



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 6, 2014

Mr. Daniel Plake
Assistant County Attorney
Montgomery County
501 North Thompson, Suite 102
Conroe, Texas 77301

OR2014-02371

Dear Mr. Plake:

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# 513120.

The Montgomery County Precinct 3 Constable's Office (the "constable's office") received a request for e-mails from a specified period of time. You assert some of the submitted information is not subject to the Act. You also claim some of the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.108, 552.117, 552.137, and 552.152 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, you contend portions of the information submitted as Exhibits C-2 and C-3 are not subject to the Act. The Act is applicable only to "public information." *See* Gov't Code §§ 552.002, .021. Section 552.002(a) defines "public information" as information that is

¹Although you raise section 552.024 of the Government Code as an exception to disclosure, this section is not an exception to public disclosure under the Act. Rather, this section permits a current or former official or employee of a governmental body to choose whether to allow public access to certain personal information relating to the official or employee that is held by the employing governmental body. *See* Gov't Code § 552.024. We note section 552.117 of the Government Code is the proper exception to assert. Furthermore, we note section 552.021 of the Government Code is not an exception to disclosure under the Act. *See id.* § 552.021 (providing that public information is available during normal business hours). Although you also raise section 552.101 of the Government Code in conjunction with section 552.107 of the Government Code, this office has concluded section 552.101 does not encompass other exceptions found in the Act. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body;

(2) for a governmental body and the governmental body:

(A) owns the information;

(B) has a right of access to the information; or

(C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or

(3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

Id. § 552.002. Thus, virtually all the information in a governmental body's physical possession constitutes public information and is subject to the Act. *See id.* § 552.002(a)(1); *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); *see* Open Records Decision No. 462 at 4 (1987). You inform us portions of Exhibits C-2 and C-3 consist of purely personal e-mails that do not relate to the official business of the constable's office. Based on your representations and our review of the information at issue, we find the information in Exhibits C-2 and C-3 you have marked does not constitute public information for purposes of section 552.002 of the Government Code. *See* Open Records Decision No. 635 at 4 (1995) (section 552.002 not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). Therefore, this information is not subject to the Act, and the constable's office need not release it in response to this request.

Next, we must address the constable's office's procedural obligations under the Act. Pursuant to section 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See* Gov't Code § 552.301(e). You inform us the constable's office received the request on

November 5, 2013. However, as of the date of this letter, you have only submitted to this office a portion of the request letter, and this portion of the request letter does not contain the entire request for information. Consequently, we find that because the constable's office did not submit the entire written request for information, the constable's office failed to comply with the procedural requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). Generally, a governmental body may demonstrate a compelling reason to withhold information by showing that the information is made confidential by another source of law or affects third party interests. *See* ORD 630. The constable's office claims sections 552.107 and 552.108 of the Government Code for portions of the remaining information. However, these exceptions are discretionary in nature. They serve to protect a governmental body's interests and may be waived; as such, they do not constitute compelling reasons to withhold information. *See* Open Records Decision Nos. 676 at 11-12 (2002) (attorney-client privilege under section 552.107(1) may be waived), 177 (1977) (governmental body may waive statutory predecessor to section 552.108); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Accordingly, no portion of the remaining information may be withheld under section 552.107 or section 552.108 of the Government Code on behalf of the constable's office. However, the interests of a governmental body, other than the one that failed to comply with section 552.301, to withhold information under section 552.108 can provide a compelling reason for non-disclosure under section 552.302. *See* Open Records Decision Nos. 586 (1991), 469 (1987). You provide a representation that the Montgomery County District Attorney's Office (the "district attorney's office") asserts section 552.108 of the Government Code for portions of the remaining information. Thus, we will consider whether the constable's office may withhold the information at issue on behalf of the district attorney's office under section 552.108. You also raise sections 552.101, 552.117, 552.137, and 552.152 of the Government Code for the remaining information. Because sections 552.101, 552.117, 552.137, and 552.152 can provide compelling reasons to overcome the presumption of openness, we will address their applicability to 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 section encompasses information protected by other statutes, such as section 58.007 of the Family Code which provides in relevant part:

- (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). 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). *See id.* § 51.03(a), (b) (defining “delinquent conduct” and “conduct indicating a need for supervision”). For purposes of section 58.007(c), a “child” is a person who is ten years of age or older and under seventeen years of age at the time of the reported conduct. *See id.* § 51.02(2). You argue the information you have marked is confidential under section 58.007. However, we note the information at issue does not identify a juvenile suspect or offender for purposes of section 58.007. As such, the information you have marked is not confidential under section 58.007 and may not be withheld under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) 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 satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Upon review, we find you have not demonstrated how any of the remaining information at issue is highly intimate or embarrassing and not of legitimate public concern. Thus, none of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.108(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You

inform us the district attorney's office states portions of the remaining information relate to an ongoing criminal case and releasing the information at issue will interfere with the ongoing criminal prosecution. However, you have provided documentation from the district attorney's office stating the district attorney's office would not be pursuing an investigation into the matter and was closing its involvement on the incident at issue. Based on these conflicting representations, we find the constable's office may not withhold the information at issue on behalf of the district attorney's office under section 552.108(a)(1) of the Government Code.

Section 552.117(a)(2) of the Government Code excepts from public disclosure a peace officer's home address and telephone numbers, emergency contact information, social security number, and family member information regardless of whether the peace officer made an election under section 552.024 of the Government Code. Gov't Code § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *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). Upon review, we find the constable's office must withhold the constable's office's peace officers' personal information you have marked pursuant to section 552.117(a)(2) of the Government Code; however, the constable's office may only withhold the marked cellular telephone number if the cellular telephone service is not paid for by a governmental body. However, you have failed to demonstrate any of the remaining information consists of a home address, home telephone number, emergency contact information, social security number, or family member information of a peace officer for the purposes of section 552.117(a)(2), and the constable's office may not withhold any of the remaining information on that basis.

Section 552.1175 of the Government Code protects the home address, home telephone number, emergency contact information, date of birth, social security number, and family member information of certain individuals, when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential.² Gov't Code § 552.1175. We note section 552.1175 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* ORD 506 at 5-6. We have marked information of a peace officer that is not held in an employment capacity by the constable's office. To the extent the peace officer elects to restrict access to the information we have marked in accordance with section 552.1175(b), the constable's office must withhold the marked information under section 552.1175 of the Government Code; however, the constable's office may only

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

withhold the marked cellular telephone numbers if the cellular telephone service is not paid for by a governmental body. To the extent the peace officer whose information is at issue does not elect to restrict access to the marked information in accordance with section 552.1175(b), the constable's office may not withhold the marked information under section 552.1175 of the Government Code.

Section 552.137 of the Government Code provides "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). You inform us the constable's office has not received consent by any member of the public to the release of any e-mail address. We note section 552.137 is not applicable to an institutional e-mail address, an Internet website address, the general e-mail address of a business, or an e-mail address a governmental entity maintains for one of its officials or employees. *See id.* § 552.137(c). We note one of the e-mail addresses you have marked is subject to section 552.137(c) of the Government Code. Accordingly, with the exception of the e-mail address we have marked for release, we find the constable's office must withhold the e-mail addresses you have marked under section 552.137 of the Government Code.

Section 552.152 of the Government Code provides as follows:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from the requirements of Section 552.021 if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

Id. § 552.152. You inform us some of the information at issue details how to escape from handcuffs. You argue release of this information could endanger constable's office officers using handcuffs because it would educate detained persons on how to escape from handcuffs. You also inform us some of the remaining information contains details pertaining to a coordinated law enforcement effort pertaining to a specific operation. You argue release of the information at issue could cause constable's office officers to be at a substantial risk of physical harm because it would allow perpetrators of the operation at issue to be able to lie in wait of responding officers. Based on your representations and our review, we conclude you have demonstrated release of some of the information at issue would subject the constable's office employees to a substantial threat of physical harm. Therefore, the constable's office must withhold the information we have marked under section 552.152 of the Government Code. However, we find you have not demonstrated how the release of any of the remaining information at issue would subject an employee of the constable's office to a substantial risk of physical harm. Accordingly, the constable's office may not withhold any of the remaining information at issue under section 552.152 of the Government Code.

In summary, the information in Exhibits C-2 and C-3 you have marked is not subject to the Act, and the constable's office need not release it in response to this request. The constable's office must withhold the constable's office's peace officers' personal information you have marked pursuant to section 552.117(a)(2) of the Government Code; however, the constable's office may only withhold the marked cellular telephone number if the cellular telephone service is not paid for by a governmental body. To the extent the peace officer elects to restrict access to the information we have marked in accordance with section 552.1175(b), the constable's office must withhold the marked information under section 552.1175 of the Government Code; however, the constable's office may only withhold the marked cellular telephone numbers if the cellular telephone service is not paid for by a governmental body. With the exception of the e-mail address we have marked for release, the constable's office must withhold the e-mail addresses you have marked under section 552.137 of the Government Code. The constable's office must withhold the information we have marked under section 552.152 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/tch

Ref: ID# 513120

Enc. Submitted documents

c: Requestor
(w/o enclosures)