



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 11, 2011

Ms. Sharae N. Bassett
Assistant City Attorney
City of Beaumont
P.O. Box 3827
Beaumont, Texas 77704-3827

OR2011-09788

Dear Ms. Bassett:

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# 423552 (ORR No. 04-74).

The Beaumont Police Department (the "department") received a request for nine categories of information relating to a named police officer. You claim some of the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.1175 of the Government Code.¹ We have considered the exceptions you claim and reviewed the information you submitted.²

We note you have labeled the submitted information as being responsive to Items C, H, and I of the instant request for information. You state that "[a]ll other information, which is not protected from disclosure, will be made available to [the requestor] upon court order after the discovery hearing." We note a governmental body that receives a request for information from a member of the public must either request a ruling by this office and claim exceptions

¹Although you do not specifically raise section 552.101 of the Government Code, we understand you to claim this section, which is a mandatory exception to disclosure. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

²You also state the named officer and an attorney for the officer were notified of their right to submit comments to this office. *See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released). As of the date of this decision, this office has received no correspondence from either of the parties you notified.

to disclosure of the information in accordance with section 552.301 of the Government Code or release the information to the requestor. *See* Gov't Code §§ 552.301(a), .302. Thus, because you have not asked this office for a ruling on the remaining information to which the requestor seeks access, the department must release that information immediately. *See* Gov't Code §§ 552.006, .221; Open Records Decision No. 664 (2000).

We next note information has been redacted from the submitted records of personnel investigations. Section 552.301 of the Government Code prescribes procedures a governmental body must follow in asking this office to determine whether requested information is excepted from public disclosure. *See* Gov't Code § 552.301(a). Section 552.301(e) requires a governmental body to submit the specific information at issue to this office, or representative samples if the information is voluminous, unless the governmental body is authorized to withhold the information pursuant to sections 552.024(c) or 552.147 of the Government Code or a previous determination. *See* Gov't Code § 552.301(e)(1)(D); Open Records Decision No. 673 (2001) (previous determinations). Section 552.024(c) authorizes a governmental body to withhold a current or former employee's home address and home telephone number, emergency contact information, social security number, and information that reveals whether the employee has family members, to the extent the employee chooses not to allow public access to the information, without requesting a decision. *See* Gov't Code § 552.024(c). Section 552.147(b) authorizes a governmental body to redact a living person's social security number from public release without requesting a decision. *See id.* § 552.147(b). This office issued a previous determination in Open Records Decision No. 670 (2001) authorizing all governmental bodies to withhold personal information relating to a peace officer under section 552.117(a)(2) of the Government Code without requesting a decision. *See* ORD 670 at 6-7. This office also issued a previous determination in Open Records Decision No. 684 (2009) authorizing all governmental bodies to withhold ten other categories of information without requesting an attorney general decision under the Act. *See* ORD 684 at 7-8. We know of no other authority for the department to withhold information under the Act without requesting a decision.

In this instance, the department is authorized to withhold some of the redacted information under section 552.117(a)(2) pursuant to Open Records Decision No. 670. Additionally, we are able to ascertain the nature of, and thus are able to rule on, other redacted information. We are unable, however, to ascertain the nature of the remaining redacted information. Therefore, except for any information the department is authorized to withhold under sections 552.024(c) and 552.147(b) of the Government Code or Open Records Decision Nos. 670 and 684, the department must release the remaining redacted information. *See* Gov't Code §§ 552.301, .302. In the future, the department should refrain from redacting any information from records submitted to this office in connection with a request for a decision under the Act unless the department is authorized to withhold the information pursuant to sections 552.024(c) or 552.147(b) or a previous determination.

We next note some of the submitted information is subject to disclosure under section 552.022 of the Government Code. Section 552.022(a)(1) provides for required

public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body,” unless the information is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law. Gov’t Code § 552.022(a)(1). The completed evaluations and personnel investigations we have marked are subject to section 552.022(a)(1). You seek to withhold these evaluations and investigations under section 552.103 of the Government Code, which is a discretionary exception to disclosure that protects a governmental body’s interests and may be waived. *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 Gov’t Code § 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not other law that makes information confidential for purposes of section 552.022(a)(1). Therefore, the department may not withhold any information encompassed by section 552.022(a)(1) under section 552.103 of the Government Code. We note you also claim sections 552.101 and 552.1175 of the Government Code, which are other law that makes information confidential for purposes of section 552.022(a)(1). We also note some of the information encompassed by section 552.022(a)(1) falls within the scope of section 552.102 of the Government Code, which also is other law that makes information confidential for purposes of section 552.022(a)(1).³ Accordingly, we will address the applicability of sections 552.101, 552.102, and 552.1175 to the information encompassed by section 552.022(a)(1). We also will address your claim under section 552.103 of the Government Code for the rest of the information at issue.

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 common-law privacy, which protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy encompasses the specific types of information held to be intimate or embarrassing in *Industrial Foundation*. *See* 540 S.W.2d at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has determined other types of information are private under section 552.101. *See generally* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private). We also have concluded common-law privacy generally protects the identifying information of juvenile offenders. *See* Open Records Decision No. 394 (1983); *cf.* Fam. Code § 58.007. Additionally, we have concluded a compilation of an individual’s criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person, and is generally not of legitimate concern to the public. *Cf. United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489

³This office will raise section 552.102 on behalf of a governmental body, as this section is a mandatory exception to disclosure. Gov’t Code §§ 552.007, .352; ORD 674 at 3 n.4.

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). We have marked information relating to a juvenile offender and criminal history information the department must withhold under section 552.101 of the Government Code in conjunction with common-law privacy.

Although you contend other information encompassed by section 552.022(a)(1) is protected by common-law privacy, we note the information in question pertains to the police officer whose personnel records are the subject of this request for information. The public generally has a legitimate interest in information relating to public employment and public employees, particularly those involved in law enforcement. *See* Open Records Decision No. 444 at 6 (1986) (public has genuine interest in information concerning law enforcement employee's qualifications and performance and circumstances of his termination or resignation). We therefore conclude the department may not withhold the information in question under section 552.101 in conjunction with common-law privacy. *See also* Open Records Decision Nos. 562 at 10 (1990) (personnel information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 473 at 3 (1987) (fact that public employee received less than perfect or even very bad evaluation not private), 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs).

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. *See Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). We have marked information the department must withhold under section 552.102(a) of the Government Code.

Section 552.1175 of the Government Code is applicable to information relating to a peace officer, as defined by article 2.12 of the Code of Criminal Procedure. *See* Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 3 (to be codified as an amendment to Gov't Code § 552.1175(b)). As a general rule, section 552.1175 is applicable to information relating to a peace officer employed by a governmental body other than the one that received the request for the information at issue. Although you raise section 552.1175, you have not demonstrated this exception is applicable to any of the information encompassed by section 552.022(a)(1). We therefore conclude the department may not withhold any of the submitted information under section 552.1175 of the Government Code.

Next, we address your claim under section 552.103 of the Government Code for the submitted information that is not encompassed by section 552.022(a)(1). Section 552.103 provides in part:

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

...

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

Id. § 552.103(a), (c). A governmental body that claims section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

You state the rest of the submitted information is related to a prosecution pending in the municipal court of the City of Beaumont (the "city"). You explain the officer to whom the remaining information pertains issued a citation to the defendant in the prosecution. You have submitted a pleading reflecting the prosecution was pending when the department received the instant request for information. We note, however, the department is not a party to the prosecution and thus does not have a litigation interest in the prosecution for purposes of section 552.103. *See Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990) (statutory predecessor to Gov't Code § 552.103 only applies when governmental body is party to litigation).* Under these circumstances, we require an affirmative representation from the governmental body with the litigation interest that it wants the information at issue withheld from disclosure under section 552.103. You note "[t]he [c]ity is an adverse party in the pending municipal court case." You state the requestor "is specifically requesting information that goes to the qualifications and credi[]bility of the state's witness." You inform us "[t]he [c]ity . . . respectfully asserts that the requestor is asking for documents that are exempted from release." Thus, we understand you to assert the city's litigation interest in the remaining information at issue. Based on your representations, we conclude the department may withhold the remaining information on behalf of the city under section 552.103 of the Government Code.

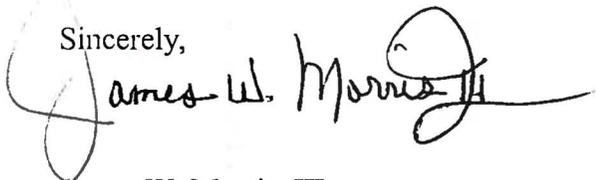
In reaching this conclusion, we assume the opposing party in the prosecution has not seen or had access to any of the information in question. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. If the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We also note the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the department (1) must withhold the information we have marked under sections 552.101 of the Government Code in conjunction with common-law privacy; (2) must withhold the information we have marked under section 552.102(a) of the Government Code; (3) must release the rest of the marked information encompassed by section 552.022(a)(1) of the Government Code; and (4) may withhold the remaining information under section 552.103 of the Government Code.

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,

A handwritten signature in black ink that reads "James W. Morris, III". The signature is written in a cursive style with a large, looping initial "J" and a long horizontal flourish at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/em

Ref: ID# 423552

Enc: Submitted documents

c: Requestor
(w/o enclosures)