



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 24, 2011

Ms. Bonnie Lee Goldstein
For City of Princeton
Bonnie Lee Goldstein, P.C.
P.O. Box 140940
Dallas, Texas 75214-0940

Mr. Jason D. King
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Austin, Texas 78730

OR2011-09059

Dear Ms. Goldstein and Mr. King:

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# 421677.

The Princeton Police Department (the "department"), which you represent, received a request for (1) the personnel files of officers who were "active" during a specified time period; (2) cellular telephone records during a specified time period; (3) work schedules for a specified time period; (4) procedures pertaining to misdemeanor traffic stops; (5) video recordings regarding citation number 47101; and (6) a named officer's training records.¹ You indicate the department has no information responsive to the request for cellular telephone records.² You claim the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.117 of the Government Code.

¹You state the department sought and received clarification from the requestor regarding the request. See Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

²The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

Section 552.103 of the Government Code provides:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body 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 was 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

For purposes of section 552.103(a), litigation includes civil lawsuits and criminal prosecutions, as well as proceedings that are governed by the Administrative Procedure Act, chapter 2001 of the Government Code, or are otherwise conducted in a quasi-judicial forum. See Open Records Decision Nos. 588 (1991), 474 (1987), 368 (1983), 336 (1982). You indicate the department received the request for information after a criminal prosecution involving the requestor and citation number 47101 was filed, and is pending, in the City of Princeton's (the "city") municipal court. We note, however, the department is not a party to the pending prosecution and, therefore, does not have a litigation interest in the matter for purposes of section 552.103. See Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990) (stating predecessor to section 552.103 only applies when governmental body is party to litigation). In such a situation, we require an affirmative representation from the

³We assume 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 those records contain substantially different types of information than that submitted to this office.

governmental body with the litigation interest that the governmental body wants the information at issue withheld from disclosure under section 552.103. You state the city, which you also represent, is the prosecuting entity in the pending prosecution and, as the prosecutor, you request the information at issue be withheld under section 552.103. Based on your representations, we conclude litigation involving the city was pending when the department received the request. You also state the requested video recordings, misdemeanor traffic stop procedures, and named officer's training records are related to the pending litigation because they constitute direct evidence in the pending case. Based on your representations and our review, we find the video recordings, procedures, and training records at issue are related to the pending litigation for purposes of section 552.103. Therefore, the department may withhold the requested video recordings, misdemeanor traffic stop procedures, and named officer's training records under section 552.103 of the Government Code.⁴

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

Section 552.108 of the Government Code excepts from disclosure the internal records and notations of law enforcement agencies and prosecutors when their release would interfere with law enforcement and crime prevention. Gov't Code § 552.108(b)(1); *see also* Open Records Decision No. 531 at 2 (1989) (quoting *Ex parte Pruitt*, 551 S.W.2d 706, 710 (Tex. 1977)). 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." *See City of Ft. Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no writ). To demonstrate the applicability of section 552.108, a governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). This office has concluded section 552.108(b) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines would unduly interfere with law enforcement), 456 at 2 (1987) (release of forms containing information regarding when and where off-duty police officers will be working would unduly interfere with law enforcement), 252 (1980) (section 552.108 is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976)

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

(disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted).

You claim the requested police officer work schedules are protected under section 552.108(b)(1). You explain that because the department is small, the officers typically work similar schedules each week, such that scheduling patterns are easily discernible. You argue future work schedules will be similar to the requested schedules and will include the same patterns. You assert releasing the requested work schedules would jeopardize the safety of the officers and permit private citizens to anticipate weaknesses in the department. Based on your arguments and our review, we conclude the department may withhold the requested officer work schedules under section 552.108(b)(1) of the Government Code.

You also claim the requested information contains certain state and federal law enforcement officer cellular telephone numbers that are protected under section 552.108(b)(1). In Open Records Decision No. 506 (1988), this office determined the statutory predecessor to section 552.108(b) excepted from disclosure "cellular mobile phone numbers assigned to county officials and employees with specific law enforcement responsibilities." Open Records Decision No. 506 at 2 (1988). In this instance, however, the remaining information does not contain any cellular telephone numbers. Consequently, you have failed to demonstrate the applicability of section 552.108(b)(1) of the Government Code to the remaining information, and the department may not withhold any of the remaining information on that basis.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section encompasses information other statutes make confidential, such as section 6103(a) of title 26 of the United States Code. Prior decisions of this office have held section 6103(a) renders tax return information confidential. *See, e.g.,* Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 600 (1992) (W-4 forms). Section 6103(b) of title 26 of the United States Code defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of . . . income, payments, . . . tax withheld, deficiencies, overassessments, or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return or . . . the determination of the existence, or possible existence, of liability . . . for any tax, penalty, . . . or offense[.]" *See* 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), *aff'd in part*, 993 F.2d 1111 (4th Cir. 1993). The submitted personnel records contain a W-4 form, which constitutes tax return information. Therefore, the department must withhold the W-4 form we have marked under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

The remaining personnel records contain an I-9 form and supporting documentation, which are also governed by federal law. Section 552.101 also encompasses section 1324a of title 8 of the United States Code, which provides an Employment Eligibility Verification Form I-9 “and any information contained in or appended to such form . . . may not be used for purposes other than for enforcement of this chapter” and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). Release of the I-9 form and supporting documentation at issue under the Act would be “for purposes other than for enforcement” of the referenced federal statutes. Accordingly, we find the department must withhold the I-9 form and supporting documentation, which we have marked, under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code.

Section 552.101 also encompasses the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. *See* Occ. Code §§ 151.001-167.202. Section 159.002 of the MPA provides, in part:

(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.

Id. § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded 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). Medical records must be released upon the patient’s signed, written consent, provided the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. You claim some of the remaining personnel records are protected under the MPA. We have marked pre-employment drug screening records completed by a physician that we find constitute confidential medical records. The department may release the marked medical records only in accordance with the MPA. ORD 598.

Section 552.101 also encompasses section 1701.306 of the Occupations Code, which provides, in relevant part:

(a) The [Texas Commission on Law Enforcement Officer Standards and Education] may not issue a license to a person as an officer or county jailer unless the person is examined by:

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test.

(b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to the commission. A declaration is not public information.

Occ. Code § 1701.306(a)-(b). You seek to withhold the L-2 (Declaration of Medical Condition) and L-3 (Declaration of Psychological and Emotional Health) forms in the remaining personnel records. We find these forms, which we have marked, are confidential under section 1701.306 of the Occupations Code, and must be withheld under section 552.101 of the Government Code.

Section 552.101 also encompasses section 1701.454 of the Occupations Code, which provides, in relevant part, “[a] report or statement submitted to the [Texas Commission on Law Enforcement Officer Standards and Education] under this subchapter is confidential and is not subject to disclosure under [the Act], unless the person resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses.” *Id.* § 1701.454(a). The remaining personnel records contain F-5 Report of Separation of License Holder forms, which we have marked. In this instance, the F-5 forms reflect the officer to whom these forms apply did not resign due to substantiated incidents of excessive force or violations of the law other than traffic offenses. Therefore, the department must withhold the marked F-5 forms pursuant to section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

You claim portions of the remaining personnel records are protected under common-law privacy. Section 552.101 also encompasses the doctrine of common-law privacy, which 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). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. This office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. *See* Open Records Decision Nos. 600 (1992) (finding personal financial information to include designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). The remaining personnel records contain information pertaining to an employee's optional insurance elections, direct deposit authorizations, and beneficiary designations. We have marked this information, which we find is not of legitimate public concern. Therefore, the department must withhold the marked personal financial information under section 552.101 of the Government Code in conjunction with common-law privacy.

You assert portions of the remaining personnel records are excepted from disclosure under section 552.101 of the Government Code in conjunction with section 217.7 of the Administrative Code, section 772.318 of the Health and Safety Code, and the common-law informer's privilege.⁵ You have not, however, marked, or otherwise indicated, what information you claim is excepted by these provisions. *See* Gov't Code § 552.301(e)(2) (governmental body must label copy of information at issue to indicate which exceptions apply to which parts of the information). Consequently, you have failed to demonstrate the applicability of section 217.7 of the Administrative Code, section 772.318 of the Health and Safety Code, and the informer's privilege to the remaining information, and the department may not withhold any of the remaining personnel records on those bases.

We note the remaining personnel records include a date of birth that is excepted from disclosure under section 552.102(a) of the Government Code.⁶ Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute

⁵Section 217.7 states before hiring or appointing a licensee, an agency shall contact the Texas Commission on Law Enforcement Officers Standards and Education, electronically or in writing, to comply with the reporting requirements of section 1701.451 of the Occupations Code, and a report or statement submitted under section 217.7 is exempt from disclosure under the Act. *See* Occ. Code § 1701.451 (requirements of preemployment request for early termination report and background check confirmation form); *see also* 37 Tex. Admin. Code § 217.7(a), (h). Section 772.318 applies to an emergency communication district for a county with a population of more than 20,000 and makes the originating telephone number and address of a 9-1-1 caller that are furnished by a 9-1-1 service supplier confidential. *See* Health & Safety Code § 772.318; *see also* Open Records Decision No. 649 (1996) at 2. 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, provided the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978).

⁶The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions.

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 department must withhold the employee’s date of birth we have marked in the remaining personnel records under section 552.102(a) of the Government Code.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home addresses, home telephone numbers, emergency contact information, 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 section 552.024 or section 552.1175 of the Government Code.⁷ Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov’t Code § 552.117(a)). We have marked in the remaining personnel records a department officer’s personal information. Thus, the department must withhold this information under section 552.117(a)(2) of the Government Code.

The remaining personnel records contain Texas driver’s license information. Section 552.130 of the Government Code provides information relating to a motor vehicle operator’s license or driver’s license issued by a Texas agency, or an agency of another state or country, is excepted from public release. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 4 (to be codified as an amendment to Gov’t Code § 552.130). We have marked a Texas driver’s license number and a copy of a Texas driver’s license in the remaining personnel records. The department must withhold this information under section 552.130 of the Government Code.

The remaining personnel records contain an e-mail address. Section 552.137 of the Government Code 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). *See* Gov’t Code § 552.137(a)-(c). The e-mail address at issue is not specifically excluded by section 552.137(c). As such, the department must withhold this e-mail address, which we have marked, under section 552.137 of the Government Code, unless the owner of the address has affirmatively consented to its release. *See id.* § 552.137(b).

In summary, the department may withhold the requested video recordings, misdemeanor traffic stop procedures, and named officer’s training records under section 552.103 of the Government Code. The department may withhold the requested officer work schedules under section 552.108(b)(1) of the Government Code. The department may release the marked medical records only in accordance with the MPA. The department must withhold

⁷“Peace officer” is defined by Article 2.12 of the Texas Code of Criminal Procedure.

under section 552.101 of the Government Code the marked W-4 form in conjunction with section 6103(a) of title 26 of the United States Code; the marked I-9 form and supporting documentation in conjunction with section 1324a of title 8 of the United States Code; the marked L-2 and L-3 forms in conjunction with section 1701.306 of the Occupations Code; the marked F-5 forms in conjunction with section 1701.454 of the Occupations Code; and the marked personal financial information in conjunction with common-law privacy. The department must withhold the marked date of birth under section 552.102(a) of the Government Code; the officer's marked personal information under section 552.117(a)(2) of the Government Code; and the marked Texas driver's license information under section 552.130 of the Government Code. The department must withhold the marked e-mail address under section 552.137 of the Government Code, unless the owner of the address has affirmatively consented to its release.⁸ The department must release the remaining information.

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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

⁸We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a direct deposit authorization form under section 552.101 of the Government Code in conjunction with common-law privacy; a Form I-9 and attachments under section 552.101 in conjunction with section 1324a of title 8 of the United States Code; a W-4 form under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code; L-2 and L-3 forms under section 552.101 in conjunction with section 1701.306 of the Occupations Code; a Texas driver's license number and a copy of a Texas driver's license under section 552.130 of the Government Code; and an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

Ref: ID# 421677

Enc. Submitted documents

c: Requestor
(w/o enclosures)