 552.117(a)(1). If that employee did not make a timely election, the marked information may not be withheld under section 552.117(a)(1).

You indicate the marked Texas driver's license numbers and motor vehicle record information in the remaining investigation documents are confidential under section 552.130 of the Government Code. This section provides 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. Gov't Code § 552.130(a)(1), (2). Therefore, the department must withhold the marked Texas driver's license numbers and motor vehicle record information in the remaining investigation documents under section 552.130 of the Government Code.

You contend the remaining information not subject to section 552.022, which consists of the submitted transfer documents, is protected under section 552.103 of the Government Code, which provides:

(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). A governmental body 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 was pending or reasonably anticipated on the date the governmental body received the request for information, 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state the department received the request for information after a lawsuit styled *Julie Cyprow v. Texas Department of Public Safety, Cesar Torres and Norma Garza-Jennings*, Cause No. 4:07-CV-03045 was filed in the United States District Court for the Southern District of Texas, Houston Division. Based upon your representation, we conclude litigation involving the department was pending when the department received the request. You also state the submitted transfer documents relate to the pending litigation because these documents relate to part of the claim that forms the basis of the lawsuit. Based on your representations and our review, we find the submitted transfer documents are related to the pending litigation for the purposes of section 552.103. We therefore conclude the department may withhold the submitted transfer documents under section 552.103 of the Government Code.²

² As our ruling for this information is dispositive, we need not address your remaining argument against disclosure for a portion of this information.

We note, however, that once the information at issue has been obtained by all parties to the pending litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, any information at issue that has either been obtained from or provided to all opposing parties in the pending litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the department must withhold the marked criminal history record information under section 552.101 of the Government Code in conjunction with federal law and chapter 411 of the Government Code; the marked medical information under section 552.101 of the Government Code in conjunction with common-law privacy; the marked information under section 552.117(a)(1) of the Government Code, if the department employee named in the request has timely elected to withhold her information under section 552.024; and the marked Texas driver's license numbers and motor vehicle record information under section 552.130 of the Government Code. The department may withhold the submitted transfer documents under section 552.103 of the Government Code. The remaining 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 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,

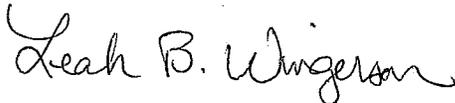
toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/ma

Ref: ID# 323663

Enc. Submitted documents

c: Ms. Julie Cyprow
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(w/o enclosures)