



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 25, 2005

Ms. M. Ann Montgomery  
Assistant Ellis County & District Attorney  
Ellis County and District Attorney  
Temporary Administrative Building  
1201 North Highway 77, Suite 104  
Waxahachie, Texas 75165-7832

OR2005-09654

Dear Ms. Montgomery:

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# 235277.

The Ellis County Sheriff's Office (the "sheriff") received a request for (1) "[a]ny and all documents identifying the full name, present or last known business and residential address, telephone number, and employment status of every Jailer . . . and every Transport Officer . . . who transported prisoners for medical treatment, who worked at the Wayne McCollum Detention Center from September 12, 2003 through November 14, 2003[;]" and (2) "[a]ny and all documents pertaining to [a named former inmate] who was incarcerated at the Wayne McCollum Detention Center[.]" You claim that the requested information is exempted from disclosure under sections 552.101, 552.103, and 552.117 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

Because your claim under section 552.103 of the Government Code is potentially broadest, we address your arguments under this exception first. Section 552.103 provides in relevant part as follows:

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<sup>1</sup>Although you raise section 552.024 of the Government Code, we note that this section is not an exception to public disclosure under the Act. Rather, this section permits a current or former official or employee of a governmental body to choose whether to allow public access to certain information relating to the current or former official or employee that is held by the employing governmental body. *See* Gov't Code § 552.024. Section 552.117 of the Government Code is the proper exception to withhold such information. Accordingly, we address your claim regarding section 552.024 under section 552.117.

(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 person's office or employment, is or may be a party.

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(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). A governmental body 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 was pending or reasonably anticipated on the date that the governmental body received the request for information; and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.<sup>2</sup> *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that, if an individual publicly threatens to bring suit against a governmental body but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who

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<sup>2</sup>In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

makes a request for information does not establish that litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

In this instance, you inform us that the requestor represented the former inmate in a cause of action that concluded in the filing of a notice of nonsuit on May 6, 2005. You argue that the sheriff reasonably anticipates litigation because you expect the requestor to initiate another lawsuit. However, we find that you have not adequately explained how the sheriff reasonably anticipates this potential future litigation. We therefore conclude that the sheriff has not met its burden of demonstrating that it reasonably anticipated litigation for purposes of section 552.103, and none of the submitted information may therefore be withheld on this basis.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses the doctrine of common-law 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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (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. In addition, this office has found that some kinds of medical information or information indicating disabilities or specific illnesses is protected under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). We have marked the information that is excepted from disclosure under section 552.101 and common-law privacy.

Next, section 552.117(a)(1) of the Government Code excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024.<sup>3</sup> Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Section 552.117(a)(2) excepts from disclosure this same information regarding a peace officer regardless of whether the officer elected under section 552.024 or 552.1175 of the Government Code to keep such information confidential.<sup>4</sup>

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<sup>3</sup>We note that a post office box number is not a “home address” for purposes of section 552.117. *See* Gov’t Code § 552.117; Open Records Decision No. 622 at 4 (1994) (legislative history makes clear that purpose of section 552.117 is to protect public employees from being harassed at home).

<sup>4</sup>The term peace officer is defined in article 2.12 of the Texas Code of Criminal Procedure.

To the extent the information that we have marked pertains to peace officers who are currently licensed, such information must be withheld from public disclosure pursuant to section 552.117(a)(2). However, to the extent the information that we have marked pertains individuals who are not currently licensed peace officers but are current or former sheriff employees who made timely confidentiality elections, the sheriff must withhold this information pursuant to section 552.117(a)(1).<sup>5</sup> The sheriff may not withhold this information under section 552.117(a)(1) for current or former employees who did not make a timely election under section 552.024.

However, with respect to any social security numbers to which section 552.117 is not applicable, we note that section 552.147 of the Government Code<sup>6</sup> provides that “[t]he social security number of a living person is excepted from” required public disclosure under the Act. Therefore, the sheriff must withhold any remaining social security numbers contained in the submitted information under section 552.147.<sup>7</sup>

Next, we note that the remaining submitted information contains Texas motor vehicle record information. Section 552.130 of the Government Code excepts from disclosure information that relates to a driver’s license or motor vehicle title or registration issued by an agency of this state. Gov’t Code § 552.130. Accordingly, the Texas motor vehicle record information we have marked is excepted from disclosure pursuant to section 552.130.

As a final point, we note that the submitted information indicates that the requestor is an attorney who represented the former inmate in the cause of action that concluded earlier this year. However, we have been provided no information to indicate that the requestor still represents the former inmate, and the request itself does not reflect that the requestor is seeking the submitted records on behalf of the former inmate as his client. In this regard, we note that section 552.023 of the Government Code provides a person or a person’s authorized representative with a special right of access to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect the person’s privacy interests. Accordingly, if the former inmate is the requestor’s client, and the requestor is seeking the submitted information on behalf of the former inmate at issue, pursuant to section 552.023 of the Government Code, the requestor has a special right of access to the information pertaining to the former inmate that we have marked under

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<sup>5</sup>We note that the submitted information indicates that some of the employees at issue did make timely elections for confidentiality of this information; however, we are unable to determine based on the information provided whether every employee whose information is at issue made a timely election.

<sup>6</sup>Added by Act of May 23, 2005, 79th Leg., R.S., S.B. 1485, § 1, sec. 552.147(a) (to be codified at Tex. Gov’t Code § 552.147).

<sup>7</sup>We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person’s social security number from public release without the necessity of requesting a decision from this office under the Act.

section 552.101 of the Government Code in conjunction with common-law privacy and section 552.130 of the Government Code.

In summary, we have marked private information that must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the information we have marked under section 552.117 of the Government Code pertains to licensed peace officers, such information must be withheld pursuant to section 552.117(a)(2); to the extent this information does not pertain to licensed peace officers, the department must withhold this information under section 552.117(a)(1) if the employees to whom it pertains made a timely election for confidentiality under section 552.024 of the Government Code. Pursuant to section 552.147 of the Government Code, the sheriff must withhold any remaining social security numbers to which section 552.117 is not applicable. The Texas motor vehicle record information we have marked must be withheld under section 552.130 of the Government Code. However, if the requestor is seeking the submitted information on behalf of the former inmate as his client, pursuant to section 552.023 of the Government Code, the requestor has a special right of access to the information pertaining to the former inmate that we have marked under section 552.101 in conjunction with common-law privacy and section 552.130.<sup>8</sup> The remaining submitted 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 ten 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the

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<sup>8</sup>Because this information, if released pursuant to section 552.023, is confidential with respect to the general public, the sheriff should again seek our decision if the sheriff receives a future request for this information from a person other than the requestor acting as the former inmate's authorized representative or the former inmate himself.

Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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 ten calendar days of the date of this ruling.

Sincerely,



Robert B. Rapfogel  
Assistant Attorney General  
Open Records Division

RBR/krl

Ref: ID# 235277

Enc. Submitted documents

c: Mr. Michael P. O'Donnell  
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(w/o enclosures)