



April 16, 2001

Mr. James M. Kuboviak
County Attorney
Brazos County
300 East 26th, Suite 325
Bryan, Texas 77803

OR2001-1502

Dear Mr. Kuboviak:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 146015.

The Brazos County Sheriff's Office (the "sheriff's office") received a request for information from the personnel file of a specified deputy sheriff. Since you have only submitted information responsive to categories 10 through 12 of the request, we presume that, to the extent it exists, you have released the remaining requested information. *See Gov't Code* §§ 552.006, .301, .302; *see also* Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information it must release information as soon as possible under circumstances). You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

We note at the outset that section 552.022 of the Government Code makes certain information expressly public unless it is confidential under other law. One category of expressly public information under section 552.022 is "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by [s]ection 552.108[.]" Gov't Code § 552.022(a)(1). You have submitted three completed evaluations which you seek to withhold under section 552.103. Our office has previously concluded that section 552.103 is a discretionary exception that does not make information confidential. *See* Open Records Decision No. 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation, and does not itself make information confidential). Accordingly, you may not withhold any of the evaluations under section 552.103. On the other hand, you claim that one evaluation is also

protected from disclosure by sections 552.101 and 552.102. Therefore, we will address whether this evaluation is confidential by law.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You claim that the document titled "Police Officer Candidate Evaluation" is a medical record that is excepted from disclosure under section 552.101 of the Government Code in conjunction with the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. The MPA provides that "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." Occupations Code § 159.002(b). It does not appear, nor do you demonstrate, that this document was created or maintained by a physician. Therefore, this evaluation is not confidential under section 552.101 in conjunction with the MPA.

You also claim that the "Police Officer Candidate Evaluation" is excepted from disclosure under section 552.102 of the Government Code in conjunction with the common law right of privacy. Section 552.102 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). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101 of the Government Code. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

Information is protected by common law privacy when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* The evaluation relates solely to the individual's qualifications and ability to execute the duties of a deputy sheriff. Since there is a legitimate public interest in the qualifications and job performance of public employees, the sheriff's office may not withhold this evaluation from disclosure based on a right of privacy. See Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in having access to information concerning performances of governmental employees), 444 (1986) (employee information about qualifications, disciplinary action and background not protected by privacy), 423 at 2 (1984) (scope of public employee privacy is narrow).

We note, however, that the evaluation and other submitted documents contain information protected by section 552.117(2). Section 552.117(2) of the Government Code excepts from disclosure a peace officer's home address, home telephone number, social security number, and information indicating whether the peace officer has family members regardless of whether the peace officer made an election under section 552.024 of the Government Code.

Section 552.117(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Accordingly, the sheriff's office must withhold this information as it appears in the submitted documents. A public employee's date of birth, however, is not information protected by this exception and must, therefore, be released.

We next address your contention that the remaining submitted information is excepted from disclosure pursuant to section 552.103 of the Government Code. Section 552.103 was intended to prevent the use of the Public Information Act as a method of avoiding the rules of discovery in litigation. *See* Attorney General Opinion JM-1048 at 4 (1989). The purpose of section 552.103 is to protect a governmental body's position in litigation by forcing parties to obtain information relating to the litigation through the discovery process. *See* Open Records Decision No. 551 (1990). Further, section 552.103 only applies where the litigation involves or is expected to involve the governmental body which is claiming the exception. *See* Open Records Decision No. 392 (1983) (finding predecessor to section 552.103 only applicable to governmental body who has the litigation interest). You claim that the submitted information is related to a pending criminal prosecution and should, therefore, be excepted from disclosure under section 552.103. However, the sheriff's office is not a party to this litigation. Consequently, the sheriff's office has no section 552.103 interest in information related to the criminal litigation. *See* Open Records Decision No. 392 (1983).

In this type of situation, we require an affirmative representation from the prosecuting attorney representing the governmental body in the litigation that he or she wants the submitted information withheld from disclosure under section 552.103. You did not properly state in your brief that the county attorney's office is the prosecuting entity. However, you do state that you are requesting a decision "[o]n behalf of the Brazos County Sheriff and *on behalf of our office.*" Based on this statement, we presume that the county attorney's office is the prosecuting entity in this matter. Therefore, we will address the county attorney's section 552.103 claim.

Section 552.103 provides:

(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 county attorney's office has the burden of providing relevant facts and documents to show that section 552.103 is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. See *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); 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). The county attorney's office must meet both prongs of this test for information to be excepted under section 552.103 of the Government Code.

Based on your statements and on the information submitted to our office, we conclude that litigation is pending against the requestor's client on the charge of driving while intoxicated. Therefore, the first prong of section 552.103 has been satisfied. We also find that you have adequately explained how the requested information relates to the subject matter of the pending litigation. Therefore, the second prong of section 552.103 has been satisfied. Accordingly, if the county attorney's office is the prosecuting entity in this matter, the submitted information may be withheld from disclosure under section 552.103 of the Government Code.¹

However, if the county attorney's office is not the prosecuting entity in this matter, section 552.103 is not applicable. In light of that possibility, we address the applicability of the rest of your claimed exceptions to the submitted information. You assert that portions of the firearms proficiency records are excepted from disclosure under section 552.108 of the Government Code. Section 552.108 provides in pertinent part:

(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 the requirements of Section 552.021 if:

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

Gov't Code § 552.108(b)(1). In order for this exception to disclosure to be applicable, a governmental body must meet its burden of explaining, if the submitted information does not supply the explanation on its face, how and why release of the information would interfere

¹ We note, however, that once information has been obtained by all parties to the litigation, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. See Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the pending litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, 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).

with law enforcement or crime prevention. See Open Records Decision No. 562 at 10 (1990). You state that the release of portions of the firearms proficiency records, which lists each weapon the officer is qualified to use, could place the officer in a potentially life-threatening disadvantage in confrontations with suspects. Based on your statement, we conclude that you may withhold the marked portions of the firearms proficiency records pursuant to section 552.108(b)(1) of the Government Code.

You further assert that the driver's license number of the deputy sheriff should be excepted under section 552.130 of the Government Code. Section 552.130(a) of the Government Code excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. Therefore, you must withhold the marked driver's license number under section 552.130(a) of the Government Code.

In summary, with the exception of information protected by section 552.117(2), the three completed evaluations must be released to the requestor pursuant to section 552.022(a)(1). Assuming that the county attorney's office is the prosecuting entity in the pending litigation, you may withhold the rest of the submitted information under section 552.103. However, if the county attorney's office is not the prosecuting entity in the pending litigation, section 552.103 is not applicable and you may only withhold from the requestor the marked portions of the firearms proficiency records pursuant to section 552.108(b)(1), the marked driver's license number of the deputy sheriff pursuant to section 552.130, and the marked section 552.117(2) information.

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;

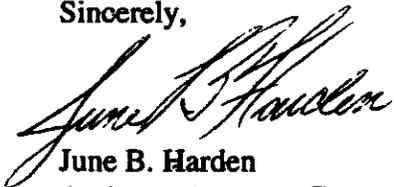
2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things 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 Hadassah Schloss at 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,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/RJB/seg

Ref: ID# 146015

Encl. Marked documents

cc: Mr. Travis Bryan, III
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