ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 27, 2009

Mr. Whitt L. Wyatt
Nichols, Jackson, Dillard, Hager & Smith, L.L.P.
1800 Lincoln Plaza
500 North Akard Street
Dallas, Texas 75201

OR2009-01071

Dear Mr. Wyatt:

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# 333250.

The Allen Police Department (the "department"), which you represent, received a request for a named police officer's personnel file and all reports written or sponsored by the same officer during a specified time period. You claim that the submitted information 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, some of which is a representative sample.[1]

Initially, we note that the named officer's address and social security number and other information have been redacted from the submitted documents. A governmental body that seeks to withhold requested information from the public must submit the information to the attorney general in a manner that enables this office to determine whether the information is excepted from disclosure. *See* Gov't Code § 552.301(e)(1)(D). In this instance, the request for information states that the department "may redact any information concerning [the named] officer's social security number or place of residence." Moreover, the previous determination issued in Open Records Decision No. 670 (2001) authorizes the redaction of a peace officer's home address and telephone number, personal cellular phone and pager number, social security number, and family member information pursuant to section 552.117(a)(2) of the Government Code without the necessity of requesting a decision under section 552.301 of the Government Code. *See* ORD 670 at 6 (addressing statutory predecessor to Gov't Code § 552.117(a)(2)). Additionally, section 552.147(b) of the

[1]This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the department to withhold any information that is substantially different from the submitted information. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

Government Code 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. Thus, the department has authorization to redact the officer's social security number, current and former home addresses, and certain other personal information. The department has no authorization, however, to redact any other responsive information without requesting a decision by this office under section 552.301. In this instance, we are able to ascertain the nature of the rest of the redacted information and thus are not prevented from determining whether it is excepted from disclosure. In the future, however, the department should refrain from redacting any responsive information other than a living person's social security number that is submitted to the office in connection with a request for a decision under the Act, unless the information is the subject of a previous determination. *See* Gov't Code §§ 552.301(a), .302.

We next note that portions of the submitted information are subject to section 552.022 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; [and]
> >
> > (2) the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body[.]

Gov't Code § 552.022(a)(1), (2). The submitted information contains a completed report and performance evaluations subject to section 552.022(a)(1) of the Government Code. We have also marked salary information that is subject to section 552.022(a)(2). The information that is subject to section 552.022(a)(1) must be released, unless the information is excepted from disclosure under section 552.108 or expressly confidential under other law. Also, the information that is subject to 552.022(a)(2) must be released, unless the information is expressly confidential under other law. Although you raise section 552.103 of the Government Code for this information, section 552.103 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 (2000) (discretionary exceptions generally). As such, section 552.103 is not "other law" that makes information confidential for the purposes of section 552.022. Likewise, section 552.108 is not other law that makes information confidential for the purposes of section 552.022(a)(2). *See* Open Records Decision Nos. 586 (1991) (governmental body may waive section 552.108), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). Therefore, the salary information that we have marked may not be withheld under section 552.103 or section 552.108, and the

department must release that information pursuant to section 552.022(a)(2). However, we will consider the department's claim under section 552.108 with respect to the remaining information, including the information that is subject to section 552.022(a)(1). We also will consider the department's claim under section 552.103 with respect to the remaining information that is not subject to section 552.022.

Section 552.103 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 at issue. 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).

You state that the remaining information is related to a pending prosecution and the request is an attempt by the defense counsel to gain information for use in the case. You do not inform us, however, that the department is or may become a party to the case. *See* Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990). Under such circumstances, we require an affirmative representation that a governmental entity that is a party to a pending case wishes to have information relating to the case withheld from disclosure. In this instance, you have not provided this office with such a representation. We therefore conclude that the department may not withhold any of the remaining information that is not subject to section 552.022 under section 552.103 of the Government Code.

Next, we will address your argument under section 552.108 of the Government Code for the remaining information, including the information that is subject to section 552.022(a)(1). Section 552.108 of the Government Code provides in part:

> (a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:
>
> > (1) release of the information would interfere with the detection, investigation or prosecution of crime[.]

Gov't Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108(a)(1) must reasonably explain how and why release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state the submitted information relates to a pending prosecution, and you expect the named officer to be called as a witness in the case. Based on these representations, we conclude release of some of the submitted information would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Thus, section 552.108(a)(1) is generally applicable to the information we have marked in the submitted police officer's personnel file and report number 08-045512. However, we find that you have failed to demonstrate how the remaining information pertains to ongoing criminal investigations or prosecutions, nor have you explained how its release would interfere with the detection, investigation, or prosecution of crime; thus you have not met your burden under section 552.108(a)(1). Therefore, none of the remaining reports may be withheld under section 552.108(a)(1) of the Government Code.

Section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). Such basic information refers to the information held to be public in *Houston Chronicle*. *See Houston Chronicle*, 531 S.W.2d at 187. Basic information includes a detailed description of the offense. *See* Open Records Decision No. 127 (1976) (summarizing types of information made public by *Houston Chronicle*). Thus, with the exception of basic information, the department may withhold the information we have marked in the submitted personnel file and report number 08-045512 pursuant to section 552.108(a)(1) of the Government Code.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."[2] Gov't Code § 552.101. Juvenile

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[2]The Office of the Attorney General will raise mandatory exceptions such as sections 552.101, 552.130, and 552.136 of the Government Code on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential under section 58.007. The relevant language of section 58.007(c) reads as follows:

> (c) 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. Report number 08-048393 pertains to juvenile delinquent conduct that occurred after September 1, 1997. *See id.* §§ 51.03 (defining "delinquent conduct" for purposes of Fam. Code § 58.007). You do not indicate, nor does it appear, that any of the exceptions in section 58.007 of the Family Code apply. Accordingly, we conclude that the report number 08-048393 must be withheld in its entirety under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code.

Section 552.101 also encompasses Criminal History Record Information ("CHRI"). 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 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.* § 411.089(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. A portion of the submitted information constitutes CHRI generated by TCIC and NCIC. We have marked the information the department must withhold pursuant to section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code.

Section 552.101 also encompasses the doctrine of common-law privacy. Common-law privacy 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). 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. *Id.* at 683. This office has found that 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). Additionally, 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). Moreover, we find that a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. Upon review, we find that the information we have marked is highly intimate or embarrassing and is not of legitimate public concern. Therefore, the department must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.130 of the Government Code excepts from 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 motor vehicle title or registration issued by an agency of this state." Gov't Code § 552.130. The department must withhold the Texas motor vehicle record information we have marked in the submitted information under section 552.130 of the Government Code.

Finally, section 552.136 of the Government Code 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." *Id.* § 552.136. Upon review, we find the department must withhold the debit card number we have marked under section 552.136 of the Government Code.

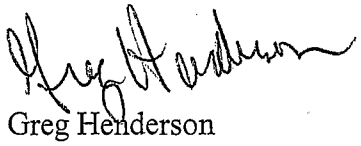
In summary, with the exception of the basic information and the information we have marked for release under section 552.022(a)(2) of the Government Code, the department may withhold report number 08-045512 and the named police officer's personnel file under section 552.108(a)(1) of the Government Code. The department must withhold report number report number 08-048393 under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code. The department must also withhold the CHRI we have marked under section 552.101 of the Government Code in conjunction with chapter 411. Next, the department must withhold the information we have marked under

section 552.101 in conjunction with common-law privacy. Finally, the department must withhold the information we have marked under sections 552.130 and 552.136 of the Government Code. The remaining information must be released to the requestor.[3]

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Greg Henderson
Assistant Attorney General
Open Records Division

GH/jb

Ref: ID# 333250

Enc. Submitted documents

c: Requestor
(w/o enclosures)

[3]We note the remaining information contains a social security number. Section 552.147(b) of the Government Code 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. Gov't Code § 552.147.