



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

June 23, 2016

Ms. Cara-Beth Bass  
Counsel for the Victoria County Sheriff's Office  
Allison, Bass & Magee, L.L.P.  
402 West 12<sup>th</sup> Street  
Austin, Texas 78701

OR2016-14357

Dear Ms. Bass:

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# 615406.

The Victoria County Sheriff's Office (the "sheriff's office"), which you represent, received two requests for (1) e-mails between specified individuals pertaining to a named former deputy and (2) information pertaining to the internal investigation, administrative investigation, and appeals process pertaining to the named former deputy. You state the sheriff's office has previously released some of the requested information to the requestor in response to a prior request for information. *See* Gov't Code § 552.232 (prescribing procedures for response to repetitious or redundant request for information). You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, 552.108, 552.111, 552.117, 552.130, 552.132, 552.1325, 552.137, and 552.152 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the submitted information contains a peace officer's Texas Commission on Law Enforcement ("TCOLE") identification number. Section 552.002(a) of the Government Code defines "public information" as information that is written, produced, collected,

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<sup>1</sup>Although you raise section 552.1175 of the Government Code, we note section 552.117 of the Government Code is the proper exception to raise for information the sheriff's office holds in its capacity as an employer.

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.

Gov't Code § 552.002(a). 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 TCOLE identification number is a unique computer-generated number assigned to peace officers for identification in the commissioner's electronic database and may be used as an access device number on the TCOLE website. Accordingly, we find the officer's TCOLE identification number in the submitted information does not constitute public information under section 552.002 of the Government Code. Therefore, the TCOLE identification number is not subject to the Act and need not be released to the requestor.

Next, you state some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2016-05422 (2016). You indicate there has been no change in the law, facts, and circumstances on which the prior ruling was based has changed. Accordingly, for the requested information that is identical to the information previously requested and ruled upon by this office, we conclude the sheriff's office must continue to rely on Open Records Letter No. 2016-05422 as a previous determination and withhold the identical information in accordance with that ruling.<sup>2</sup> See Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes

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<sup>2</sup>As we are able to make this determination, we need not address your remaining arguments against disclosure of this information.

that information is or is not excepted from disclosure). For the information that is not subject to Open Records Letter No. 2016-05422, we will consider the sheriff's office's arguments against disclosure.

We note some of the remaining information is part of a completed investigation subject to section 552.022(a)(1) 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 subject to section 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.* Although you raise section 552.111 of the Government Code for the information at issue, we note this exception is discretionary and does not make information confidential under the Act. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (governmental body may waive section 552.111), 470 at 7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver). As such, the sheriff's office may not withhold any portion of the information at issue under section 552.111. However, we will address your claim under section 552.111 of the Government Code for the information that is not subject to section 552.022(a)(1). Because information subject to section 552.022(a)(1) may be withheld under section 552.108 of the Government Code, we will consider your argument under section 552.108 for the information at issue and the remaining information. Further, as sections 552.101, 552.102, 552.117, 552.132, 552.1325, 552.137, and 552.152 of the Government Code make information confidential, we will consider your arguments under these sections for the information subject to section 552.022(a)(1) of the Government Code and the remaining information.

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that did not result in conviction or deferred adjudication. *See* Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). Section 552.108 is generally not applicable to the records of an internal affairs investigation that is purely administrative in nature and that 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); *see also* Open Records Decision No. 350 at 3-4 (1982).

We note some of the information you seek to withhold under section 552.108(a)(2) of the Government Code pertains to an investigation by the Victoria Police Department (the “department”) you assert has concluded and did not result in a conviction or deferred adjudication. In this instance, you have not provided our office with any representation to indicate the department wishes to have the information at issue withheld. Accordingly, the sheriff’s office has failed to demonstrate section 552.108(a)(2) of the Government Code is applicable to this investigation, and the sheriff’s office may not withhold any portion of this investigation under section 552.108(a)(2).

The remaining information you seek to withhold under section 552.108(a)(2) reflects it was generated as part of an internal investigation that was purely administrative in nature. You do not provide any arguments explaining the internal investigation resulted in a criminal investigation or prosecution by the sheriff’s office. Therefore, you have failed to demonstrate the applicability of section 552.108(a)(2) to the information at issue, and the sheriff’s office may not withhold this information on that basis.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “to facilitate the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends

on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You claim the information you marked is protected by section 552.107(1) of the Government Code. You state the information at issue consists of communications between employees of the sheriff's office and outside counsel. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the sheriff's office. You indicate these communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the sheriff's office may withhold the information you marked under section 552.107(1) of the Government Code.<sup>3</sup>

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 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). Upon review, we find the information we have marked and indicated satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the sheriff's office must withhold the information we have marked and indicated under section 552.101 of the Government Code in conjunction with common-law privacy.<sup>4</sup> However, we find the remaining information at issue is not highly intimate or embarrassing information or is of legitimate public interest. Therefore, none of the remaining information may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

<sup>4</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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 under section 552.101 of the Government Code. As previously mentioned, common-law privacy protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found.*, 540 S.W.2d at 685. 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 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. Having carefully reviewed the information at issue, we find none of the remaining information is subject to section 552.102(a) of the Government Code, and the sheriff’s office may not withhold any of the remaining information on that basis.

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 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 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).

You assert some of the remaining information consists of advice, recommendations, and opinions of sheriff's office's employees regarding policymaking decisions. Upon review, we find the information at issue is general administrative and purely factual information or does not pertain to policymaking. Thus, we find you have failed to establish any portion of the information at issue constitutes advice, opinions, recommendations, or other material reflecting the policymaking processes of the sheriff's office. Accordingly, the sheriff's office may not withhold the remaining information under the deliberative process privilege of section 552.111 of the Government Code.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home addresses, home telephone numbers, emergency contact information, social security number, and family member information of a peace officer, as defined by article 2.12 of the Code of Criminal Procedure, regardless of whether the peace officer complies with section 552.024 of the Government Code or section 552.1175 of the Government Code. Gov't Code § 552.117(a)(2). We note section 552.117(a)(2) protects a peace officer's personal cellular telephone number only if the officer pays for the cellular telephone service with his or her personal funds. See Open Records Decision Nos. 670 at 6 (2001) (Gov't Code § 552.117(a)(2) excepts from disclosure peace officer's cellular telephone number if officer pays for service), 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). We note the information at issue pertains to a former sheriff's office deputy. It is unclear whether this individual is a currently licensed peace officer as defined by article 2.12 of the Code of Criminal Procedure. Thus, if the individual at issue is a currently licensed peace officer as defined by article 2.12, the sheriff's office must withhold the information we have marked under section 552.117(a)(2) of the Government Code; however, the sheriff's office may only withhold the marked cellular telephone number if the cellular telephone service is not paid for by a governmental body. If, however, the individual at issue is not a currently licensed peace officer, his personal information may not be withheld under section 552.117(a)(2) of the Government Code. Further, we find no portion of the remaining information is subject to section 552.117(a)(2) of the Government Code, and the sheriff's office may not withhold any of the remaining information at issue on that basis.

In the event the individual at issue is no longer a licensed peace officer, then his information may be subject to section 552.117(a)(1) of the Government Code. Further, some of the remaining information may be subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers,

emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). As previously noted, section 552.117 also 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 piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, a governmental body must withhold information under section 552.117(a)(1) on behalf of current or former officials or employees only if these individuals made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. To the extent the individuals at issue timely elected to keep such information confidential under section 552.024, the sheriff's office must withhold the information we have marked under section 552.117(a)(1) of the Government Code; however, the sheriff's office may only withhold the marked cellular telephone numbers if the cellular telephone services are not paid for by a governmental body. If the individuals at issue did not make a timely election under section 552.024, the sheriff's office may not withhold the information we have marked under section 552.117(a)(1) of the Government Code. Further, we find no portion of the remaining information is subject to section 552.117(a)(1) of the Government Code, and the sheriff's office may not withhold any of the remaining information at issue on that basis.

You claim some of the remaining information is excepted by section 552.132 of the Government Code. Section 552.132 provides, in relevant part, the following:

(b) The following information held by the crime victim's compensation division of the attorney general's office is confidential:

(1) the name, social security number, address, or telephone number of a crime victim or claimant; or

(2) any other information the disclosure of which would identify or tend to identify the crime victim or claimant.

Gov't Code § 552.132(b). The remaining information is held by the sheriff's office, not the crime victim's compensation division of the attorney general's office. Therefore, section 552.132(b) is not applicable to this information. Accordingly, the sheriff's office may not withhold any of the remaining information under section 552.132(b) of the Government Code.

Section 552.1325 of the Government Code provides as follows:

(a) In this section:

(1) “Crime victim” means a person who is a victim as defined by Article 56.32, Code of Criminal Procedure.

(2) “Victim impact statement” means a victim impact statement under Article 56.03, Code of Criminal Procedure.

(b) The following information that is held by a governmental body or filed with a court and that is contained in a victim impact statement or was submitted for purposes of preparing a victim impact statement is confidential:

(1) the name, social security number, address, and telephone number of a crime victim; and

(2) any other information the disclosure of which would identify or tend to identify the crime victim.

*Id.* § 552.1325. Upon review, we find none of the remaining information consists of a victim impact statement, or information submitted for purposes of preparing a victim impact statement, as defined by article 56.03 of the Code of Criminal Procedure. *See* Crim. Proc. Code art. 56.03. Accordingly, we find none of the remaining information is subject to section 552.1325 and it may not be withheld on that basis.

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). We note the requestor has a right of access to her own e-mail address pursuant to section 552.137(b) of the Government Code. *See id.* § 552.137(b). Therefore, the sheriff’s office may not withhold the requestor’s e-mail address under section 552.137. Upon review, we find the sheriff’s office must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.

You seek to withhold the remaining information under section 552.152 of the Government Code. Section 552.152 provides,

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from [required public disclosure] 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 represent the release of the remaining information would subject an employee or officer of the sheriff’s office to a substantial threat of physical harm. Upon

review, we find the sheriff's office has not demonstrated the release of any of the remaining information would subject an employee of the sheriff's office to a substantial threat of physical harm. Thus, the sheriff's office may not withhold any of the remaining information under section 552.152 of the Government Code.

In summary, the TCOLE identification number in the submitted information is not subject to the Act and need not be released to the requestor. For the requested information that is identical to the information previously requested and ruled upon by this office, we conclude the sheriff's office must continue to rely on Open Records Letter No. 2016-05422 as a previous determination and withhold the identical information in accordance with that ruling. The sheriff's office may withhold the information you marked under section 552.107(1) of the Government Code. The sheriff's office must withhold the information we have marked and indicated under section 552.101 of the Government Code in conjunction with common-law privacy. If the individual at issue is a currently licensed peace officer as defined by article 2.12 of the Code of Criminal Procedure, the sheriff's office must withhold the information we have marked under section 552.117(a)(2) of the Government Code; however, the sheriff'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 individuals at issue timely elected to keep such information confidential under section 552.024, the sheriff's office must withhold the information we have marked under section 552.117(a)(1) of the Government Code; however, the sheriff's office may only withhold the marked cellular telephone numbers if the cellular telephone services are not paid for by a governmental body. The sheriff's office must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure. The sheriff's office must release the remaining information.<sup>5</sup>

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](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

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<sup>5</sup>We note the responsive information being released contains an e-mail address to which the requestor has a right of access under section 552.137(b) of the Government Code. See Gov't Code § 552.137(b). However, Open Records Decision No. 684 (2009) is a previous determination authorizing all governmental bodies to withhold specific categories of information without the necessity of requesting an attorney general decision, including e-mail addresses of members of the public under section 552.137 of the Government Code. Thus, if the sheriff's office receives another request for this same information from a person who does not have a right of access to it, Open Records Decision No. 684 authorizes the sheriff's office to redact the requestor's e-mail address without the necessity of requesting an attorney general decision.

providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kenny Moreland', written in a cursive style.

Kenny Moreland  
Assistant Attorney General  
Open Records Division

KJM/som

Ref: ID# 615406

Enc. Submitted documents

c: Requestor  
(w/o enclosures)