



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 16, 2011

Mr. Robert J. Davis
Matthews, Stein, Shiels, Pearce, Knott, Eden, & Davis, L.L.P.
For Collin County
8131 LBJ Freeway, Suite 700
Dallas, Texas 75251

OR2011-06855

Dear Mr. Davis:

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# 417493 (Collin County file no. 1600/63701).

Collin County (the "county"), which you represent, received a request for information related to a specified investigation and a named officer's personnel file. You claim the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108, 552.117, 552.1175, and 552.119 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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 public information and not excepted from required disclosure under this chapter 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]

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(1), (17). Exhibits 5 and 6 consist of information that is part of a completed investigation. Exhibit 7 contains completed evaluations and court-filed documents. This information falls within the purview of subsections 552.022(a)(1) and 552.022(a)(17), respectively. The county may only withhold the completed investigation and evaluations subject to subsection 552.022(a)(1) if it is excepted from disclosure under section 552.108 of the Government Code or is expressly made confidential under other law. The county may only withhold the court-filed documents subject to subsection 552.022(a)(17) if they are confidential under other law. You claim the court-filed documents in Exhibit 7 are excepted from disclosure under sections 552.103 and 552.108 of the Government Code. However, sections 552.103 and 552.108 are discretionary exceptions that protect a governmental body's interests. *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), 177 (1977) (governmental body may waive statutory predecessor to section 552.108). As such, sections 552.103 and 552.108 are not "other law" for purposes of section 552.022(a)(17). Additionally, although you raise section 552.103 for the completed investigation in Exhibits 5 and 6 and the evaluations in Exhibit 7, this section is not "other law" for purposes of section 552.022(a)(1). Therefore, the county may not withhold the completed investigation in Exhibits 5 and 6 and the evaluations in Exhibit 7 under section 552.103 and may not withhold the court-filed documents under sections 552.103 or section 552.108. However, we will address whether the completed investigation in Exhibits 5 and 6 and the evaluations in Exhibit 7 may be withheld under section 552.108 of the Government Code. In addition, because sections 552.101, 552.102, 552.117, 552.1175, and 552.119 of the Government Code are "other law" for purposes of sections 552.022, we will address the applicability of these exceptions for all of the information subject to section 552.022. We will also address your claims for the information not subject to section 552.022.

First, we will address whether the information not subject to section 552.022 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.

...

(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). The governmental body has the burden of providing relevant facts and documents to show 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 establish that litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.* This office has concluded that a governmental body’s receipt of a claim that it represents to be in compliance with the notice requirements of the Texas Tort Claims Act (the “TTCA”), chapter 101 of the Civil Practice and Remedies Code, is sufficient to establish that litigation is reasonably anticipated. If this representation is not made, then the receipt of the claim letter is a factor that we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established that litigation is reasonably anticipated.¹ *See* Open Records Decision No. 638 at 4 (1996).

You state the requestor, who is an attorney, provided a notice of claim letter to the county which made a personal injury claim on behalf of his client against the county relating to the incident at issue. You do not represent this letter is in compliance with the TTCA. However, the letter alleges his client sustained psychological and physical injuries, and the letter seeks monetary damages. Additionally, the submitted information reveals that the requestor’s client intends to sue the county. Therefore, after reviewing the submitted documentation and your arguments, we conclude, based on the totality of the circumstances, the county reasonably anticipated litigation when it received the request for information. Furthermore, we find the information not subject to section 552.022 is related to the anticipated litigation for purposes of section 552.103(a). Therefore, based on your representations and our review of the information at issue, we find the county may withhold the information not subject to section 552.022 under section 552.103 of the Government Code.

Generally, however, 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.

¹Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); (2) 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 (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

See Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to 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 or is no longer anticipated. See Attorney General Opinion MW-575 (1982); see also Open Records Decision No. 350 (1982).

Next, we address your arguments against disclosure of the information subject to section 552.022(a)(1). We will first address your argument under section 552.108 of the Government Code as it is potentially the most encompassing. Section 552.108 of the Government Code provides in relevant 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;

...

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution[.]

Gov't Code § 552.108(a)(1), (b)(1). A governmental body claiming subsection 552.108(a)(1) or subsection 552.108(b)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. See *id.* §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); see also *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108(a)(1) protects information, the release of which would interfere with a particular pending criminal investigation or prosecution. Section 552.108(b)(1) is intended to protect "information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State." *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.). To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a governmental body must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. Instead, the governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. See Open Records Decision No. 562 at 10 (1990) (construing statutory predecessor). In addition, generally known policies and

techniques may not be withheld under section 552.108. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common law rules, and constitutional limitations on use of force are not protected under law enforcement exception), 252 at 3 (1980) (governmental body did not meet burden because it did not indicate why investigative procedures and techniques requested were any different from those commonly known). The determination of whether the release of particular records would interfere with law enforcement is made on a case-by-case basis. *See* Open Records Decision No. 409 at 2 (1984) (construing statutory predecessor).

The information you seek to withhold under section 552.108 relates to an internal affairs investigation. Section 552.108 is generally not applicable to information relating to an administrative investigation that did not result in a criminal investigation or prosecution. *See 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); *see also* Open Records Decision No. 350 at 3-4 (1982). You state that the “limitations for possible criminal matters involving the [incident at issue] have not expired” and that release of the information at issue would interfere with possible future investigations. You further inform this office that an internal affairs investigation is completed and the officer at issue has resigned. However, you have not provided a representation that release of the information at issue would interfere with a pending criminal investigation. Accordingly, you have failed to demonstrate section 552.108(a)(1) applies to the information at issue. Thus, the county may not withhold any portion of the information subject to section 552.022(a)(1) under section 552.108(a)(1).

You also generally state releasing portions of the information at issue “may reveal security measures or strip search procedures.” However, we note the submitted information pertains to the investigation of the incident specified in the request. You do not mark and we are unable to determine which portion of this information would reveal security measures and strip search procedures. Thus, you have failed to explain how the release of this information would interfere with current and future law enforcement and crime prevention efforts. Consequently, we find you have failed to show the applicability of section 552.108(b)(1) to the remaining information at issue. Therefore, the county may not withhold this information under section 552.108(b)(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. This exception encompasses information protected by other statutes, such as section 261.201 of the Family Code, which provides in relevant part:

- (a) Except as provided by Section 261.203, the following information is confidential, is not subject to public release under [the Act], and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). You state portions of the submitted information relates to an investigation of alleged child abuse under chapter 261 of the Family Code. Section 261.001 of the Family Code defines "abuse" for purposes of section 261.201 to include, among other things, sexual assault under section 22.011 of the Penal Code, aggravated sexual assault under section 22.021 of the Penal Code, continuous sexual abuse of a young child or children under section 21.02 of the Penal Code, and indecency with a child under section 21.11 of the Penal Code. *Id.* § 261.001(1)(E). Although, section 101.003(a) of the Family Code defines a "child" for purposes of section 261.201 as a "person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes," *id.* § 101.003(a), we note the Penal Code defines a "child" for purposes of section 22.011 as "a person younger than 17 years of age who is not the spouse of the actor." Penal Code § 22.011(c)(1). We find, when read together, sections 261.001(1)(E) of the Family Code and 22.011(c)(1) of the Penal Code proscribe that sexual abuse of a child under chapter 261 requires the child be under the age of 17. Therefore, because the victim listed in the submitted information is seventeen years old, we cannot conclude any of the submitted information consists of a report of or was used or developed in an investigation of child abuse under chapter 261 of the Family Code. Thus, section 261.201 of the Family Code is inapplicable to the remaining information at issue, and it may not be withheld under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses section 58.007 of the Family Code. Juvenile law enforcement records relating to delinquent conduct or conduct indicating a need for supervision that occurred on or after September 1, 1997 are confidential under section 58.007(c). The relevant language of section 58.007 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). For purposes of section 58.007(c), "child" means a person who is ten years of age or older and under seventeen years of age. *See id.* § 51.02(2). As previously noted, the remaining information consists of an internal investigation and portions of an officer's personnel file. The remaining information does not consist of juvenile law enforcement records for purposes of section 58.007; therefore, this information is not confidential under section 58.007(c) of the Family Code, and the county may not withhold it under section 552.101 of the Government Code on that ground.

Section 552.101 of the Government Code also encompasses section 1703.306 of the Occupations Code, which provides in part:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person[.]

Occ. Code § 1703.306(a). We have marked polygraph information in the remaining information. The marked polygraph information is confidential under section 552.101 in conjunction with section 1703.306. Therefore, the county must withhold the information we have marked under section 552.101 in conjunction with section 1703.306 of the Occupations Code.

We now address your arguments under common-law privacy, which is also encompassed by section 552.101 of the Government Code. 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 or 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 determined common-law privacy generally protects the identities of juvenile offenders. *See* Open Records Decision No. 394 (1983). Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the county must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. However, we find no portion of the remaining

information is highly intimate or embarrassing and of no legitimate concern to the public. Consequently, the county may not withhold any of the remaining information under section 552.101 in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses the informer's privilege, which has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The informer's privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority. Open Records Decision No. 515 at 3 (1988). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5. However, the informer's privilege does not apply where the informant's identity is known to the individual who is the subject of the complaint. *See* Open Records Decision No. 208 at 1-2 (1978).

You assert some of the remaining information should be withheld under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. However, we note, and you acknowledge, and the information itself reveals the subject of the complaint knows the identity of the complainant. *See id.* In addition, we note a witness who provides information in the course of an investigation, but does not make the initial report of a violation, is not an informant for purposes of the common-law informer's privilege. We therefore conclude the county has failed to demonstrate the applicability of the common-law informer's privilege in this instance. Thus, the county may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with the informer's privilege.

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). The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). The county must withhold the information we have marked under section 552.102(a) of the Government Code. The remaining information is not excepted under section 552.102(a) and may not be withheld on that basis

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home addresses, home telephone numbers, and social security number of a peace officer, as well

as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code.² Gov't Code § 552.117(a)(2). In this instance, the submitted information reflects the employee whose information is at issue is no longer employed by the county, and it is unclear whether this individual is currently a licensed peace officer as defined by article 2.12. Thus, if the former employee is a currently licensed peace officer as defined by article 2.12, the county must withhold the information we have marked, under section 552.117(a)(2) of the Government Code. If, however, the former employee is not a currently licensed peace officer, his personal information may not be withheld under section 552.117(a)(2) of the Government Code.

If the former employee is no longer a licensed peace officer, then his personal information may be subject to section 552.117(a)(1) of the Government Code, which excepts from disclosure the home addresses and telephone numbers, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024. *See id.* § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See Open Records Decision No. 530 at 5 (1989)*. Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Therefore, if the former employee is no longer a licensed peace officer as defined by article 2.12, then to the extent he timely elected confidentiality under section 552.024, the county must withhold the information we have marked under section 552.117(a)(1) of the Government Code. If, however, the former employee is no longer a licensed peace officer and did not timely elect to keep his personal information confidential, his marked personal information may not be withheld under section 552.117(a)(1).

You also assert some of the remaining information may be excepted under section 552.1175 of the Government Code, which provides in part the following:

Information that relates to the home address, home telephone number, or social security number of [a peace officer as defined by article 2.12 of the Code of Criminal Procedure], or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

- (1) chooses to restrict public access to the information; and

²"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(b). Upon review, we find you have failed to demonstrate how the remaining information is encompassed by section 552.1175. Therefore, the county may not withhold the remaining information on that ground.

Section 552.119 of the Government Code provides the following:

(a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, the release of which would endanger the life or physical safety of the officer, is excepted from [required public disclosure] unless:

(1) the officer is under indictment or charged with an offense by information;

(2) the officer is a party in a civil service hearing or a case in arbitration; or

(3) the photograph is introduced as evidence in a judicial proceeding.

(b) A photograph excepted from disclosure under Subsection (a) may be made public only if the peace officer gives written consent to the disclosure.

Id. § 552.119. Under section 552.119, a governmental body must demonstrate, if the documents do not demonstrate on their face, that release of the photograph would endanger the life or physical safety of a peace officer. The submitted information does not contain any photographs. Therefore, we understand you to raise section 552.119 for the submitted video. Upon review, we find you have not demonstrated, and it is not apparent from our review of the submitted information, that release of the images of the officers in the submitted video recording would endanger the life or physical safety of the peace officers depicted; therefore, the county may not withhold the images of the officers under section 552.119 of the Government Code.

In summary, the county may withhold the information not subject to section 552.022 of the Government Code under section 552.103 of the Government Code. The county must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. The county must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The county must withhold the information we have marked under section 552.102(a) of the Government Code. If the former employee is a

currently licensed peace officer as defined by article 2.12, the county must withhold the information we have marked under section 552.117(a)(2) of the Government Code. If the former employee is no longer a peace officer as defined by article 2.12, then to the extent he timely elected confidentiality under section 552.024 of the Government Code, the county must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The remaining information must be released.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, toll free, at (888) 672-6787.

Sincerely,



Tamara Wilcox
Assistant Attorney General
Open Records Division

TW/dls

Ref: ID# 417493

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³We note the requestor has a special right of access to some of the information being released in this instance. See Gov't Code § 552.023. Because such information is confidential with respect to the general public, if the county receives another request for this information from a different requestor, then the county should again seek a ruling from this office.