



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 20, 2004

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

OR2004-3182

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# 199846.

The Harris County Constable, Precinct 6 (the "constable") received a request for information pertaining to the shooting of the requestor's client and personnel records of three named deputies. You claim that the requested information is excepted from disclosure under sections 552.101, 552.108, 552.117, 552.119, 552.130, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Because your claim regarding section 552.108 is the broadest, we address it first. Section 552.108(a)(1) of the Government Code 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." Gov't Code § 552.108(a)(1). A governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

In this instance, you indicate that the Houston Police Department (the "department") is currently conducting a criminal investigation of this shooting and inform us that the personnel records pertain to "deputies who provided witness statements to the . . . Department in reference to that incident." You contend that "if released, the records would

be used at a future criminal trial, since the deputies have knowledge of the shooting incident.” In addition, you have submitted a representation from a department police officer who states that the “Houston Police Department opposes the disclosure of [the requested] records because such records are directly related to an open case in which a criminal investigation is pending.” Based on these representations and our review of the information at issue, we conclude that the constable and the department have demonstrated that section 552.108(a)(1) applies to the submitted information that pertains directly to the shooting. *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) (court delineates law enforcement interests that are present in active cases). We have marked this information, which may be withheld under section 552.108(a)(1). We find, however, that neither the constable nor the department has reasonably explained how and why the release of the submitted personnel records would interfere with law enforcement. Therefore, these records may not be withheld pursuant to section 552.108. *See Gov't Code* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

We note that the personnel records include documents that are subject to Chapter 611 of the Health and Safety Code, which provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002 provides in part:

Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

Health & Safety Code § 611.002(a). Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See Open Records Decision No. 565* (1990). We have marked the information that constitutes mental health records, which may only be released in accordance with the access provisions of sections 611.004 and 611.0045 of the Health and Safety Code.¹

You also contend that some of the information in the submitted personnel files must be withheld under section 552.101 of the Government Code. This section excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision” and encompasses information made confidential by other statutes. Fingerprint information is governed by sections 560.001, 560.002, and 560.003 of the Government Code, which provide:

¹Because of our ruling on this issue, we need not address your arguments regarding section 552.137 of the Government Code.

Sec. 560.001. DEFINITIONS. In this chapter

- (1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.
- (2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 560.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

- (1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:
 - (A) the individual consents to the disclosure;
 - (B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or
 - (C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and
- (2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 560.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

Gov't Code §§ 560.001-.003. Thus, pursuant to section 552.101 and section 560.003, the constable must withhold the fingerprint information you have marked unless section 560.002 permits its disclosure.

We note that the submitted information also includes declarations of medical condition and of psychological and emotional health. Section 552.101 also encompasses section 1701.306 of the Occupations Code, which provides:

(a) The commission may not issue a license to a person as an officer or county jailer unless the person is examined by:

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test.

(b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to the commission. *A declaration is not public information.*

Occ. Code § 1701.306 (emphasis added). We have marked the information that must be withheld under section 552.101 in conjunction with section 1701.306.

We also note that the submitted information includes Report of Resignation or Separation of License Holder forms addressed to the Texas Commission on Law Enforcement (“the commission”). Section 1701.452 requires that a law enforcement agency submit a report to the commission regarding an officer licensed under chapter 1701 who resigns from the law enforcement agency. *See* Occ. Code § 1701.452. Section 1701.454 makes such reports, which are commonly referred to as “F-5s,” confidential and provides in relevant part:

(a) A report or statement submitted to the commission under this subchapter is confidential and is not subject to disclosure under Chapter 552 of the Government Code.

Occ. Code § 1701.454. Therefore, the constable must withhold the marked F-5s pursuant to section 552.101 in conjunction with section 1701.454.

You also contend that some of the information in the personnel files is protected by common law privacy. Common law privacy, which is also encompassed by section 552.101, 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. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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. In addition, this office has found that the following types of information are excepted from required public disclosure under common law privacy: an individual's criminal history when compiled by a governmental body, *see* Open Records Decision No. 565 (*citing United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)); personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). We have reviewed the personnel files and marked the information that must be withheld pursuant to section 552.101 and common law privacy.

In addition, you note that the personnel records include information that is excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(2) excepts from public 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 made an election under section 552.024 or section 552.1175 of the Government Code.² We have reviewed the submitted documents and understand that the individuals whose personnel records are at issue were all licensed peace officers at the time the constable received this request. Therefore, pursuant to section 552.117(a)(2), the constable must withhold the information it has marked and additional information that we have marked.

We also note that the constable may be required to withhold some of the submitted information pursuant to section 552.1175 of the Government Code. Section 552.1175 also applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure and provides in pertinent part:

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

- (1) chooses to restrict public access to the information; and
- (2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

²"Peace officer" is defined by article 2.12 of the Code of Criminal Procedure.

Gov't Code § 552.1175(b). The submitted personnel records contain the home address and telephone number of other "officers" who do not work for the constable. If any of these individuals is currently a peace officer and elects to restrict access to this information in accordance with section 552.1175, the constable must withhold the address and telephone number we have marked. Otherwise, the constable must release this information.

You also raise section 552.119 of the Government Code as a possible exception to disclosure. This section provides:

(a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under Section 51.212, Education Code, the release of which would endanger the life or physical safety of the officer, is excepted from [required public disclosure] unless:

(1) the officer is under indictment or charged with an offense by information;

(2) the officer is a party in a fire or police civil service hearing or a case in arbitration; or

(3) the photograph is introduced as evidence in a judicial proceeding.

(b) A photograph exempt from disclosure under Subsection (a) may be made public only if the peace officer or security officer gives written consent to the disclosure.

Gov't Code § 552.119. In this instance, you have not demonstrated, nor is it apparent from our review of the submitted information, that release of the photographs would endanger the life or physical safety of the officers depicted. We therefore determine that the constable may not withhold any portion of the submitted records pursuant to section 552.119 of the Government Code.

Finally, you raise section 552.130 of the Government Code. This section requires the constable to withhold "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." Consequently, pursuant to section 552.130, the constable must withhold the information it has marked and the additional information we have marked.

In summary, we have marked the information that directly relates to the shooting and may be withheld under section 552.108 of the Government Code. The marked mental health records may only be released in accordance with the release provisions in chapter 611 of the Health and Safety Code. Fingerprint information must be withheld under sections 552.101

and 560.003 of the Government Code unless section 560.002 permits its release. We have marked declarations of medical condition and of psychological and emotional health and F-5 forms that must be withheld under section 552.101 in conjunction with the relevant provisions of the Occupations Code. You must also withhold the information we have marked as being excepted from disclosure under section 552.101 and common law privacy. Section 552.117 of the Government Code requires the constable to withhold the present and former home addresses and telephone numbers, social security numbers, and family member information of the peace officers who are employed by the constable. Under section 552.1175, the constable must withhold this same information for any of the individuals who do not work for the constable who are currently peace officers and elect to restrict access to this information in accordance with section 552.1175. The marked Texas-issued motor vehicle information must be withheld under section 552.130. The remaining submitted information must be released.³

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).

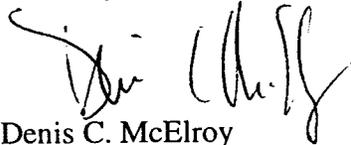
³As our ruling on these issues is dispositive, we need not address your remaining arguments.

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.

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,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 199846

Enc. Submitted documents

c: Mr. Michael Gillespie
3730 Kirby, Suite 520
Houston, Texas 77098
(w/o enclosures)