



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 14, 2009

Ms. Vanessa A. Gonzalez
Allison, Bass & Associates
Attorney for Bandera County
402 West 12th Street
Austin, Texas 78701

OR2009-11408

Dear Ms. Gonzalez:

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# 352263.

The Bandera County Attorney (the "county attorney"); which you represent, received a request for several categories of information, including the personnel records of the requestor and other named deputies, several specified incident reports, a specified purchase order, and information relating to the storage of hazardous chemicals. You state the county attorney does not possess any information responsive to a portion of the request.¹ You also state you have released some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, a portion of which is a representative sample.²

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990).

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 note that certain information has been redacted from the submitted documents. Section 552.301 of the Government Code prescribes procedures that a governmental body must follow in asking this office to determine whether requested information is excepted from public disclosure. See Gov't Code §§ 552.301(a), .302. Pursuant to section 552.301(e)(1)(D), the governmental body must submit the requested information at issue, or representative samples if the information is voluminous, unless the information is the subject of a previous determination. See *id.* § 552.301(a), (e)(1)(D); Open Records Decision No. 673 (2001) (previous determinations). Pursuant to the previous determination issued under section 552.117(a)(2) of the Government Code in Open Records Decision No. 670 (2001), all governmental bodies are authorized to withhold certain personal information relating to a peace officer, including the officer's current and former home addresses and telephone numbers, personal cell phone and pager numbers, social security number, and family member information, without the necessity of requesting a decision under the Act. See ORD 670 at 6-7. However, some of the information that the county attorney has redacted does not fall within the scope of the previous determination in Open Records Decision No. 670. You do not indicate, and our own records do not otherwise reflect, that the county attorney is authorized to withhold any other types of information without requesting a decision. In this instance, we are able to ascertain the nature of the redacted information and thus are not prevented from determining whether it is excepted from disclosure. In the future, however, the county attorney should refrain from redacting any information submitted to this office in connection with a request for a decision under the Act that it is not authorized to redact. An unauthorized redaction may result in a determination that the information must be released. See Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ).

Next, we note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[,]" unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022 (a)(1). Section 552.022(a)(17) provides that information filed with a court is generally a matter of public record that cannot be withheld from disclosure. *Id.* § 552.022(a)(17); *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54 (Tex. 1992). In this instance, the submitted information includes completed investigations and reports that are subject to section 552.022(a)(1) and a court-filed document that is subject to section 552.022(a)(17). Section 552.103 is not other law that makes information expressly confidential for the purposes of section 552.022(a)(1) and section 552.022(a)(17). See *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. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived). Likewise, section 552.108 is a discretionary exception that protects a governmental body's interests and is, therefore, not "other law" for purposes of section 552.022(a)(17). See Open Records Decision No. 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). Accordingly, the county attorney

may not withhold the information subject to section 552.022(a)(1) and section 552.022(a)(17), which we have marked, under section 552.103. Additionally, the county attorney may not withhold the information subject to section 552.022(a)(17) under section 552.108 of the Government Code. However, because information subject to 552.022 may be withheld under sections 552.101 and 552.130 of the Government Code, we will address the applicability of these sections to this information.³ We will also address your claim under section 552.108 of the Government Code for the information subject to 552.022(a)(1).

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. Section 552.101 of the Government Code encompasses section 58.007 of the Family Code. You claim that the completed report in Exhibit I is excepted from disclosure pursuant to section 58.007. Juvenile 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 Subchapters B, D, and E.

Fam. Code § 58.007(c). Section 51.02(2)(A) defines "child" as a person who is ten years of age or older and under seventeen years of age. *Id.* § 51.02(2)(A). Upon review, we agree that the information in Exhibit I involves juvenile delinquent conduct occurring after September 1, 1997. *See id.* §§ 51.03(a) (defining "juvenile delinquent conduct" for the purposes of section 58.007). It does not appear that any of the exceptions in section 58.007

³The Office of the Attorney General will raise a mandatory exception such as section 552.130 of the Government Code on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

apply. Accordingly, we conclude the information in Exhibit I is confidential pursuant to section 58.007 of the Family Code and must be withheld under section 552.101 of the Government Code.

You claim the completed reports in Exhibit D and J are excepted from disclosure under section 552.108 of the Government Code. Section 552.108 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; [or]

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(a)(1), (2). The protections offered by sections 552.108(a)(1) and 552.108(a)(2) of the Government Code are, generally, mutually exclusive. Section 552.108(a)(1) generally applies to information that pertains to criminal investigations or prosecutions that are currently pending, while section 552.108(a)(2) protects law enforcement records that pertain to criminal investigations and prosecutions that have concluded in final results other than criminal convictions or deferred adjudication. A governmental body claiming section 552.108(a)(1) 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). A governmental body that claims section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See Gov't Code* §§ 552.108(a)(2), .301(e)(1)(A).

You claim that the incident reports in Exhibits D and J relate to either pending investigations or investigations that did not result in conviction or deferred adjudication. Because you have provided this office with contradictory assertions, we find that you have failed to sufficiently demonstrate the applicability of section 552.108. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why claimed exceptions to disclosure apply). We therefore conclude that the county attorney may not withhold the incident reports in Exhibits D and J under section 552.108 of the Government Code.

You claim the remaining information subject to section 552.022 is excepted from disclosure under common-law privacy. Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information if it (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 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. In addition, this office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure. See Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Generally, only highly intimate information that implicates the privacy of an individual is withheld. However, in certain instances, where it is demonstrated that the requestor knows the identity of the individual at issue and the nature of certain types of incidents, the entire report must be withheld to protect the individual's privacy. In this instance, you seek to withhold the remaining incident reports subject to section 552.022 in their entirety under section 552.101 in conjunction with common-law privacy. Upon review, we find that none of these remaining reports reflects a situation in which the entire report must be withheld on the basis of common-law privacy. However, we agree that the information we have marked is highly intimate or embarrassing and of no legitimate public interest. Therefore, the county attorney must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Next, we note that portions of the remaining information subject to section 552.022 of the Government Code are excepted from public disclosure under section 552.130 of the Government Code, which 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. Gov't Code § 552.130(a)(1), (2). Accordingly, the county attorney must withhold the Texas motor vehicle and driver's license information we have marked under section 552.130.

We next address your argument under section 552.103 of the Government Code against the disclosure of the information not subject to section 552.022. Section 552.103 of the Government Code 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.

Id. § 552.103(a), (c). The county attorney 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 county attorney 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). The county attorney must meet both prongs of this test for information to be excepted under section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. See Open Records Decision No. 452 at 4 (1986). When the governmental body is the prospective plaintiff in litigation, the evidence of anticipated litigation must at least reflect that litigation involving a specific matter is “realistically contemplated.” See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982) (investigatory file may be withheld if governmental body’s attorney determines that it should be withheld pursuant to section 552.103 and that litigation is “reasonably likely to result”).

You state, and provide documentation showing, that the requestor filed a claim of discrimination with the Equal Employment Opportunity Commission (the “EEOC”) prior to the date of the county attorney’s receipt of the present request for information. This office has found that a pending EEOC complaint indicates that litigation is reasonably anticipated. See Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982). Thus, we agree the county attorney reasonably anticipated litigation on the date it received the present request for information. You also claim that the information at issue is related to the anticipated litigation because the requested records and reports relate to the requestor’s allegations of malfeasance by the department and the qualifications of other department employees and will likely be used during the anticipated litigation. Upon review, we agree that the information at issue is related to the anticipated litigation for purposes of section 552.103. Therefore, the county attorney may generally withhold the information not subject to section 552.022 pursuant to section 552.103 of the Government Code.⁴

However, we note basic factual information about a crime must be released. Open Records Decision No. 597 (1991). Information normally found on the front page of an offense report is generally considered public, and must be released. *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.);

⁴As our ruling for this information is dispositive, we need not address your remaining argument against its disclosure.

see Open Records Decision No. 127 (1976). Basic information includes the identification and description of the complainant. *See* ORD 127. Therefore, the basic information pertaining to report number 08-000752 may not be withheld under section 552.103 of the Government Code.

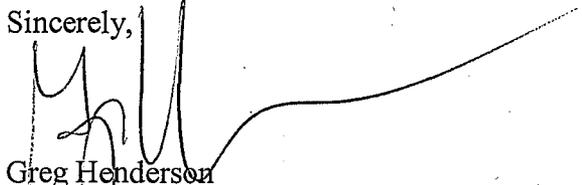
We also note that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated 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 been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the county attorney must withhold the information in Exhibit I under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code. The county attorney must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and the information we have marked under section 552.130 of the Government Code. With the exception of the basic information pertaining to report number 08-000752, the information not subject to section 552.022 may be withheld under section 552.103 of the Government Code. The remaining information subject to section 552.022 of the Government Code must be released.

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/rl

Ref: ID#352263

Enc. Submitted documents

c: Requestor
(w/o enclosures)
