



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 3, 2005

Mr. David K. Walker
County Attorney
Montgomery County
207 West Phillips
Conroe, Texas 77301

OR2005-09943

Dear Mr. Walker:

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# 235641.

The Montgomery County Sheriff's Office (the "sheriff") received a request for information related to the requestor's application and rejection for employment with the sheriff. You state that the sheriff does not have information responsive to the portion of the request seeking the reasons the sheriff denied the requestor's application.¹ You claim that the submitted information is not public information subject to the Act. Alternatively, you claim the sheriff is not required to release some of the requested information pursuant to section 552.027 of the Government Code, and that the remaining submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.111 of the Government Code. We have considered your arguments and reviewed the submitted information.

Initially, we note that some of the submitted information is not responsive to the instant request. Information that is not responsive to this request, which we have marked, need not be released. Moreover, we do not address such information in this ruling.

¹The Act does not require a governmental body to disclose information that did not exist at the time the request was received, nor does it require a governmental body to prepare new information in response to a request. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); see also Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984).

Next, we address your argument that the submitted information is not subject to the Act. The Act is applicable to “public information.” *See* Gov’t Code § 552.021. “Public information” is defined as information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body; or

(2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov’t Code § 552.002(a). Thus, virtually all information in the physical possession of a governmental body is public information that is encompassed by the Act. *Id.* § 552.022(a)(1); *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). Likewise, the Act is applicable to information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for a governmental body, and the governmental body owns the information or has a right of access to it. Gov’t Code § 552.002(a)(2); *see also* Open Records Decision No. 462 at 4 (1987) (Act applies to information collected or maintained by consultant if information relates to governmental body’s official duties or business, consultant acts as agent of governmental body in collecting information, and governmental body has or is entitled to access to information). However, the Act does not require a governmental body to release information if the governmental body that receives the request has neither possession of the information nor a right of access to it. *See* Open Records Decision Nos. 534 at 2-3 (1989), 518 at 2-3 (1989).

Having considered your argument and reviewed the information at issue, we conclude that the submitted information relates to the transaction of the official business of the sheriff and is maintained by the sheriff, and, therefore, constitutes “public information” of the sheriff. *See* ORD 534 at 2-3, 518 at 2-3. Consequently, the sheriff may only withhold this information from the requestor if it is excepted from disclosure pursuant to a provision of chapter 552 of the Government Code.

We next address your claim that the requestor’s credit history report submitted as Exhibit I is not subject to disclosure under the Act because the report is commercially available to the requestor. Section 552.027 of the Government Code provides:

(a) A governmental body is not required under this chapter to allow the inspection of or to provide a copy of information in a commercial book or publication purchased or acquired by the governmental body for research purposes if the book or publication is commercially available to the public.

(b) Although information in a book or publication may be made available to the public as a resource material, such as a library book, a governmental body

is not required to make a copy of the information in response to a request for public information.

(c) A governmental body shall allow the inspection of information in a book or publication that is made part of, incorporated into, or referred to in a rule or policy of a governmental body.

Gov't Code § 552.027. This section is designed to alleviate the burden of providing copies of commercially available books, publications, and resource materials maintained by governmental bodies, such as telephone directories, dictionaries, encyclopedias, statutes, and periodicals. You state the credit history report is available to the requestor through commercial means and was obtained by the sheriff during a background check on the requestor. However, we find you have failed to demonstrate that this information came from the type of commercial book or publication contemplated by section 552.027. *See* Gov't Code § 552.027. Accordingly, we conclude this information is public information subject to disclosure under the Act. We now turn to the exceptions to disclosure you have raised for the submitted information.

You claim the memorandum submitted as Exhibit D and the e-mails submitted as Exhibit E are excepted from disclosure under section 552.111 of the Government Code. Section 552.111 excepts from public disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. Section 552.111 encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of this exception is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, and opinions that reflect the policymaking processes of the governmental body. *See* Open Records Decision No. 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (Gov't Code § 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995).

Exhibits D and E encompass routine personnel matters concerning the requestor and consist of information obtained during a background check of the requestor upon his application for employment with the sheriff. Exhibits D and E do not consist of advice, recommendations, and opinions that reflect the policymaking processes of the sheriff. Accordingly, these exhibits may not be withheld under section 552.111.

You also claim Exhibit D is excepted from disclosure under section 552.108 of the Government Code. Section 552.108(b) excepts from disclosure “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 . . . if: (1) release of the internal record or notation would interfere with law enforcement or prosecution.” Generally, 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), (b)(1), .301(e)(1)(a); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state the memorandum in Exhibit D “was created solely with the intent to better assist personnel in determining the eligibility of the [requestor] for employment.” However, you argue that releasing Exhibit D will give future employment applicants with the sheriff insights into the sheriff’s hiring processes. After reviewing Exhibit D and considering the sheriff’s arguments, we conclude that the sheriff has failed to demonstrate how release of Exhibit D would interfere with law enforcement. Accordingly, Exhibit D is not excepted from public disclosure under section 552.108(b)(1). *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.) (finding section 552.108 not generally applicable to background information obtained pursuant to law enforcement application process).

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision” and encompasses information that is made confidential by statute. Gov’t Code § 552.101. Criminal history record information (“CHRI”) generated by the National Crime Information Center (“NCIC”) or by the Texas Crime Information Center (“TCIC”) is confidential and not subject to disclosure. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.*

Section 411.083 of the Government Code deems confidential CHRI that the Texas Department of Public Safety (“DPS”) maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See Gov’t Code* § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. Furthermore, any CHRI

obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. *See* Gov't Code § 411.082(2)(B) (term CHRI does not include driving record information). Therefore, the sheriff must withhold the CHRI that we have marked in the submitted information under section 552.101 in conjunction with federal law and chapter 411 of the Government Code.²

Section 552.101 of the Government Code also encompasses section 1703.306 of the Occupations Code. Section 1703.306 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.

(b) The [Polygraph Examiners B]oard or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Occ. Code § 1703.306. Here, the requestor is the examinee. Section 1703.306(a)(1) expressly provides the examinee with access to otherwise confidential polygraph information. Accordingly, the sheriff must release to the requestor his polygraph information.

²We note that the requestor can obtain his own CHRI from DPS. Gov't Code § 411.083(b)(3).

The submitted information also includes an e-mail address that is excepted under section 552.137 of the Government Code.³ Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). We have marked e-mail address in the submitted information that is not of a type specifically excluded by section 552.137(c). Therefore, the sheriff must withhold this marked e-mail address in accordance with section 552.137 unless the sheriff receives consent for its release.

In summary, information that is not responsive to this request, which we have marked, need not be released. The sheriff must withhold the CHRI that we have marked in the submitted information under section 552.101 in conjunction with federal law and chapter 411 of the Government Code. The marked e-mail address must be withheld under section 552.137 of the Government Code. The remaining submitted information must be released to the requestor.⁴

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁴Because the records being released contain information relating to the requestor that would be excepted from disclosure to the general public to protect his privacy, the sheriff must request another ruling from our office if it receives a future request for this information from an individual other than this requestor or his authorized representative.

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 10 calendar days of the date of this ruling.

Sincerely,



Ramsey A. Abarca
Assistant Attorney General
Open Records Division

RAA/krl

Ref: ID# 235641

Enc. Submitted documents

c: Mr. Jerrod Martin
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(w/o enclosures)