



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 4, 2015

Ms. Denise M. Fortenberry
County Attorney
County of Matagorda
1700 Seventh Street, Room 305
Bay City, Texas 77414-5034

OR2015-04273

Dear Ms. Fortenberry:

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# 555512.

The Matagorda County Sheriff's Office (the "sheriff's office") received a request for information pertaining to comments made on social media by a named former deputy, including (1) any complaints filed against the deputy, (2) a copy of the internal investigation of the deputy, and (3) a copy of the sheriff's office's social media policy. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108, and 552.152 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note you have submitted information that falls outside the scope of the categories of information requested. Therefore, this information is not responsive to the present request. The sheriff's office need not release non-responsive information in response to the request, and this ruling will not address that information.¹

¹As our ruling is dispositive for this information, we need not address your arguments against its disclosure.

Next, we note portions of the responsive information consist of a completed investigation 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 sheriff's office must release the information at issue pursuant to subsection 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. *See id.* § 552.022(a)(1). You seek to withhold the information subject to subsection 552.022(a)(1) under section 552.103. We note section 552.103 is a discretionary exception and does not make information confidential under the Act. *See 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); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the information subject to subsection 552.022(a)(1) may not be withheld under section 552.103 of the Government Code. However, information subject to subsection 552.022(a)(1) may be withheld under section 552.108. Further, sections 552.101, 552.102, 552.130, 552.137, and 552.152 of the Government Code make information confidential under the Act.² Thus, we will consider the applicability of sections 552.101, 552.102, 552.108, 552.130, 552.137 and 552.152 for this information. We will also address your arguments against the disclosure of the remaining information, which is not subject to section 552.022(a)(1).

Section 552.108(b)(2) of the Government Code excepts from disclosure “[a]n 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 . . . if . . . the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]” Gov't Code § 552.108(b)(2). A governmental body claiming section 552.108(b)(2) must demonstrate the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments

²The 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 (1987), 480 (1987), 470 (1987).

explaining why exceptions raised should apply to information requested). We note section 552.108 is generally not applicable to records of an internal affairs investigation that is purely administrative in nature and does not involve the investigation or prosecution of crime. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.); *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution). The information at issue was generated as part of an internal administrative investigation conducted by the sheriff's office. You have not demonstrated the internal investigation resulted in a criminal investigation or prosecution that concluded in a final result other than a conviction or deferred adjudication. We therefore conclude you have failed to demonstrate the applicability of subsection 552.108(b)(2) and the sheriff's office may not withhold any of the responsive information under section 552.108(b)(2).

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. Section 552.101 of the Government Code 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. We note, however, the public generally has a legitimate interest in information relating to public employment and public employees. *See Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 423 at 2 (1984) (scope of public employee privacy is narrow).* Upon review, we find you have not demonstrated how any of the responsive information is highly intimate or embarrassing and not of legitimate public concern. Thus, none of the responsive information may be withheld under section 552.101 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). We understand you to assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test as announced in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976). In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the Third Court of Appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court has expressly disagreed with *Hubert's* interpretation of section 552.102(a) and held the privacy standard under section 552.102(a) differs from the *Industrial Foundation* test under section 552.101. *See Tex. Comptroller of Pub. Accounts*

v. Attorney Gen. of Tex., 354 S.W.3d 336 (Tex. 2010). The Supreme Court also considered the applicability of section 552.102(a) and held it excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *See id.* at 348. Upon review, we find none of the responsive information is excepted from disclosure under section 552.102(a) of the Government Code.

Section 552.103 of the Government Code provides, in relevant part, as follows:

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

...

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

Gov't Code. § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, 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 governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, an attorney for a potential opposing party making a demand for payment and asserting an intent to sue if such payments are not made. Open Records Decision Nos. 555 at 3 (1990), 346 (1982). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party threatened to sue on several occasions and hired an attorney. *See* Open Records Decision No. 288 at 2 (1981). However,

an individual publicly threatening to bring suit against a governmental body, but who does not actually take objective steps toward filing suit, is not concrete evidence that litigation is reasonably anticipated. *See* Open Records Decision No. 331 at 1-2 (1982).

You inform us the responsive information not subject to subsection 552.022(a)(1) pertains to an investigation into a complaint filed against the named deputy, which resulted in terminating the deputy's job. You argue due to the termination, the sheriff's office was informed it "can reasonably expect litigation over this incident due to statements made by the deputy to other law enforcement officers and his actions of taking this issue to the media through talk shows." Upon review, however, we find the sheriff's office has not demonstrated any party had taken concrete steps toward filing litigation when the sheriff's office received the request for information. Thus, we conclude the sheriff's office has failed to demonstrate it reasonably anticipated litigation when it received the request for information. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). Therefore, the sheriff's office may not withhold any portion of the responsive information not subject to subsection 552.022(a)(1) under section 552.103(a) of the Government Code.

Section 552.108(b)(1) of the Government Code excepts from disclosure "[a]n 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 . . . if . . . release of the internal record or notation would interfere with law enforcement or prosecution[.]" *Id.* § 552.108(b)(1). This section is intended to protect "information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State." *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.). This office has concluded this provision protects certain kinds of information, the disclosure of which might compromise the security or operations of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 at 3-4 (1989) (detailed guidelines regarding police department's use of force policy), 508 at 3-4 (1988) (information relating to future transfers of prisoners), 413 (1984) (sketch showing security measures for forthcoming execution). However, to claim this aspect of section 552.108 protection a governmental body must meet its burden of explaining how and why release of the information at issue would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). Further, commonly known policies and techniques may not be withheld under section 552.108. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (former section 552.108 does not protect Penal Code provisions, common-law rules, and constitutional limitations on use of force), 252 at 3 (1980) (governmental body did not meet burden because it did not indicate why investigative procedures and techniques submitted were any different from those commonly known with law enforcement and crime prevention). To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a law enforcement agency must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. The determination of whether the release of particular records would interfere

with law enforcement is made on a case-by-case basis. Open Records Decision No. 409 at 2 (1984).

You inform us some of the responsive information reveals actions deputies should take in certain situations and also identifies a confidential informant. Upon review, we find the release of some of the information at issue would interfere with law enforcement. Therefore, the sheriff's office may withhold this information, which we have marked and indicated, under section 552.108(b)(1) of the Government Code. However, we conclude the sheriff's office has not established the release of the remaining information would interfere with law enforcement. Therefore, the sheriff's office may not withhold any of the remaining responsive information under section 552.108(b)(1) of the Government Code.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's or driver's license or permit, a motor vehicle title or registration, or a personal identification document issued by an agency of Texas or another state or country is excepted from public release. Gov't Code § 552.130(a). Upon review, we find the sheriff's office must withhold the driver's license information we have marked under section 552.130 of the Government Code.

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). *Id.* § 552.137(a)-(c). The e-mail addresses we have marked are not of types excluded by subsection (c). Accordingly, the sheriff's office must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their release.

Section 552.152 of the Government Code provides the following:

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 state releasing the information at issue could cause harm to the named deputy, his family, and current deputies of the sheriff's office. Upon review, we find you have failed to demonstrate release of any of the remaining responsive information would subject any individual to a substantial threat of physical harm. Accordingly, the sheriff's office may not withhold any of the remaining responsive information under section 552.152 of the Government Code.

In summary, the sheriff's office may withhold the information we have marked and indicated under section 552.108(b)(1) of the Government Code. The sheriff's office must withhold the driver's license information we have marked under section 552.130 of the Government Code. The sheriff's office must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their release. The sheriff's office must release the remaining responsive information.³

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.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,



Lauren Dahlstein
Assistant Attorney General
Open Records Division

LMD/som

Ref: ID# 555512

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³We note the remaining information contains social security numbers. 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 a decision from this office under the Act. Gov't Code § 552.147(b).