ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 21, 2009

Lieutenant Carol Taylor
Commander - Communications/Records
Taylor County Sheriff's Office
450 Pecan Street
Abilene, Texas 79602-1692

OR2009-18084

Dear Lt. Taylor:

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#364881.

The Taylor County Sheriff's Department (the "sheriff") received a request for all records pertaining to a specified address and all records pertaining to the requestor. 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 representative sample of information.[1]

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code, which provides in pertinent part:

> (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are

[1]We 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.

> public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:
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> > (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). The submitted information contains completed incident reports. Pursuant to section 552.022(a)(1) of the Government Code, a completed report is expressly public unless it is either excepted under 552.108 of the Government Code or is expressly confidential under other law. Section 552.103 of the Government Code is a discretionary exception that protects a governmental body's interest and may be waived. *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. 552 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, 552.103 is not other law that makes information confidential for the purposes of section 552.022. Consequently, the completed reports, which we have marked, may not be withheld under section 552.103 of the Government code. However, because information subject to section 552.022(a)(1) may be withheld under section 552.108, we will consider the applicability of this exception to the completed reports. Additionally, we will address all of the claimed exceptions for the information not subject to section 552.022.

First, we address your claims for the information not subject to section 552.022. You assert that this information is excepted under section 552.103 of the Government Code, which provides in 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.
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> . . .
>
> (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.

The 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 is 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). The governmental body 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). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* 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.[2] 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 Open Records Decision No. 638 (1996), this office stated that a governmental body has met its burden of showing that litigation is reasonably anticipated when it received a notice of claim letter and the governmental body represents that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act ("TTCA"), chapter 101 of the Civil Practice and Remedies Code, or an applicable municipal ordinance. If a governmental body does not make this representation, the claim letter is a factor that this office will consider in determining whether a governmental body has established that litigation is reasonably anticipated based on the totality of the circumstances.

You inform us and provide documentation showing that, prior to the sheriff's receipt of the request for information, the sheriff received multiple notice of lawsuit forms filed by the requestor naming the sheriff as a defendant in a potential lawsuit. Based on your representations, our review of the submitted information, and the totality of the circumstances, we determine that the sheriff has established that it reasonably anticipated

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[2]In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

litigation on the date that it received the request. We also conclude that the submitted information is related to the anticipated litigation for purposes of section 552.103. Therefore, we agree the sheriff may generally withhold the information not subject to section 552.022(a)(1) under section 552.103 of the Government Code.[3]

We note, however, that once the information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note that the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

With respect to the information subject to section 552.022(a)(1), we will address your argument under section 552.108 of the Government Code. Section 552.108(a) of the Government Code provides the following:

> 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:
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> > (1) release of the information would interfere with the detection, investigation, or prosecution of crime;
> >
> > (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). Section 552.108(a)(1) is mutually exclusive of section 552.108(a)(2). Section 552.108(a)(1) protects information that pertains to a specific pending criminal investigation or prosecution. In contrast, section 552.108(a)(2) protects information that relates to a concluded criminal investigation or prosecution that did not result in conviction 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), 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You do not state that the submitted information pertains to an ongoing criminal investigation or prosecution, nor have you explained how its release would interfere in some way with the detection, investigation, or prosecution of crime; therefore, you have not met your burden under section 552.108(a)(1). A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that concluded

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[3]As our ruling for this information is dispositive, we need not address your remaining arguments against disclosure.

in a final result other than conviction or deferred adjudication. It is not clear to this office, nor have you explained, how or if the investigations at issue actually concluded. Thus, you have not met your burden under section 552.108(a)(2). Because you have failed to demonstrate the applicability of section 552.108, the sheriff may not withhold the information subject to section 552.022(a)(1) under section 552.108 of the Government Code.

You state that a portion of the remaining information is excepted from disclosure under section 552.101 of the Government Code. 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 encompasses information made confidential by other statutes. Chapter 772 of the Health and Safety Code authorizes the development of local emergency communications districts. Sections 772.118, 772.218, and 772.318 of the Health and Safety Code are applicable to emergency 9-1-1 districts established in accordance with chapter 772 of the Health and Safety Code. *See* Open Records Decision No. 649 (1996). These sections make originating telephone numbers and addresses of 9-1-1 callers furnished by a service supplier confidential. *Id.* at 2. Section 772.118 applies to an emergency communication district for a county with a population of more than two million. Section 772.218 applies to an emergency communication district for a county with a population of more than 860,000. Section 772.318 applies to an emergency communication district for a county with a population of more than 20,000.

You indicate that the remaining dispatch reports contain telephone numbers and addresses of 9-1-1 callers that were furnished by a 9-1-1 service supplier. You do not inform us, however, whether Taylor County is part of an emergency communication district established under section 772.118, section 772.218, or section 772.318 of the Health and Safety Code. Nevertheless, if Taylor County is part of an emergency communication district established under one of these sections, then the sheriff must withhold the telephone numbers and addresses of the 9-1-1 callers contained in the submitted call reports under section 552.101, to the extent that such information was provided by a 9-1-1 service supplier. We have marked the information that must be withheld if those sections apply. If Taylor County is not subject to section 772.118, section 772.218, or section 772.318, then the sheriff may not withhold any information in the call reports under section 552.101 on the basis of section 772.118, section 772.218, or section 772.318.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body.

See Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). For example, information related to an individual's mortgage payments, assets, bills, and credit history is generally protected by the common-law right to privacy. *See* Open Records Decision Nos. 545, 523 (1989). The information we have marked constitutes personal financial information. Further, in this instance, we find that there is not a legitimate public interest in the release of this information. Therefore, the sheriff must withhold the personal financial information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

We note that some of the remaining information may be excepted from 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 sheriff must withhold the Texas motor vehicle information we have marked under section 552.130 of the Government Code. We note, however, that the requestor appears to be the spouse of one of the individual's whose Texas motor vehicle information is at issue. Section 552.130 protects privacy interests, and as his wife's authorized representative, the requestor would have a right of access under section 552.023 to some of the information marked under section 552.130.[4] Thus, if the requestor is his wife's authorized representative, then he has a right of access to that information and the sheriff must release the marked Texas motor vehicle information that pertains his wife. To the extent the requestor does not have a right of access to this information, the sheriff must withhold the marked information under section 552.130 of the Government Code.

We note that some of the submitted information is excepted from disclosure under section 552.136 of the Government Code. 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(b). Section 552.136 is intended to protect privacy interests. We note that the requestor is the spouse of the individual whose credit and debit card information is at issue within the submitted report. Thus, to the extent the requestor is acting as his wife's authorized representative, the requestor has a right of access to his wife's credit and debit card number. *See id.* § 552.023. However, if the requestor is not the his wife's authorized representative, the sheriff must withhold the marked credit and debit card information under section 552.136 of the Government Code.

We note some of the remaining information is excepted from disclosure under section 552.137 of the Government Code. Section 552.137 excepts from disclosure "an

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[4]Section 552.023(a) provides that "[a] person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests." Gov't Code § 552.023(a).

e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c), and you do not inform us that a member of the public has affirmatively consented to its release. Therefore, unless the sheriff receives consent to release them, the sheriff must withhold the e-mail addresses we have marked under section 552.137 of the Government Code.[5]

In summary, the sheriff may withhold the information not subject to section 552.022(a)(1) under section 552.103 of the Government Code. If Taylor County is subject to section 772.118, section 772.218, or section 772.318 of the Health and Safety Code, then the sheriff must withhold the telephone numbers and addresses of the 9-1-1 callers we have marked in the submitted call reports under section 552.101 of the Government Code in conjunction with section 772.118, section 772.218, or section 772.318 of the Health and Safety Code. The sheriff must withhold the personal financial information we have marked under section 552.101 in conjunction with common-law privacy. To the extent this requestor does not have a right of access under section 552.023 of the Government Code, the sheriff must withhold the marked Texas motor vehicle record information under section 552.130 of the Government Code and the marked credit and debit card information under section 552.136 of the Government Code. The sheriff must withhold the e-mail addresses we have marked under section 552.137 of the Government Code. The remaining information must be released.[6]

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,

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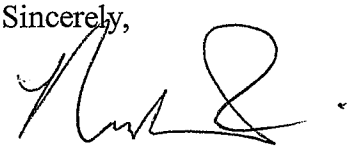
[5]We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas driver's license and Texas license plate numbers under section 552.130 of the Government Code, credit card and debit card numbers under section 552.136 of the Government Code, and e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

[6]We note that the information you are releasing contains confidential information to which the requestor has a right of access. *See* Gov't Code § 552.023(a); ORD 481 at 4. Therefore, if the sheriff receives another request for this particular information from a different requestor, the sheriff must seek a decision from this office.

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, toll free, at (888) 672-6787.

Sincerely,



Nneka Kanu
Assistant Attorney General
Open Records Division

NK/rl

Ref: ID# 364881

Enc. Submitted documents

cc: Requestor
(w/o enclosures)