



November 17, 2000

Ms. Sarajane Milligan  
Assistant County Attorney  
County of Harris  
1019 Congress, 15<sup>th</sup> Floor  
Houston, Texas 77002-1700

OR2000-4443

Dear Ms. Milligan:

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# 141362.

The Harris County Sheriff's Department (the "department") received a request for the following information:

1. Records/reports on excessive use of force complaints filed by civilians, and or prisoners, against the department, and/or any of its employees, from 1995 through 2000 in database form.
2. A copy of the 2000-2001 promotion eligibility list for all ranks in the department.

You have submitted for our review representative samples of information that are responsive to item 1 above, contained in exhibits marked by you as C, D, and E. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.111, and 552.117 of the Government Code.<sup>1</sup> We have considered your comments and

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<sup>1</sup>In your initial correspondence to this office, you also assert section 552.131 of the Government Code. You have provided no comments in support of the section 552.131 assertion, nor have you marked any of the submitted information as excepted under section 552.131. See Gov't Code § 552.301(e)(1)(A), (2). We therefore do not address the section 552.131 assertion.

arguments, the exceptions you claim, and we have reviewed the submitted samples of information.<sup>2</sup>

We first address the information requested in item 2 above. You represent that the department does not "maintain the documents" responsive to item 2, that such documents are maintained by the Harris County Sheriff's Civil Service Department, which is a separate county department, and that the requestor has been so notified with the suggestion that the request be made of the Harris County Sheriff's Civil Service Department. The Act does not require a governmental body to make available information which does not exist. Open Records Decision No. 362 (1983).

As to the information responsive to item 1 above, we first address your comments that do not directly pertain to the asserted exceptions. You represent:

Some of the information can be found in a computer record maintained by the Internal Affairs Division ("IAD") of the Department, however, it is in the form of a word processing program, not a database that can be manipulated. Because of the voluminous nature of the records, we have attached the hard copy for a one-year period as a representative sample. *See Exhibit "C."* However, the actual records and reports regarding the claims of excessive use of force would have to be obtained by reviewing each individual file. Due to the voluminous number of records, a representative copy of an IAD file is attached. *See Exhibit "D."* As can be seen from [exhibit C], there are records of complaints other than excessive force that would need to be redacted prior to the release of the information. Moreover, not all prisoners' claims of excessive use of force are contained in the IAD reports since there were not necessarily IAD investigations into all allegations. Thus, to properly respond to the request, a review of each individual prisoner file would be needed to locate the responsive documents. Because of the voluminous nature of those files, a representative copy of a prisoner's file is attached. *See Exhibit "E."*

You also estimate that approximately 500,000 individuals were detained in Harris County jail facilities during the time period specified in the request, and that you will have to review each inmate's file for responsive information.

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<sup>2</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

It has long been established that the difficulty of complying with a public information request is not a relevant factor in determining whether the responsive information is excepted from required public disclosure under the Act. *See, e.g., Industrial Found. v. Texas Industrial Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). It appears from the department's statement that despite the voluminous records that may be responsive to the request, the department is reviewing its files in order to comply with the request. Furthermore, because of the voluminous number of records, the department is submitting a representative sample to this office.

You state that the requested information "is not maintained in a 'database' format." The Public Information Act does not require a governmental body to create or prepare new information. Open Records Decision Nos. 572 (1990), 342 (1982). Additionally, the Act does not require a governmental body to prepare information in a form requested by a member of the public. Open Records Decision No. 467 (1987). However, if a request for public information requires programming or manipulation of data or the information could be made available in the requested form only at a cost that covers the programming and manipulation of data, a governmental body is required to provide the requestor with a written statement describing the form in which the information is available, a description of what would be required to provide the information in the requested form, and a statement of the estimated cost and time to provide the information in the requested form. Gov't Code § 552.231(a), (b). Once the governmental body provides the statement to the requestor, the governmental body has no obligation to provide the requested information in the requested form until the requestor responds to the governmental body in writing. *Id.* § 552.231(d); *see also* Gov't Code § 552.228 (stating the correct procedures for providing a suitable copy of information to a requestor who seeks information in electronic form).

Section 552.103 of the Government Code, the "litigation exception," excepts from disclosure 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.

[Information is excepted from disclosure] 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)(part). Section 552.103 was intended to prevent the use of the Act as a method of avoiding the rules of discovery in litigation. Attorney General Opinion JM-1048 at 4 (1989). The litigation exception enables a governmental body to protect its position in litigation by requiring information related to the litigation to be obtained through

discovery. Open Records Decision No. 551 at 3 (1990). To show that the litigation exception is applicable, the department must demonstrate that (1) litigation was pending or reasonably anticipated at the time of the request and (2) the information at issue is related to that litigation. See Gov't Code § 552.103(a), (c); see also *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). You represent that there are "numerous pending matters" in which the claims involve allegations of excessive use of force by department employees, and you specifically cite nine cases that are pending. We therefore agree that you have demonstrated litigation was pending at the time the department received the present request. As to the second prong of the above-stated test, you argue that all of the information responsive to the request relates to these pending cases because the information "could be used to attempt to establish past acts of Harris County, the Sheriff, and the individuals involved in the litigation." This office has stated that a governmental body in asserting section 552.103 must identify the issues in the litigation and explain how the information responsive to a request relates to those issues. Open Records Decision No. 551 at 5 (1990). You have provided as exhibit F correspondence from the plaintiff's attorney and a copy of the plaintiff's original petition in one of the pending cases: cause no. H-00-2199, *Howard Baker, et. al. v. Harris County, Texas, Floyd M. Garner, Jr., and Harris County Sheriff's Department Deputies John Does 1, 2, 3, and 4*, in the United States District Court for the Southern District of Texas Houston Division. Open Records Decision No. 638 at 4 (1996) (governmental body should provide to attorney general a copy of the relevant pleadings). We understand that exhibit D consists of the IAD administrative investigation file of the incident that resulted in this pending case. Upon careful consideration of your arguments and the submitted samples, we conclude that the department has demonstrated the second prong of the section 552.103 test with regard to the information responsive to the request. Except as otherwise specifically noted herein, the responsive information is therefore excepted from disclosure by section 552.103, and we have marked the documents accordingly.

We note that absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, to the extent the opposing parties in the pending cases have seen or had access to any of the responsive information, there is no justification for withholding that information from the requestor pursuant to section 552.103. We also note that the applicability of section 552.103 ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). In addition, we note that section 552.103 does not except from required disclosure "basic information" regarding the incidents at issue. See, *e.g.*, Open Records Decision No. 362 (1983).

Section 552.022(a)(1) of the Act states in pertinent part that "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by

Section 552.108” constitutes a category of information that is not excepted from required public disclosure under the Act unless “expressly confidential under other law.” As explained below, you have not demonstrated the applicability of section 552.108 to any of the information in exhibits D and E. We also note that sections 552.103 and 552.111 are discretionary exceptions under the Act that do not constitute “other law” that makes information “expressly confidential.” Therefore, in exhibit D, we have marked for release a thirty-eight page document that comprises a “completed report” under section 552.022(a)(1). In exhibit E, we have also marked a document with attachments marked A through K, that we believe also comprises a “completed report” under section 552.022(a)(1). The department must release these documents. We have marked the reports at issue with green flags. Please note, however, that prior to releasing the reports, the department must first withhold from the documents the specific information we have marked with red flags because this information is expressly made confidential under other law and therefore is not subject to release under section 552.022(a)(1) of the Act.

You also assert that section 552.108 excepts some information from required disclosure. In relevant part, section 552.108 provides:

(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;

(2) it is information that 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 the detection, investigation, or prosecution of crime;

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

(c) This section does not except from [required public disclosure] information that is basic information about an arrested person, an arrest, or a crime.

Gov't Code § 552.108. Generally, a governmental body claiming an exception under section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). The submitted information does not explain on its face how and why its release would interfere with law enforcement.

You argue that the internal memoranda and witness statements are excepted under section 552.108(b)(1) because "release of this information would inhibit the ability of [the department] to further investigate the incidents at issue or future incidents as it would have a chilling effect on the ability to obtain pertinent witness statements." You do not explain, nor is it apparent to this office, how the release of the information would cause this "chilling effect." In the context of this argument, you also cite to Open Records Decision No 252 (1980), in which this office found certain information to be excepted under the statutory predecessor to section 552.108 because its release would reveal a police department's investigative techniques and certain procedures used in law enforcement. You have not identified the specific information in the submitted samples which, if released, would interfere with law enforcement by revealing department investigative techniques or procedures. We also note that in Open Records Decision No. 252 (1980), this office stated that where the investigative techniques are commonly known, the statutory predecessor to section 552.108 did not operate to except the information from required public disclosure. Open Records Decision No. 252 at 3 (1980). We conclude from our review of the samples you have provided that the information responsive to the present request, at most, would reveal investigative techniques or department procedures that are commonly known. Thus, you have not demonstrated that any of the responsive information is excepted from disclosure under section 552.108 on the basis that it may reveal investigative techniques or procedures of the department.

You also argue the applicability of section 552.108(a)(2) and (b)(2) in stating that "[w]ithout reviewing all 500,000 files, it is impossible to rule out the possibility of documents falling within" these provisions, and that "[i]t is probable that the majority of the files will not have resulted in criminal prosecutions." In addition, you aver that section 552.108(a)(1) also applies because "[n]o determination has been made as yet whether to bring any charges regarding some of the allegations." However, on their face, the documents in exhibits D and E pertain to *administrative* investigations of alleged employee misconduct. These representative samples of responsive information do not indicate that the department investigated any alleged crime as a result of the complaints. Section 552.108 does not operate to except from disclosure information regarding non-criminal investigations.

regardless of whether the investigation remains active. *See Morales v. Ellen*, 840 S.W.2d 519, 526 (Tex. App.—El Paso 1992, writ denied)(statutory predecessor to section 552.108 did not apply to an investigation of sexual harassment which did not result in a criminal investigation). We therefore conclude that you have not demonstrated how release of the types of information in exhibits D and E would interfere with the detection, investigation, or prosecution of crime.

As to exhibit C, we acknowledge that some of the entries refer to alleged crimes (e.g. “assault”). It is therefore possible that these entries involve investigations of crime. We also acknowledge that portions of the information in exhibit D refer to criminal records of the department or of the Houston Police Department. However, the categories of information at issue constitute basic information that is not excepted by section 552.108. *See Gov’t Code § 552.108(c)*. We believe the term “basic information” in section 552.108(c) refers to those categories of information that are generally considered public, such as information that is normally found on the front page of an offense report. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, pursuant to section 552.108(c), information that is considered to be front page offense report information is not excepted by section 552.108, even if this information is not actually located on the front page of an offense report. Therefore, even the information in the submitted samples that pertains to criminal investigations is not excepted under section 552.108. *See also* Open Records Decision No. 127 (1976) (summarizing the types of information deemed public by *Houston Chronicle*). In summary, based on your arguments and the submitted representative samples, we conclude that none of the information responsive to the request is excepted by section 552.108.

We next address the section 552.111 assertion for the information that is basic information not excepted by section 552.108. Section 552.111 states in pertinent part that an “interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency” is excepted from required public disclosure. This section incorporates the common law deliberative process privilege which may apply to memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity’s policymaking process. Open Records Decision No. 615 at 5 (1993). Its purpose is “to protect from public disclosure advice and opinions *on policy matters* and “to encourage frank and open discussion within the agency in connection with its decision-making processes.” *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref’d n.r.e.) (emphasis added). However, an agency’s policymaking functions do not encompass internal administrative or personnel matters, as disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6 (1993). While the deliberative process privilege aspect of section 552.111 also does not ordinarily except factual information from disclosure, this office has found that the privilege protects from

required disclosure entire drafts of documents that have been or will be released to the public, because such drafts necessarily represent the advice, opinion, and recommendation of the drafter as to the form and content of the final document. Open Records Decision No. 559 (1990). However, as indicated above, this office has held since 1993 that the deliberative process privilege aspect of section 552.111 pertains only to communications that contain advice, opinion, or recommendation *on policy matters*. In support of the applicability of section 552.111, you argue that certain responsive documents represent information "used to determine the policies involving the applicability of disciplinary action or criminal charges being brought against individual Harris County employees." Upon review of the submitted samples, we find the information at issue pertains to internal administrative or personnel matters of the department, not policymaking by the department. Accordingly, we do not believe that the basic information is excepted by section 552.111.

You also assert section 552.101 of the Act. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The Medical Practice Act (the "MPA"), found at Subtitle B of Title 3 of the Occupations Code, governs records of the treatment of a patient by a physician. Section 159.002(b) states:

A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

Section 159.002(b) makes confidential the responsive physician treatment records. Sections 159.003 and 159.004 provide exceptions to this confidentiality provision, none of which appear to apply in this instance. Thus, the department must withhold in their entirety the records we have marked, contained in exhibits D and E, pursuant to the MPA.

Exhibit D also contains polygraph examination reports and polygraph results. The release of this information is governed by section 1703.306 of the Occupations Code which provides:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

(1) the examinee or any other person specifically designated in writing by the examinee;

(2) the person that requested the examination;

(3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;

(4) another polygraph examiner in private consultation; or

(5) any other person required by due process of law.

(b) The board or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

Occ. Code § 1703.306. This provision prohibits the release of polygraph information to anyone other than those individuals listed in subsection (a). In this instance, the requestor is not among those entitled to access to the polygraph information. We conclude, therefore, that the department must withhold the polygraph information in exhibit D, which we have marked, pursuant to section 1703.306 of the Occupations Code.

We additionally note that exhibit E contains one document that evidently consists of criminal history record information ("CHRI") that is excepted by section 552.101, and we have also marked social security number information that the department may be required to withhold under this provision, as noted below.

CHRI generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that 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 law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that the 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 such as the department 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. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except

in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. Accordingly, we have marked CHRI that is excepted from required public disclosure by section 552.101 of the Government Code.

Social security numbers may be withheld in some circumstances under section 552.101. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any the social security number information we have marked is confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing the social security number information, you should ensure that no such information was obtained or is maintained by the department pursuant to any provision of law enacted on or after October 1, 1990.

Finally, you assert section 552.117 of the Act. Section 552.117(2) excepts from disclosure information that relates to the home address, home telephone number, or social security number of a peace officer, or that reveals whether the officer has family members. *See* Gov't Code § 552.117(2). We find no information that implicates this provision in the submitted information that this decision concludes is subject to release. However, we agree that this provision requires the department to redact from the information responsive to the request the home telephone number, home address, and social security number of any peace officer, as well as information that reveals whether the officer has family members.

In summary, the department must withhold in its entirety the types of information we have marked as governed by section 1703.306 of the Occupations Code or the MPA. The department may also withhold under section 552.103 of the Act the information responsive to the request, except as otherwise noted herein. Thus, basic information as described above is not excepted by this provision, nor may the categories of information under section 552.022 of the Act be withheld under section 552.103. None of the responsive information may be withheld under sections 552.108 or 552.111 of the Act. As to section 552.101 of the Act, the department must withhold the CHRI we have marked and the social security number information we have marked if it was obtained or is maintained by the department pursuant to any provision of law enacted on or after October 1, 1990. In addition, the department must withhold under section 552.117(2) the home addresses, home telephone numbers, social security numbers, and personal family member information of

peace officers. Pursuant to section 552.022(a)(1) of the Act, the department must release the completed reports, such as those we have marked in exhibits D and E, but the department must first redact from the reports the types of information we have marked or otherwise noted herein as expressly confidential under other law.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

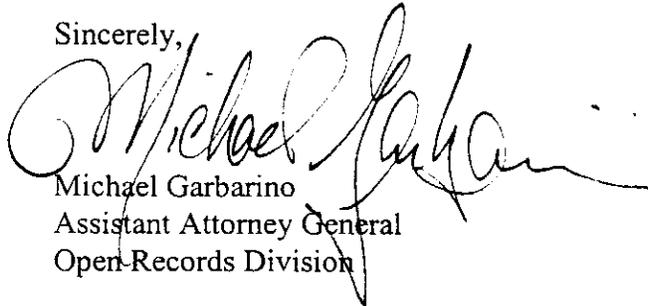
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael Garbarino  
Assistant Attorney General  
Open-Records Division

MG/seg

Ref: ID# 141362

Encl. Submitted documents

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