



August 15, 2002

Ms. Melissa L. Barloco
Assistant County Attorney
Harris County
1019 Congress, 15th Floor
Houston, Texas 77002-1700

OR2002-4511

Dear Ms. Barloco:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 167197.

The Harris County Sheriff's Department (the "department") received a request for four categories of information regarding Deputy D.R. Houston, unit 4091. You indicate that the department does not have any information responsive to category four of the request.¹ You claim that the information responsive to categories one, two and three of the request is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

At the outset, we must address the department's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. You indicate that you have submitted information responsive to category two of the request under Exhibit C. In actuality, however, you did not submit any such information.

¹We note that a governmental body is not required to obtain information not in its possession. Open Records Decision No. 558 (1990). Further, the Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See Gov't Code § 552.302; Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Normally, a compelling interest exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Because you have not submitted the information responsive to category two of the request, we have no basis for finding it confidential. Thus, we have no choice but to order the information responsive to category two of the request released per section 552.302. If you believe the information is confidential and may not lawfully be released, you must challenge the ruling in court as outlined below.

Next, we note that the information submitted as Exhibit D is subject to section 552.022 of the Government Code. Section 552.022(a) provides in pertinent part as follows:

Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter *unless they are expressly confidential under 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[.]* [Emphasis added.]

The submitted information pertains to completed investigations. Consequently, the department may withhold the information in Exhibit D only to the extent the information is made confidential under other law or is otherwise protected by section 552.108 of the Government Code. Section 552.103 of the Government Code is a discretionary exception to disclosure that protects the governmental body's interests and is therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.--Dallas 1999, no pet.) (governmental body may waive section 552.103). Therefore, the department may not withhold the information in Exhibit D under section 552.103 of the Government Code.

As you argue that the submitted information is excepted under section 552.108(a)(2), we will address your section 552.108 argument. Section 552.108 provides in relevant part:

- (a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

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- (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[.]

A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. You contend that the internal affairs investigations contained in Exhibit D should be excepted under section 552.108(a)(2) because they relate to an investigation "that did not conclude in a conviction or deferred adjudication." However, you also inform us that criminal litigation remains pending in the same matter. Because you have provided this office with conflicting arguments, you have not demonstrated the applicability of section 552.108. Therefore, the department may not withhold any of the submitted information under section 552.108(a)(2).

We note that the Harris County District Attorney's Office (the "district attorney") has provided an affidavit stating that the requested information relates to a pending criminal case and should therefore be withheld from disclosure. However, as the district attorney has not raised any specific exception against disclosure, we are unable to conclude that any of the requested information may be withheld based on the district attorney's arguments.

We also note, however, that access to a portion of the information in Exhibit D is governed by the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (b) 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.
- (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Information that is subject to the MPA includes both medical records and information obtained from those medical records. See Occ. Code §§ 159.002, .004; Open Records

Decision No. 598 (1991). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. See Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982).

Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We have marked the information in Exhibit D that was obtained from medical records and may therefore be released only in accordance with the MPA.

We further note that portions of the information in Exhibit D must be withheld under section 552.101 of the Government Code. Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Under section 552.101, information may be withheld on the basis of common-law privacy. The doctrine of common-law privacy protects information if it is highly intimate or embarrassing such that its release would be highly objectionable to a reasonable person and the public has no legitimate interest in it. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. The submitted information includes such intimate information. Further, we believe there is no legitimate public interest in this information. Accordingly, we have marked the information in Exhibit D that must be withheld under section 552.101 in conjunction with common-law privacy.

Further, in Open Records Decision No. 339 (1982), we concluded that a sexual assault victim has a common-law privacy interest that prevents disclosure of information that would identify the victim. See also *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, *writ denied*) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information). Thus, we have also marked the information that would identify a sexual assault victim that the department must withhold from Exhibit D pursuant to section 552.101 and common-law privacy. See Open Records Decision Nos. 393 (1983), 339 (1982).

Next, we note that when a governmental entity compiles criminal history information pertaining to a particular individual, the compiled information takes on a character that implicates the individual's right of privacy in a manner that the same information in an uncompiled state does not. See *United States Dep't of Justice v. Reporters Comm. for*

Freedom of the Press, 489 U.S. 749 (1989); *see also* Open Records Decision No. 616 at 2-3 (1993). We have marked the criminal history information in Exhibit D that the department must withhold under section 552.101 and *Reporters Committee*.

Section 552.101 also encompasses information protected by other statutes. Section 1703.306 of the Occupations Code provides as follows:

(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.

Occ. Code § 1703.306. We find that certain information in the submitted records was acquired from polygraph examinations. It does not appear that any of the exceptions in section 1703.306 apply in this case. *See* Open Records Decision 565 (1990)(construing predecessor statute). Accordingly, we have marked the information in Exhibit D that is confidential pursuant to section 1703.306 of the Occupations Code and must therefore be withheld pursuant to section 552.101 of the Government Code.

We further note that Exhibit D contains social security numbers that may be confidential under federal law. A social security number may be withheld in some circumstances 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 of the social security numbers in the responsive records are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 of the Act 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 any 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.

Exhibit D also contains information that is excepted under section 552.130 of the Government Code. Section 552.130 excepts from public disclosure information relating to a driver's license or motor vehicle title or registration issued by an agency of this state. We have marked the information in the submitted documents that the department must withhold pursuant to section 552.130.

Lastly, we will address your claimed exceptions with respect to the information in Exhibit B. Section 552.103 of the Government Code provides 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.

The department has the burden of providing relevant facts and documents to show that 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, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *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 department must meet both prongs of this test for information to be excepted under 552.103(a).

You inform us that the requestor represents an individual arrested by the named deputy for the possession of a controlled substance. You further inform us that there is currently a criminal case pending in the matter and that the Harris County District Attorney representing the state has informed the department that information in any way related to this pending criminal prosecution should be withheld in order to permit the proper functioning of pretrial discovery and the introduction of evidence at trial. On this basis, we conclude that the first prong of the section 552.103 test has been met. Upon review of the information in

Exhibit B, we find that the information relates to the pending litigation for purposes of section 552.103. Therefore, the information in Exhibit B may be withheld from the requestor at this time pursuant to section 552.103(a) of the Government Code.

Generally, however, 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. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

To summarize, (1) we have marked the information in Exhibit D that may be released only in accordance with the MPA; (2) the department must withhold the information we have marked in Exhibit D under section 552.101; (3) prior to releasing any 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; (4) the department must withhold the information we have marked in Exhibit D under section 552.130; and (5) the department may withhold the information in Exhibit B under section 552.103. The remaining information must be released.

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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Karen A. Eckerle
Assistant Attorney General
Open Records Division

KAE/sdk

Ref: ID# 167197

Enc: Submitted documents

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(w/o enclosures)