



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 17, 2014

Ms. Cheryl Elliott Thornton
Assistant County Attorney
Harris County
1019 Congress Street, 15th Floor
Houston, Texas 77002

OR2014-04354

Dear Ms. Thornton:

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# 515420 (CAO File No. 13PIA0647).

The Harris County Constable Precinct 6 (the "constable's office") received a request for a named former employee's complete personnel file. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.111, 552.117, and 552.1175 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note a portion of the submitted information, which we have marked, is not responsive to the present request for information because the information was created after the constable's office received the request for information. This ruling does not address the public availability of non-responsive information, and the constable's office need not release the marked information in response to this request.

Next, we note the responsive information includes officers' Texas Commission on Law Enforcement Officer Standards and Education ("TCLEOSE") identification numbers. In Open Records Decision No. 581 (1990), this office determined certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. We understand an officer's TCLEOSE identification number is a unique computer-generated number assigned to that peace officer for identification in the commissioner's electronic database, and may be used as an access device number on the TCLEOSE website. Thus, we find the TCLEOSE numbers we have marked do not

constitute public information under section 552.002 of the Government Code. Therefore, the TCLEOSE numbers we have marked are not subject to the Act and need not be released to the requestor.

Next, we note portions of the responsive information are subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or 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[.]

Gov't Code § 552.022(a)(1). The responsive information contains completed investigations and reports, which we have marked, that are subject to section 552.022(a)(1). Although you assert this information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code, these sections are discretionary and do not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 439, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111 deliberative process). Therefore, the constable's office may not withhold the information at issue under section 552.103 or section 552.111. You also seek to withhold the information at issue under section 552.108 of the Government Code. As information subject to section 552.022(a)(1) may be withheld under section 552.108 of the Government Code, we will address your argument under section 552.108 of the Government Code for the responsive information subject to section 552.022(a)(1) and the remaining responsive information. Additionally, because sections 552.101, 552.117, and 552.1175 make information confidential under the Act, we will consider the applicability of these exceptions to the responsive information subject to section 552.022 and the remaining responsive information. We further note portions of the information subject to section 552.022 are subject to sections 552.102, 552.130, and 552.137 of the Government Code, all of which make information confidential under the Act.¹ Thus, we will consider the applicability of these exceptions. Furthermore, we will consider your arguments under sections 552.103 and 552.111 for the responsive information not subject to section 552.022.

We note the responsive information contains the fingerprints of the named former employee, which we have marked. The public availability of fingerprints is governed by

¹The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481, 480 (1987), 470.

sections 560.001, 560.002, and 560.003 of the Government Code. Section 560.003 provides “[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act].” Gov’t Code § 560.003; *see id.* § 560.001(1) (“biometric identifier” means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry). Section 560.002 of the Government Code provides, however, that “[a] governmental body that possesses a biometric identifier of an individual . . . may not sell, lease, or otherwise disclose the biometric identifier to another person unless . . . the individual consents to the disclosure[.]” *Id.* § 560.002(1)(A). Thus, section 560.002(1)(A) of the Government Code gives an individual or his authorized representative a right of access to his own fingerprints. In this instance, the requestor may be acting as the authorized representative of the named former employee. Although the constable’s office seeks to withhold the fingerprints at issue under sections 552.103, 552.108, and 552.117 of the Government Code, we note statutes governing the release of specific information prevail over the general exceptions to disclosure found in the Act. *See* Open Records Decision Nos. 613 at 4 (1993) (exceptions in Act cannot impinge on statutory right of access to information), 451 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under the Act). Therefore, we do not address your arguments under sections 552.103, 552.108, and 552.117 of the Government Code for the named former employee’s fingerprints. However, we understand you to raise section 552.101 in conjunction with constitutional privacy for the responsive information. Under the Supremacy Clause of the United States Constitution, the United States Constitution and duly-enacted federal statutes are “the supreme law of the Land,” and states have a responsibility to enforce federal law. *See* U.S. Const., art. VI, cl. 2; *Howlett v. Rose*, 496 U.S. 356, 367-69 (1990). As a federal law, constitutional privacy preempts any conflicting state provisions, including section 560.002 of the Government Code. *See Equal Employment Opportunity Comm’n v. City of Orange, Tex.*, 905 F. Supp. 381, 382 (E.D. Tex. 1995) (federal law prevails over inconsistent provision of state law). Thus, we will address your argument under section 552.101 in conjunction with constitutional privacy for the fingerprints 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 the doctrine of constitutional privacy, which consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual’s interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual’s autonomy within “zones of privacy” which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual’s privacy interests and the public’s need to know information of public concern. *Id.* The information must concern the “most intimate aspects of human affairs.” *Id.* at 5; *see Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985). Upon review, we find you have failed to demonstrate the marked fingerprints fall within the zones of privacy or implicate an individual’s privacy interests for the purposes of constitutional privacy. Thus, the constable’s office may not

withhold the marked fingerprints under section 552.101 in conjunction with constitutional privacy. Accordingly, if the requestor is an authorized representative of the named former employee, the marked fingerprints must be released pursuant to section 560.002 of the Government Code. However, if the requestor is not an authorized representative of the named former employee, the marked fingerprints must be withheld under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code. Furthermore, we find you have failed to demonstrate any of the remaining responsive information falls within the zones of privacy or implicates an individual's privacy interests for the purposes of constitutional privacy. Thus, the constable's office may not withhold any portion of the remaining responsive information under section 552.101 in conjunction with constitutional privacy.

You raise section 552.108 of the Government Code for the responsive information. Section 552.108 provides in pertinent part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime; [or]

(2) it is information that the deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication;

...

(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 [required public disclosure] if:

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

Gov't Code § 552.108(a)(1)-(2), (b)(1). Generally speaking, subsections 552.108(a)(1) and 552.108(b)(1) are mutually exclusive of subsection 552.108(a)(2). Subsection 552.108(a)(1) protects information, the release of which would interfere with a particular pending criminal investigation or prosecution, while subsection 552.108(b)(1) encompasses internal law enforcement and prosecution records, the release of which would interfere with law enforcement and prosecution efforts in general. In contrast, subsection 552.108(a)(2) protects information that relates to a concluded criminal investigation or prosecution that did not result in a conviction or deferred adjudication. A

governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why the exception it claims is applicable to the information the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). However, section 552.108 is generally not applicable to an internal administrative investigation involving a law enforcement officer that did not result in a criminal investigation or prosecution. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.); Open Records Decision No. 562 at 10 (1990); *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. App.—El Paso 1992, writ denied) (statutory predecessor not applicable to internal investigation that did not result in criminal investigation or prosecution); Open Records Decision No. 350 at 3-4 (1982).

You state the responsive information relates to “anticipated litigation” and claim that release of the responsive information would “significantly impair and interfere with the ability of the State to properly investigate these matters which are pending and would also unduly interfere with the judicial enforcement of the penal statutes of Texas.” Further, you submit a representation from the constable’s office claiming “the case [has] an open and ongoing criminal investigation.” However, we note the responsive information consists of routine personnel documents, documents relating to internal administrative investigations, and documents relating to multiple different criminal incidents. You do not inform us of any pending or ongoing criminal investigation or prosecution to which the responsive information relates. You further do not inform us how the responsive information relates to a concluded criminal investigation or prosecution that did not result in a conviction or deferred adjudication. Finally, you do not inform us how release of the responsive information would interfere with law enforcement and prosecution efforts in general. Thus, we find the constable’s office has failed to demonstrate the applicability of subsection 552.108(a)(1), 552.108(a)(2), or 552.108(b)(1) to the responsive information. Accordingly, we find no portion of the responsive information may be withheld under section 552.108 of the Government Code.

Section 552.103 of the Government Code provides, in relevant 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.

Gov't Code § 552.103(a), (c). The constable's office 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 of the 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, 481 (Tex. App.—Austin 1997, orig. proceeding); *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 constable's office must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). To demonstrate litigation is reasonably anticipated, the governmental body must furnish concrete evidence litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. Open Records Decision No. 361 (1983). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* ORD 452 at 4. We note contested cases conducted under the Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code, are considered litigation for purposes of section 552.103. *See* Open Records Decision No. 588 at 7 (1991). We further note a contested case before the State Office of Administrative Hearings ("SOAH") is considered litigation for the purposes of the APA. *See id.*

In this instance, we note, prior to the date the request for information was received, the requestor filed a petition with TCLEOSE challenging the status of the named former employee's discharge from the constable's office. The submitted information also includes a letter from the Officer Standards and Education division of TCLEOSE reflecting this matter was referred to SOAH for a contested case hearing challenging the named former employee's F-5 Report of Separation, in accordance with section 1701.4525(c) of the Occupations Code. *See* Occ. Code § 1701.4525 (establishing process for officer to contest information in employment termination report). Section 1701.4525(d) states "[a] proceeding

to contest information in an employment termination report is a contested case under Chapter 2001, Government Code.” *See id.* § 1701.4525(d). Based on your representations and our review, we determine litigation was reasonably anticipated on the date the constable’s office received the request for information. Furthermore, we find the information at issue relates to the anticipated litigation. Accordingly, we find the constable’s office may generally withhold the responsive information not subject to section 552.022 of the Government Code under section 552.103 of the Government Code.

We note, however, the opposing party has seen or had access to some of the information at issue. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* ORD 551 at 4-5. Thus, once the opposing party has seen or had access to information relating to the anticipated 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). Upon review, we find the information we have marked was seen by the opposing party to the anticipated litigation and may not be withheld under section 552.103. However, the remaining responsive information not subject to section 552.022 of the Government Code may be withheld under section 552.103 of the Government Code.² We also note the applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

Section 552.111 of the Government Code excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” Gov’t Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref’d n.r.e.); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body’s policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22

²As our ruling for this information is dispositive, we need not address your remaining argument against its disclosure.

S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *see* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party with a privity of interest. *See* Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* ORD 561. We note a governmental body does not share a privity of interest with a third party when the governmental body and the third party are involved in contract negotiations, as the parties' interests are adverse.

You claim the deliberative process privilege under section 552.111 for the remaining responsive information not subject to section 552.022 of the Government Code. However, we note this information was sent to or received from the named former employee in relation to his challenge to his discharge status under section 1701.4525 of the Occupations Code. Because the interests of the constable's office and the named former employee were adverse, we find they did not share a privity of interest for purposes of the deliberative process privilege. Accordingly, we find the remaining responsive information not subject to section 552.022 of the Government Code has been shared with individuals with whom you have not demonstrated a privity of interest. Thus, we find you have failed to show how any of the remaining responsive information not subject to section 552.022 of the Government Code constitutes internal communications that consist of advice, opinions, or recommendations on the policymaking matters of the constable's office. Therefore, the constable's office may not withhold the remaining responsive information not subject to section 552.022 of the Government Code under the deliberative process privilege of section 552.111 of the Government Code.

You assert the remaining responsive information is excepted under section 552.117 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 number, social security number, emergency contact information, 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 a post office box number is not a "home address" for purposes of section 552.117.³ We further note section 552.117(a)(2) also encompasses an employee's cellular telephone number, unless the cellular telephone service is paid for by a governmental body. *See* Open Records Decision No. 506 at 5-7 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). We have marked information pertaining to licensed peace officers with the constable's office, the named former employee, and a former deputy. To the extent the named former employee and former deputy are currently licensed peace officers as defined by article 2.12, the constable's office must generally withhold the information we have marked under section 552.117(a)(2) of the Government Code; however, the constable's office must withhold the cellular telephone numbers we have marked only if a governmental body did not pay for the service.

If the named former employee and former deputy is not currently a licensed peace officer, section 552.117(a)(1) of the Government Code may apply to the information at issue. In addition, we note the remaining responsive information contains information related to a county employee who is not a licensed peace officer. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, emergency contact information, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. *Id.* § 552.117(a)(1). As noted above, a post office box number is not a "home address" for purposes of section 552.117. As also noted above, section 552.117 applies to the personal cellular telephone number of a current or former official or employee of a governmental body, provided the cellular telephone service is not paid by a governmental body. *See* ORD 506 at 5-6. 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 official or 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. If the individuals at issue made timely elections under section 552.024, the constable's office must generally withhold the information we have marked under section 552.117(a)(1); however, the marked cellular telephone numbers may be withheld only if a governmental body does not pay for the cellular telephone service. If the individuals

³*See* Gov't Code § 552.117; Open Records Decision No. 622 at 4 (1994) (legislative history makes clear purpose of Gov't Code § 552.117 is to protect public employees from being harassed at *home*) (citing House Comm. on State Affairs, Bill Analysis, Tex. H.B. 1976, 69th Leg. (1985); Senate Comm. on State Affairs, Bill Analysis, Tex. H.B. 1976, 69th Leg. (1985)).

at issue did not make timely elections under section 552.024, this information may not be withheld under section 552.117(a)(1).⁴ The remaining information does not contain the home address, home telephone number, emergency contact information, social security number, or family member information of a current or former official, employee, or peace officer of the constable's office. Therefore, the constable's office may not withhold any of the remaining information under section 552.117.

However, we note section 552.117 protects personal privacy. As noted above, the requestor in this instance may be an authorized representative of the named former employee, and, thus have a right of access under section 552.023 of the Government Code to that former employee's private information. *See* Gov't Code § 552.023(a) (person or a person's authorized representative has special right of access, beyond the right of general public, to information held by a governmental body that relates to person and is protected from public disclosure by laws intended to protect person's privacy interests); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Thus, if the requestor is an authorized representative of the named former employee, the constable's office may not withhold any of the named former employee's information under section 552.117.

We note some of the remaining information pertains to peace officers not employed by the constable's office. Section 552.1175 of the Government Code protects the home address, home telephone number, emergency contact information, social security number, date of birth, 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. *See* Gov't Code § 552.1175. Section 552.1175 applies, in part, to "peace officers as defined by Article 2.12, Code of Criminal Procedure." *Id.* § 552.1175(a)(1). Accordingly, the constable's office must withhold the information we have marked under section 552.1175 of the Government Code if the peace officers elect to restrict access to their information in accordance with section 552.1175(b) of the Government Code. If the peace officers whose information is at issue do not elect to restrict access to their information in accordance with section 552.1175(b) of the Government Code, the constable's office may not withhold their information under section 552.1175. However, you have failed to establish section 552.1175 is applicable to any of the remaining responsive information, and the constable's office may not withhold any of it on that basis.

Section 552.101 of the Government Code also encompasses section 1701.454 of the Occupations Code, which governs the public availability of information submitted to TCLEOSE under subchapter J of chapter 1701 of the Occupations Code. Section 1701.454 provides as follows:

⁴If the employees did not make timely confidentiality elections under section 552.024, we note section 552.147(b) of the Government Code permits a governmental body to withhold a living person's social security number without the necessity of requesting a decision from this office. *See* Gov't Code § 552.147(b).

(a) All information submitted to the [TCLEOSE] under this subchapter is confidential and is not subject to disclosure under Chapter 552, Government Code, unless the person resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses.

(b) Except as provided by this subchapter, a [TCLEOSE] member or other person may not release information submitted under this subchapter.

Occ. Code § 1701.454. The remaining responsive information includes information that was submitted to TCLEOSE pursuant to subchapter J of chapter 1701 of the Occupations Code. Furthermore, the information at issue does not indicate the named former employee resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses. Therefore, the constable's office must withhold the submitted F-5 forms, which we have marked, under section 552.101 in conjunction with section 1701.454 of the Occupations Code.

Section 552.101 of the Government Code also encompasses chapter 411 of the Government Code, which pertains to criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center. *See* Gov't Code § 411.083(a). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual laws with respect to the CHRI it generates. *See id.* Section 411.083 of the Government Code deems confidential CHRI the Texas Department of Public Safety ("DPS") maintains, except DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-.127. Similarly, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 in conjunction with chapter 411, subchapter F of the Government Code. We note section 411.083 does not apply to active warrant information or other information relating to one's current involvement with the criminal justice system. *See id.* § 411.081(b) (police department allowed to disclose information pertaining to person's current involvement in the criminal justice system). Further, CHRI does not include driving record information. *See id.* § 411.082(2)(B). Upon review, we find the information we have marked consists of confidential CHRI, and the constable's office must withhold the marked information under section 552.101 in conjunction with chapter 411 of the Government Code.

Section 552.101 of the Government Code also encompasses section 773.091 of the Health and Safety Code. Section 773.091 provides, in part, the following:

(b) Records of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

...

(g) The privilege of confidentiality under this section does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services.

Health & Safety Code § 773.091(b), (g). Except for the information specified in section 773.091(g), emergency medical services (“EMS”) records are deemed confidential under section 773.091. *See id.* § 773.091. Upon review, we find the information we have marked constitutes EMS records that are confidential under section 773.091. Therefore, with the exception of the information subject to section 773.091(g), the constable’s office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 773.091 of the Health and Safety Code.

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. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). A compilation of an individual’s criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual’s privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one’s criminal history). Moreover, we find a compilation of a private citizen’s criminal history is generally not of legitimate concern to the public. We note, however, active warrant information or other information relating to an individual’s current involvement in the criminal justice system does not constitute criminal history information

for the purposes of section 552.101. *See* Gov't Code § 411.081(b). We also note that records relating to routine traffic violations are not considered criminal history information. *See id.* § 411.082(2)(B) (criminal history record information does not include driving record information). This office has also found personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure. *See* Open Records Decision Nos. 600 (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, 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), 455 at 9 (employment applicant's salary information not private), 423 at 2 (1984) (scope of public employee privacy is narrow). However, this office has found the public has a legitimate interest in information relating to applicants and employees of governmental bodies and their employment qualifications and job performance, especially where the applicant was seeking a position in law enforcement. *See* Open Records Decision Nos. 562 at 10, 470 at 4 (public has legitimate interest in job qualifications and performance of public employees), 444 (1986), 423 at 2. Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the constable's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

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 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.*, 354 S.W.3d 336 (Tex. 2010). Upon review, we have marked dates of birth that must generally be withheld under section 552.102(a) of the Government Code. However, we note section 552.102(a) protects personal privacy. As noted above, the requestor may be an authorized representative of the named former employee, in which case he would have a right of access to that named former employee's information, including his birth date. *See* Gov't Code § 552.023(a); ORD 481 at 4. Therefore, if the requestor is an authorized representative of the named former employee, the constable's office may not withhold the named former employee's date of birth under section 552.102.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release. *See* Gov't Code § 552.130. Accordingly, the constable's office must generally withhold the motor vehicle record information we have marked under

section 552.130 of the Government Code.⁵ However, we note section 552.130 protects personal privacy. As noted above, the requestor may be an authorized representative of the named former employee, in which case he would have a right of access to that named former employee's information, including his motor vehicle record information. *See id.* § 552.023(a); ORD 481 at 4. Therefore, if the requestor is an authorized representative of the named former employee, the constable's office may not withhold the named former employee's motor vehicle record information under section 552.130.

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). Gov't Code § 552.137(a)-(c). Upon review, we find the e-mail addresses we have marked are not one of the types specifically excluded by section 552.137(c). Therefore, the constable's office must generally withhold the e-mail addresses we have marked under section 552.137, unless the owners of the addresses affirmatively consent to their release. We note, however, one of the marked e-mail addresses is the named former employee's personal e-mail address, to which the requestor has a right of access under section 552.137(b) if he is acting as the named former employee's authorized representative. *See id.* § 552.137(b) (personal e-mail address of member of public may be disclosed if owner of address affirmatively consents to its disclosure). Accordingly, the constable's office may not withhold the named former employee's personal e-mail address under section 552.137 if the requestor is acting as the named former employee's authorized representative.

We note portions of the remaining responsive information are subject to copyright law. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the TCLEOSE numbers we have marked are not subject to the Act and need not be released to the requestor. If the requestor is an authorized representative of the named former employee, the marked fingerprints must be released pursuant to section 560.002 of the Government Code. Otherwise, the marked fingerprints must be withheld under section 552.101 of the Government Code in conjunction with section 560.003 of the

⁵We note section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsection 552.130(a) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e).

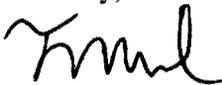
Government Code. With the exception of the information subject to section 552.022 of the Government Code, which we have marked, and the information seen by the opposing party, which we have marked, the constable's office may withhold the remaining information under section 552.103 of the Government Code. The constable's office must withhold the information we have marked under section 552.117(a)(2) of the Government Code if the individuals at issue are currently licensed peace officers as defined by article 2.12 and a governmental body does not pay for the cellular telephone service; however, if the requestor is an authorized representative of the named former employee, the constable's office may not withhold any of the named former employee's information. The constable's office must withhold the information we have marked under section 552.117(a)(1) of the Government Code if the individuals at issue timely elected confidentiality under section 552.024 of the Government Code and a governmental body does not pay for the cellular telephone service; however, if the requestor is an authorized representative of the named former employee, the constable's office may not withhold any of the named former employee's information. The constable's office must withhold the information we have marked under section 552.1175 of the Government Code if the peace officers elect to restrict access to their information in accordance with section 552.1175(b) of the Government Code. The constable's office must withhold the submitted F-5 forms, which we have marked, under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code. The constable's office must withhold the confidential CHRI we have under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. The constable's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The constable's office must withhold the dates of birth we have marked under section 552.102(a) of the Government Code; however, if the requestor is an authorized representative of the named former employee, the constable's office may not withhold the named former employee's date of birth. The constable's office must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code; however, if the requestor is an authorized representative of the named former employee, the constable's office may not withhold the named former employee's motor vehicle record information. The constable's office must withhold the e-mail addresses we have marked under section 552.137, unless the owners of the addresses affirmatively consent to their release; however, if the requestor is an authorized representative of the named former employee, the constable's office may not withhold the named former employee's e-mail address. The constable's office must release the remaining responsive information; however, any information subject to copyright may be released only in accordance with copyright law.⁶

⁶We note the information being released in this instance includes information that is confidential with respect to the general public, but to which the requestor may have a right of access. *See* Gov't Code § 552.023(a), ORD 481 at 4. Therefore, if the requestor has a right of access to this information and the constable's office receives another request for this information from a different requestor, the constable's office must again seek a ruling from this office. In addition, we note the information to be released contains social security numbers. As noted above, section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting an attorney general decision under the Act. *See* Gov't Code § 552.147(b).

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,



Tim Neal
Assistant Attorney General
Open Records Division

TN/dls

Ref: ID# 515420

Enc. Submitted documents

c: Requestor
(w/o enclosures)