



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

June 5, 2003

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

OR2003-3866

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# 182294.

The Harris County Sheriff's Office (the "sheriff") received a request for several categories of information relating to a named deputy. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that much of the submitted information is subject to a previous ruling by this office. In Open Records Letter No. 2003-3695 (2003), this office concluded that portions of the submitted information were excepted from disclosure pursuant to sections 552.101, 552.103, 552.117, and 552.130 of the Government Code. As the facts and circumstances surrounding that ruling do not appear to have changed, the sheriff may continue to rely on our previous decision with respect to responsive information that was previously ruled on. *See* Open Records Decision No. 673 at 6-7 (2001) (criteria of previous determination regarding specific information previously ruled on).

We next note that the submitted information includes several completed evaluations and investigations, which are subject to section 552.022 of the Government Code. This section provides that "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," is public and may not be withheld unless it is expressly confidential under other law or excepted from disclosure by section 552.108. Gov't Code § 552.022(a)(1). Thus, these documents, which we have marked, may only be withheld if they are excepted under section 552.108 or confidential under other law.

You assert that all of the submitted information, including the portions subject to section 552.022, is excepted under section 552.103. This section is a discretionary exception and is not “other law” for the purpose of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.–Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 663 (1999) (governmental body may waive section 552.103), 522 at 4 (1989) (discretionary exceptions in general). Therefore, the submitted information that is subject to section 552.022 may not be withheld on the basis of section 552.103. However, because you also raise section 552.108 as well as sections 552.101, 552.117, and 552.130, which constitute “other law” for purposes of section 552.022, we will address those arguments.

You contend that all of the submitted information, including the documents that are subject to section 552.022, may be withheld pursuant to section 552.108 of the Government Code. Section 552.108(a) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime.” Generally, a governmental body claiming 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. *See Gov’t Code* §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Furthermore, section 552.108 is not generally applicable to the personnel records of law enforcement officers or to information relating to complaints involving law enforcement officers. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.–Austin 2002, no pet.); *see also* Open Records Decision Nos. 562 at 10 (1990) (predecessor to section 552.108(b) inapplicable to employment information in police officer’s file), 361 at 2-3 (1983) (statutory predecessor to section 552.108(b) inapplicable to background information collected on unsuccessful applicant for employment with sheriff’s department).

In this instance you inform us that the deputy at issue worked as a “courtesy officer” at an apartment complex where he had several encounters with two named individuals. You state that shortly after those individuals moved from the complex, one of the individuals allegedly murdered the other and that a murder trial was pending at the time of the request. You claim that “if released, [the deputy’s] records would be used at the pending criminal trial, since [the deputy] has direct knowledge of [the alleged murderer] and his relationship with the victim . . . during the time immediately preceding her death.” We note that the information in question consists of the personnel records of the deputy rather than criminal investigatory records concerning the murder. You have not adequately explained, nor have we received comments from the prosecuting attorney explaining, how the release of the submitted personnel records would interfere with the pending criminal investigation or prosecution. Thus, we determine the sheriff may not withhold any of the submitted information under section 552.108(a)(1) of the Government Code.

We note, however, that the documents that are subject to section 552.022 include polygraph information, the release of which is prohibited by law. Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This exception encompasses information that is made confidential by other statutes. Section 1703.306 of the Occupations Code provides that “a person for whom a polygraph examination is conducted . . . may not disclose information acquired from a polygraph examination” except to certain categories of people. Because the requestor does not fall within any of the enumerated categories, pursuant to section 552.101 and section 1703.306, you must withhold the polygraph information that we have marked.

Section 552.101 also encompasses the common law right of privacy, which 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. *Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types 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. *Id.* at 683. In the records that are subject to section 552.022, we have marked the information that must be withheld pursuant to section 552.101 and common law privacy.

You also assert that information concerning the officer must be redacted pursuant to section 552.117 of the Government Code. Section 552.117(2) excepts from disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of a peace officer regardless of whether the officer requests confidentiality under section 552.024.¹ You indicate that the individual at issue was a licensed peace officer on the date the sheriff received this request. Therefore, we agree that, under section 552.117, the sheriff must withhold the listed information concerning this individual. Pursuant to this exception, the sheriff must redact the types of information we have marked in the documents that are subject to section 552.022.

We now address your arguments under section 552.103 for information that is not subject to section 552.022. Section 552.103 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.

¹“Peace officer” is defined by article 2.12 of the Code of Criminal Procedure.

....

(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 sheriff 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 on the date that the hospital received the request, 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 sheriff must meet both prongs of this test for information to be excepted under 552.103(a).

In this case, you inform us that at the time the sheriff received this request, the sheriff's office and the named deputy were parties to a lawsuit relating to the deputy's employment with the sheriff. In support of your arguments, you have provided us a copy of the petition that was filed in the suit prior to the sheriff's receipt of the request. We therefore find that you have met the first prong of the section 552.103 test. Furthermore, after reviewing your arguments and the information that is not subject to section 552.022, we agree that it relates to the pending litigation for the purposes of section 552.103(a).

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 to which all parties in the pending suit have had access 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).

In summary, the sheriff may rely on Open Records Letter No. 2003-3695 (2003) for all of the submitted information that was also at issue in that ruling. As for the other submitted information, the sheriff must redact the following information from the completed evaluations and completed investigations: 1) information protected by common law privacy; 2) information obtained during a polygraph examination; and 3) the current and former home address and telephone numbers, social security number, and family member information of the named deputy. After redacting this information, which we have marked, the sheriff must release the remainder of the completed evaluations and investigations. The

remaining submitted information, which is not subject to section 552.022, may be withheld pursuant to section 552.103 while litigation is pending.²

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).

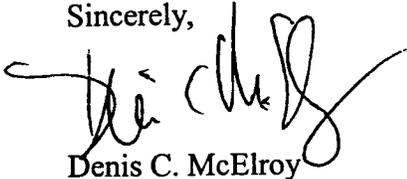
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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.

²As our ruling on these issues is dispositive, we need not address your remaining arguments.

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,

A handwritten signature in black ink, appearing to read 'Denis C. McElroy', with a large, sweeping flourish extending to the right.

Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 182294

Enc. Submitted documents

c: Mr. David W. Kiatta
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(w/o enclosures)