



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 7, 2006

Mr. Kevin D. Cullen
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P.O. Box 2938
Victoria, Texas 77902-2938

OR2006-05982

Dear Mr. Cullen:

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# 251003.

The Victoria County Sheriff's Office (the "sheriff"), which you represent, received a request for the personnel file of a named employee. You state that you have released some of the requested information. You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.102, 552.108, 552.117, 552.1175, 552.119, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that some of the submitted information is not subject to the Act. In Open Records Decision No. 581 (1990), this office determined that certain computer information, such as source codes, documentation information, and other computer programming that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. Based on the reasoning in that decision and our review of the information at issue, we determine that the marked password information does not constitute public information under section 552.002. Accordingly, this information is not subject to the Act and need not be released to the requestor.

Next, we must address the sheriff's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(e), a governmental body receiving a request for

information that the governmental body wishes to withhold pursuant to an exception to disclosure is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that 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. Gov't Code § 552.301(e). You did not, however, submit a copy or representative sample of portions of the requested information within fifteen business days of the sheriff's receipt of the instant request. Consequently, the sheriff failed to comply with section 552.301(e) with respect to that information.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See id.* § 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 section 552.302); Open Records Decision No. 319 (1982). Normally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Because your claims under sections 552.101, 552.102, 552.117, 552.1175, 552.119, and 552.137 can provide compelling reasons to overcome the presumption of openness, we will address your arguments under those exceptions for the information at issue, as well as the remaining information. We will also address your claim under section 552.108 of the Government Code, as the documents for which you claim that exception were submitted timely.

Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information made confidential by other statutes. Declarations of Medical Condition and Declarations of Psychological and Emotional Health required by the Texas Commission on Law Enforcement Officer Standards and Education (the "commission") are confidential under section 1701.306 of the Occupations Code, which provides as follows:

(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(a), (b). Therefore, the sheriff must withhold the submitted declarations that we have marked under section 552.101 in conjunction with section 1701.306 of the Occupations Code.

The submitted information includes Reports of Separation of License Holder (F-5). Section 1701.454 of the Occupations Code 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.

Id. § 1701.454. Therefore, the sheriff must withhold the submitted F-5 forms, which we have marked, pursuant to section 552.101 in conjunction with section 1701.454 of the Occupations Code.

The submitted documents also contain fingerprint information. Sections 560.001, 560.002, and 560.003 of the Government Code provide as follows:

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. Upon review, we find that section 560.002 does not permit the disclosure of the submitted fingerprint information in this instance. Therefore, the sheriff must withhold the fingerprint information we have marked under section 552.101 in conjunction with section 560.003 of the Government Code.

Section 552.102 of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *Id.* § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101 of the Government Code. We will therefore address your common law privacy claims under both sections 552.101 and 552.102.

The doctrine of common law privacy 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.*, 540 S.W.2d at 685. 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. *Id.* at 683. Prior decisions of this office have determined that some kinds of medical information are protected by common law privacy. *See* Open Records Decision Nos. 470 (1987) (information pertaining to illness from severe emotional and job-related stress protected by privacy), 455 (1987) (information pertaining to prescription drugs, specific illnesses, procedures, and physical disabilities protected by privacy). We have marked the information that the sheriff must withhold under sections 552.101 and 552.102 in conjunction with common law privacy. Upon review of the remaining information, we conclude that no portion of this information is excepted from disclosure under sections 552.101 and 552.102 in conjunction with common law privacy. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow).

You claim that some of the submitted documents are excepted from disclosure under section 552.108 of the Government Code. Section 552.108(a)(1) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime [if] 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 id.* §§ 552.108(a)(1), (b)(1), 552.301(e)(1)(A); *see also* Ex parte Pruitt, 551 S.W.2d 706 (Tex. 1977). You state that the documents you seek to withhold relate to a pending criminal investigation. Based on this representation, we conclude that the release of these documents would interfere with the detection, investigation, or prosecution of crime. *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., 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Therefore, the sheriff may withhold the withhold the documents that we have marked under section 552.108(a)(1).

You claim that portions of the submitted information are excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(2) excepts from disclosure the current and former home addresses and telephone numbers, pager number, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 or 552.1175.¹ Gov't Code § 552.117(a)(2). Section 552.117(a)(1) protects the current and former home addresses and telephone numbers, social security number, and family member information of a current or former employee of a governmental body who requests that the information be kept confidential under section 552.024. *Id.* § 552.117(a)(1).

¹Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure.

Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. We note that an individual's personal post office box number is not a "home address" for purposes of section 552.117 and therefore may not be withheld under section 552.117. *See* Open Records Decision No. 622 at 4 (1994) (purpose of section 552.117 is to protect public employees from being harassed at home).

To the extent that the information that we have marked pertains to employees who were licensed peace officers at the time the sheriff received this request, the sheriff must withhold such information under section 552.117(a)(2). Pursuant to section 552.117(a)(1), the sheriff must withhold the same information for these employees if they were not licensed peace officers at the time of the sheriff's receipt of the request and made timely elections to keep such information confidential.

We note that some of the submitted information relates to peace officers employed by a governmental body other than the sheriff. Section 552.1175 of the Government Code provides, in relevant part:

(b) Information that relates to the home address, home telephone number, or social security number of [a peace officer], 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.

Gov't Code § 552.1175(b). Accordingly, to the extent that the home addresses and home telephone numbers that we have marked pertain to peace officers who elect to restrict access to such information in accordance with section 552.1175(b), the sheriff must withhold this information pursuant to section 552.1175. If the sheriff does not receive the appropriate elections, this information must be released.

Even if the submitted social security number is not protected under section 552.117, it must be withheld under section 552.147 of the Government Code. This section provides that "[t]he social security number of a living person is excepted from" required public disclosure

under the Act. *Id.* § 552.147. Therefore, the sheriff must withhold the submitted social security number under section 552.147.²

You assert that the submitted photographs are excepted under section 552.119 of the Government Code, which provides as follows:

(a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, 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 civil service hearing or a case in arbitration; or
- (3) the photograph is introduced as evidence in a judicial proceeding.

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

Id. § 552.119. Under section 552.119, a governmental body must demonstrate, if the documents do not demonstrate on their face, that release of the photograph would endanger the life or physical safety of a peace officer. You have not demonstrated, nor is it apparent from our review of the submitted information, that release of the photographs at issue would endanger the life or physical safety of the officer depicted. We therefore determine that the sheriff may not withhold submitted photographs pursuant to section 552.119.

Section 552.130 of the Government Code excepts from disclosure 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.” *Id.* § 552.130. In accordance with section 552.130, the sheriff must withhold the Texas motor vehicle record information that we have marked.

You note that the submitted documents include e-mail addresses. Section 552.137 of the Government Code 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

²We 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.

specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). You do not inform us that the relevant member of the public has affirmatively consented to the release of these e-mail addresses. Therefore, the sheriff must withhold the e-mail addresses we have marked under section 552.137.

The submitted information contains military discharge information. Section 552.140 of the Government Code³ provides in relevant part:

(a) This section applies only to a military veteran's Department of Defense Form DD-214 or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003.

Id. § 552.140(a). Section 552.140 provides that a military veteran's DD-214 form or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003 is confidential for a period of seventy-five years and may only be disclosed in accordance with section 552.140 or in accordance with a court order. *See id.* § 552.140(a), (b). You do not inform us when the sheriff first came into possession of the submitted DD-214 forms. Therefore, if these forms came into the possession of the sheriff on or after September 1, 2003, we conclude that the sheriff must withhold the forms under section 552.140.

In summary, we conclude as follows: (1) the marked password information is not subject to the Act and need not be released to the requestor; (2) the marked declarations must be withheld pursuant to section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code; (3) the marked F-5 forms must be withheld pursuant to section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code; (4) the marked fingerprint information must be withheld pursuant to section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code; (5) the marked information must be withheld pursuant to sections 552.101 and 552.102 of the Government Code in conjunction with common law privacy; (6) the marked documents may be withheld pursuant to section 552.108(a)(1) of the Government Code; (7) to the extent that the personal information we have marked pertains to employees who were licensed peace officers at the time of the sheriff's receipt of the request, this information must be withheld pursuant to section 552.117(a)(2) of the Government Code; (8) pursuant to section 552.117(a)(1) of the Government Code, the same information must be withheld if these employees were not licensed peace officers at the time of the sheriff's receipt of the request and made timely elections to keep such information confidential; (9) if the peace officers who are not employed by the sheriff elect to restrict

³This office will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

access to the marked personal information in accordance with section 552.1175(b) of the Government Code, such information must be withheld pursuant to section 552.1175 of the Government Code; (10) the submitted social security number must be withheld pursuant to section 552.147 of the Government Code; (11) the Texas motor vehicle record information we have marked must be withheld pursuant to section 552.130 of the Government Code; (12) the e-mail addresses we have marked must be withheld pursuant to section 552.137 of the Government Code; (13) if the submitted DD-214 forms came into the possession of the sheriff on or after September 1, 2003, they must be withheld pursuant to section 552.140 of the Government Code. 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 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 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,



Caroline E. Cho
Assistant Attorney General
Open Records Division

CEC/sdk

Ref: ID# 251003

Enc. Submitted documents

c: Ms. Terri Langford
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