



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 11, 2010

Ms. Myrna S. Reingold  
Galveston County  
722 Moody, 5<sup>th</sup> Floor  
Galveston, Texas 77550-2317

OR2010-03533

Dear Ms. Reingold:

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# 372295.

The Galveston County Sheriff's Office (the "sheriff") received a request for all records maintained by the sheriff's Internal Affairs Division regarding a named former jailer, including the employment file. You state you have released some of the requested information. You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.102, 552.108, 552.114, 552.117, 552.1175, 552.122, 552.130, 552.137, and 552.147 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

Initially, you state the sheriff is withholding the following pursuant to Open Records Decision No. 684 (2009): (1) L-2 and L-3 declarations under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code; (2) fingerprints under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code; (3) Texas driver's license numbers and Texas

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<sup>1</sup>You raise section 552.026 of the Government Code, however, section 552.026 is not an exception to disclosure. Rather, section 552.026 provides that the Act does not require the release of information contained in education records except in conformity with the Family Educational Rights and Privacy Act of 1974. Gov't Code § 552.026. Further, although you also raise sections 552.103, 552.115, 552.136, and 552.140, you have provided no arguments explaining how these exceptions are applicable to the submitted information. Therefore, we assume you no longer assert these sections as exceptions to disclosure. *See id.* §§ 552.301, .302.

license plate numbers under section 552.130 of the Government Code; and (4) e-mail addresses of members of the public under section 552.137 of the Government Code.<sup>2</sup>

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 that other statutes make confidential, such as the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part the following:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(a)-(c). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). You contend some of the submitted information constitutes medical records subject to the MPA. However, upon review, we find the none of the submitted information consists of medical records for purposes of the MPA. Therefore, the sheriff may not withhold any of the submitted information under section 552.101 on that ground.

Section 552.101 also encompasses section 411.083 of the Government Code. Criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center is confidential. Gov't Code § 411.083(a); Open Records Decision No. 565 (1990). 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.

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<sup>2</sup>We note this office recently issued Open Records Decision No. 684, a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including L-2 and L-3 declarations under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code, fingerprints under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code, Texas driver's license numbers, a copy of a Texas driver's license, and Texas license plate numbers under section 552.130 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.

ORD 565. 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. 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. The term CHRI does not include driving record information maintained by DPS. *Id.* § 411.082(2)(B). Furthermore, we note that an individual's current involvement in the criminal justice system, including active warrant information, does not constitute CHRI. Upon review, we agree a portion of the submitted information constitutes CHRI. Thus, the sheriff must withhold this information, which we have marked, pursuant to section 552.101 in conjunction with section 411.083 of the Government Code. However, you have failed to establish how any portion of the remaining information you have marked constitutes CHRI for the purposes of chapter 411, subchapter F; thus, it may not be withheld under section 552.101 on that basis.

Section 552.101 also encompasses information that is made confidential under the constitutional right to privacy. Constitutional privacy protects two kinds of interests. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first is the interest in independence in making certain important decisions related to the "zones of privacy," pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. *See Fado v. Coon*, 633 F.2d 1172 (5th Cir. 1981); ORD 455 at 3-7. The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. *See Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual's privacy interest against the public's interest in the information. *See* ORD 455 at 7. Constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492).

This office has applied privacy to protect certain information about incarcerated individuals. *See* Open Records Decision Nos. 430 (1985), 428 (1985), 185 (1978). Citing *State v. Ellefson*, 224 S.E.2d 666 (S.C. 1976), as authority, this office held that those individuals who correspond with inmates possess a "first amendment right . . . to maintain communication with [the inmate] free of the threat of public exposure." This office ruled that this right would be violated by the release of information that identifies those correspondents because such a release would discourage correspondence. *See* ORD 185. The information at issue in this ruling was the identities of individuals who had corresponded with inmates. In Open

Records Decision No. 185, our office found that “the public’s right to obtain an inmate’s correspondence list is not sufficient to overcome the first amendment right of the inmate’s correspondents to maintain communication with him free of the threat of public exposure.” *Id.* Implicit in this holding is the fact that an individual’s association with an inmate may be intimate or embarrassing. In Open Records Decision Nos. 428 and 430, our office determined that inmate visitor and mail logs which identify inmates and those who choose to visit or correspond with inmates are protected by constitutional privacy because people who correspond with inmates have a First Amendment right to do so that would be threatened if their names were released. ORD 430. Further, we recognized that inmates have a constitutional right to visit with outsiders and could also be threatened if their names were released. *See* ORD 185. The rights of those individuals to anonymity was found to outweigh the public’s interest in this information. *Id.*; *see* ORD 430 (list of inmate visitors protected by constitutional privacy of both inmate and visitors). Therefore, upon review, we find the sheriff must withhold the inmate visitor information, which we have marked, under section 552.101 of the Government Code in conjunction with constitutional privacy.

You claim some of the remaining information is excepted from disclosure on the basis of common-law privacy, which is also encompassed by section 552.101. Section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102(a) is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976) for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101. Accordingly, we address the sheriff’s section 552.102(a) claim in conjunction with its common-law privacy claim under section 552.101 of the Government Code.

Common-law privacy 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. *See Indus. Found.*, 540 S.W.2d at 685. To demonstrate the applicability of common-law privacy, both elements of the test must be established. *See 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. *See id.* at 683. This office has found personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600, 545 (1990). In addition, 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). Furthermore, we find that a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. However, information relating to routine traffic violations is not excepted from release under common-law privacy. *Cf.* Gov't Code § 411.082(2)(B) (criminal history record information does not include driving record information).

Upon review, we find that portions of the remaining information, which we have marked, are highly intimate or embarrassing and not of legitimate public interest. Thus, the sheriff must withhold this information under section 552.101 on the basis of common-law privacy and section 552.102. However, we find you have failed to show how the remaining information at issue is highly intimate or embarrassing information of no legitimate public interest. Therefore, the remaining information you have marked may not be withheld under either section 552.101 of the Government Code in conjunction with common-law privacy or section 552.102(a).

You raise section 552.108 of the Government Code for a portion of the remaining information. Section 552.108(a) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime." *Id.* § 552.108(a)(1). We note that the information you seek to withhold under section 552.108 relates to an administrative investigation conducted by the sheriff. Section 552.108 is generally not applicable to records of an internal investigation that is purely administrative in nature and does not involve the investigation or prosecution of crime. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.); *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution). However, we have received a letter from the Galveston Criminal District Attorney's Office (the "district attorney") objecting to the release of police report number 09-008335 because its release would interfere with a pending criminal prosecution by the district attorney. Based upon the district attorney's representation, we conclude the release of this report 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). Accordingly, we find section 552.108(a)(1) of the Government Code is applicable to report number 09-008335. However, you not have informed our office, nor does the district attorney indicate, the district attorney objects to the release of the remaining information you seek to withhold under section 552.108. Thus, you have not demonstrated how any portion of this information pertains to the detection, investigation, or prosecution of crime. Accordingly, the sheriff may not withhold the remaining information at issue under section 552.108(a)(1) of the Government Code.

We note 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). Basic information refers to the information held to be public in *Houston Chronicle*. See 531 S.W.2d at 185-86. Thus, with the exception of basic information, which you state you have released, you may withhold report number 09-008335 under section 552.108(a)(1) of the Government Code.

Section 552.114 of the Government Code excepts from disclosure student records "at an educational institution funded wholly or partly by state revenue." Gov't Code § 552.114(a). The federal Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, governs the availability of student records held by educational institutions or agencies receiving federal funds. These provisions only apply to student records in the custody of educational institutions and to records directly transferred from the educational institution to the third party. 34 C.F.R. § 99.33(a)(2). Although the submitted information includes an educational record, this record is maintained by the sheriff, whose office is not an educational institution. You do not inform us the sheriff received the submitted test results from the educational institutions that created them. We therefore conclude the sheriff may not withhold the submitted educational record on the basis of section 552.114 of the Government Code or FERPA.

Section 552.117(a)(2) excepts from disclosure the home address, home telephone number, social security number, and family member information of a peace officer as defined by article 2.12 of the Code of Criminal Procedure. See Gov't Code § 552.117(a)(2); Open Records Decision No. 622 (1994). You indicate that an individual whose personal information we have marked is a licensed peace officer as defined by article 2.12 of the Code of Criminal Procedure. Therefore, to the extent the individual at issue is a licensed peace officer as defined by article 2.12, the sheriff must withhold the personal information we have marked pursuant to section 552.117(a)(2) of the Government Code.

If the individual at issue is not a licensed peace officer, then his personal information, as well as the personal information of the named former jailer and other sheriff employees, may be excepted under section 552.117(a)(1) of the Government Code.<sup>3</sup> Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). We note that section 552.117 encompasses a personal cellular telephone number, provided that a governmental body does not pay for the cell phone service. See Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for

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<sup>3</sup>We note that, although you also raise section 552.1175 of the Government Code for this information, the proper exception in this instance is section 552.117 of the Government Code because the sheriff holds the submitted information in an employment context.

it is made. *See* Open Records Decision No. 530 at 5 (1989). The sheriff may only withhold information under section 552.117(a)(1) if the individuals at issue elected confidentiality under section 552.024 prior to the date on which the request for information was made. Thus, if the individuals at issue timely elected confidentiality, the sheriff must withhold the marked personal information under section 552.117(a)(1); however, the sheriff may only withhold the personal cellular telephone numbers we have marked if the cellular services were paid for with personal funds.<sup>4</sup> The sheriff may not withhold this information under section 552.117(a)(1), however, if the individuals at issue did not make a timely election to keep the information confidential.

Section 552.122(b) of the Government Code excepts from disclosure test items developed by a licensing agency or governmental body. Gov't Code § 552.122(b). In Open Records Decision No. 626 (1994), this office determined that the term "test item" in section 552.122 includes any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated, but does not encompass evaluations of an employee's overall job performance or suitability. Whether information falls within the section 552.122 exception must be determined on a case-by-case basis. *See* ORD 626 at 6. Traditionally, this office has applied section 552.122 where release of "test items" might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Section 552.122 also protects the answers to test questions when the answers might reveal the questions themselves. *See* Attorney General Opinion JM-640 at 3 (1987); ORD 626 at 8.

You inform us that a portion of the remaining information includes an examination created and used by the sheriff to determine whether individuals have the ability and knowledge base to effectively satisfy the demands of a certain position. You also state the sheriff continues to administer the exam, and thus, releasing the exam questions and their answers would compromise its effectiveness in the future. Based on your representations and our review of the submitted information, we find that the submitted exam questions constitute "test items" under section 552.122(b) and the release of these questions would compromise the effectiveness of future examinations. We also find that the release of the answers to these questions would tend to reveal the questions themselves. Accordingly, we conclude the sheriff may withhold the submitted questions and their corresponding answers, which we have marked, under section 552.122(b) of the Government Code. The cover sheet, however, does not evaluate any specific knowledge. Accordingly, we determine the cover sheet does not qualify as a test item for the purposes of section 552.122(b) and it may not be withheld on that basis.

You state you have marked Texas driver's license numbers under section 552.130 of the Government Code pursuant to Open Records Decision No. 684. We note, however, the remaining information includes additional Texas driver's license numbers as well as other

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<sup>4</sup>As our ruling is dispositive, we need not address your argument under section 552.147 of the Government Code for this information.

Texas motor vehicle record information subject to section 552.130. Section 552.130 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). Thus, we conclude section 552.130 is applicable to some of the remaining information. However, we find the driver's license issuing state you have marked does not constitute motor vehicle record information for purposes of section 552.130. Therefore, the sheriff must only withhold the Texas motor vehicle record information we have marked pursuant to section 552.130.<sup>5</sup>

You state you have also marked private e-mail addresses under section 552.137 of the Government Code pursuant to Open Records Decision No. 684. We note, however, the remaining information includes additional e-mail addresses subject to section 552.137. Section 552.137 excepts from disclosure "an 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). *Id.* § 552.137(a)-(c). The e-mail addresses in the remaining information are not of a type specifically excluded by section 552.137(c). Thus, we find the sheriff must withhold the e-mail addresses we have marked under section 552.137, unless the sheriff receives consent for their release. You also seek to withhold the name of the owner of an e-mail address under section 552.137. However, this information does not constitute an e-mail address subject to section 552.137. Thus, this information, which we have marked for release, may not be withheld on that basis.

Finally, section 552.147 of the Government Code states that "[t]he social security number of a living person is excepted from" required public disclosure under the Act.<sup>6</sup> *Id.* § 552.147. Upon review, we agree the sheriff may withhold the remaining social security numbers you have marked under section 552.147 of the Government Code.

In summary, in conjunction with section 552.101 of the Government Code, the sheriff must withhold: (1) the CHRI we have marked under chapter 411 of the Government Code; (2) the information we have marked under constitutional privacy; and (3) the information we have marked under common-law privacy and section 552.102 of the Government Code. The sheriff must also withhold: (1) the information we have marked under section 552.117(a)(2) of the Government Code, to the extent the individual at issue is a licensed peace officer; (5) the information we have marked under section 552.117(a)(1) of the Government Code if the individuals at issue timely elected confidentiality; however, the sheriff may only withhold the marked cellular telephone numbers if the cellular telephones were paid for with personal funds; (6) the Texas motor vehicle record information we have marked under

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<sup>5</sup>As our ruling is dispositive of this information, we need not address your remaining arguments against its disclosure.

<sup>6</sup>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(b).

section 552.130 of the Government Code; and (7) with the exception of the information marked for release, the e-mail addresses we have marked under section 552.137 of the Government Code, unless the sheriff receives consent for their release. The sheriff may withhold: (1) report number 09-008335 under section 552.108(a)(1) of the Government Code, with the exception of basic information; (2) the marked questions and their corresponding answers under section 552.122(b) of the Government Code; and (3) the remaining social security numbers of living persons under section 552.147 of the Government Code. The remaining information 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](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, toll free, at (888) 672-6787.

Sincerely,



Christina Alvarado  
Assistant Attorney General  
Open Records Division

CA/rl

Ref: ID# 372295

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)