ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 22, 2008

Captain M.W. Morgan
Parker County Sheriff's Office
129 Hogle Street
Weatherford, Texas 76086

OR2008-05301

Dear Captain Morgan:

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# 307892.

The Parker County Sheriff's Office (the "sheriff") received a request for information in the personnel file of two specified peace officers. You state that one of the named officers is not employed by the sheriff. Thus, you do not maintain any responsive information regarding this officer. You state, however, that the sheriff has released some of the information regarding the other officer to the requestor. You claim that a portion of the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, the requestor specifically excluded from his request social security numbers, home telephone numbers, home addresses, and family information. Therefore those categories of information are not responsive to this request. This ruling does not address the public availability of any information that is not responsive to the request, and the sheriff is not required to release this information in response to the request. We note that you have marked some of the non-responsive information in the submitted documents. We have marked additional information that is not responsive to this request.

Next, we note that you have also marked other information that is responsive to this request, including driver's license numbers, dates of birth, division and unit names, and the last name

of an individual in a commendation letter. You have marked this responsive information in such a manner that it totally obscures the information to the point that we are unable to review it. However, you have in some instances rewritten the substance of the obscured information. In other instances, we can discern what the obscured information is by its context and placement in the particular document. The failure to provide this office with requested information is a violation of section 552.301 of the Government Code because it generally deprives us of the ability to determine whether information may be withheld. *See* Gov't Code §§ 552.301(e)(1)(D) (governmental body must provide this office with copy of "specific information requested" or representative sample), .302. Generally, in such instances, this office has no alternative other than to order that the obscured information be released. However, in this instance, because we can generally discern the nature of the responsive information that has been obscured, being deprived of this information does not inhibit our ability to make a ruling. Therefore, we will address the public availability of this information. In the future, the sheriff should refrain from obscuring responsive information that it submits to this office for the purpose of requesting a ruling under the Act. *See id.*

Next, we must address the sheriff's obligations under section 552.301 of the Government Code. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) provides that a governmental body must ask for an attorney general's decision and state the exceptions that apply within a reasonable time but not later than the tenth business day after the date of receiving the written request. Gov't Code § 552.301(b). In determining a governmental body's deadline for submission, this office only counts those days the entity was open for business. The sheriff received the request for information on January 25, 2008. You assert that the sheriff was unable to comply with the requirements of section 552.301 because of "a flu epidemic which has greatly diminished clerical and key personnel responsible for such functions and review." However, you make no assertion that the sheriff was not open for business on any particular date during the period at issue. Accordingly, you were required to submit your request for a decision by February 8, 2008. Your request for a decision from this office was not postmarked until February 13, 2008. Thus, the sheriff failed to comply with the requirements mandated by section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.–Austin 1990, no writ); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake or when information is confidential by law. Open Records Decision No. 150 (1977). In this instance, the sheriff claims exceptions to disclosure under sections 552.101, 552.102, and 552.108 of the Government Code. Section 552.108 of the Government Code, which protects law enforcement interests, is a discretionary exception and

generally does not provide a compelling reason to overcome the presumption of openness. *See* Open Records Decision Nos. 586 (1991) (governmental body may waive predecessor to section 552.108), 522 at 4 (1989) (discretionary exceptions in general). *But see* Open Records Decision Nos. 630 at 3 (1994), 586 at 3 (1991) (need of another governmental body to withhold information under predecessor to section 552.108 can provide compelling reason under section 552.302). In this instance, you have not provided us with a compelling reason to withhold the submitted information under section 552.108. Therefore, the sheriff may not withhold any of the requested information under section 552.108 of the Government Code. However, we will address the sheriff's claims under sections 552.101 and 552.102 which can provide compelling reasons for non-disclosure under section 552.302.

You contend that the information which references the named officer as working in a specialized unit, task force, or division and the submitted background applications are excepted from disclosure in their entirety under section 552.101 based on the "special circumstances" aspect of common-law privacy. 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. Section 552.101 encompasses common-law privacy. Ordinarily, information is protected by common-law privacy only if (1) the information contains highly intimate or embarrassing facts, the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Texas Indus. Accident Bd.,* 540 S.W.2d 668, 685 (Tex. 1976). However, information may also be withheld under section 552.101 in conjunction with common-law privacy upon a showing of certain "special circumstances." *See* Open Records Decision No. 169 (1977). In Open Records Decision No. 169, we considered the personal safety concerns of public employees and recognized that there may be specific instances where "special circumstances" exist to except from public disclosure some of the employees' addresses. *See* Open Records Decision No. 123 (1976). In that decision, the employees demonstrated that their lives would be placed in danger if their addresses were released to the public. ORD 169 at 7. This office further noted that the initial determination of credible threats and safety concerns should be made by the governmental body to which a request for disclosure is directed, and this office will determine whether a governmental body has demonstrated the existence of special circumstances on a case-by-case basis. *Id.* We noted, however, that "special circumstances" do not include "a generalized and speculative fear of harassment or retribution." *Id.* at 6. In addition, "special circumstances" do not apply to information when the individual has not taken precautions to insure that particular information is not available to the public. *Id.*

In this instance, the sheriff informs us that the release of information that identifies the named officer as working in a specialized unit, task force, or division and the information in the two background surveys would likely cause the officer to face imminent threat of physical danger. You seek to withhold words and phrases in several commendation letters and conduct certificates that you assert references the officer's assignment to a specialized area of law enforcement within the department. However, you have submitted a letter from

a member of the public who addresses the letter to the named officer by one of the specific assigned units you now seek to withhold. In addition, it is clear from that letter and another letter of commendation that the named officer, as part of his job, actively educates the community about avoiding involvement in certain criminal behavior that is directly related to the specialized area of law enforcement in which he works. Upon review of the documents we find that the officer's assignment to a specialized area of law enforcement within the department is a fact of common knowledge in the community. Therefore, we conclude that the sheriff has failed to establish that special circumstances exist to except any of the information it has marked referencing the officer's assignment from disclosure. You also seek to withhold several unit and task force designations for the officer and two complete background applications. However, you have not made any specific arguments as to how the officer's life would be placed in danger if this information was released to the public. Furthermore, since many of the submitted documents were created several years ago, it does not appear, and you have not indicated that the officer is currently involved in the units and task force designations you seek to withhold. Therefore, we conclude that the sheriff has failed to establish that special circumstances exist to except the unit and task force designations or the two background applications from disclosure. Thus, none of the information you seek to withhold may be withheld under section 552.101 based on special circumstances.

Next, you contend that the officer's assignment to the specialized area of law enforcement within the department, the unit and task force designations, and the two background applications should be exempt from disclosure in their entirety because this information is confidential under section 552.102. 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." Gov't Code § 552.102(a). The privacy analysis under section 552.102(a) is the same as the common-law privacy standard under section 552.101. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (addressing statutory predecessor). As discussed, common-law privacy protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82.

In this instance you seek to withhold information in the named officer's personnel file, that is solely related to his qualifications, job performance, and work conduct. This office has stated, in numerous decisions, that information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and therefore generally not protected from disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute employee's private affairs), 455 (1987) (public employee's job performance or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing

reasons for dismissal, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (scope of public employee privacy is narrow). Therefore, the information referencing the officer's assignment to a specialized area of law enforcement within the department, the unit and task force designations, and the two background applications cannot be withheld in their entirety under common-law privacy.

However, we note that one of the background applications contains personal financial information. This office has found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision No. 600 (1992) (finding personal financial information to include designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care). We have marked financial information in one of the background applications that is not of legitimate public interest. Therefore, the sheriff must withhold the financial information we have marked under 552.102. *See* ORD 600. However, none of the remaining information may be withheld under section 552.102 of the Government Code.

Next, you have marked information relating to an individual who is not a public employee that you seek to withhold under section 552.101 in conjunction with common-law privacy. As discussed above, common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. 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.

In this instance, you seek to withhold the last name of the citizen referenced in a commendation letter. Upon review of the commendation letter, we find that the last name of the citizen that you have marked is not intimate or embarrassing information. However, we find a small portion of the commendation letter constitutes highly intimate or embarrassing information. Furthermore, we find that there is no legitimate public interest in the release of this information. Therefore, this information, which we have marked, must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. The remaining information in the commendation letter must be released.

The submitted information contains Texas driver's license numbers. Section 552.130 of the Government Code provides in relevant part:

> (a) Information is excepted from the requirement of Section 552.021 if the information relates to:
>
> > (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state.

Gov't Code § 552.130(a)(1). Accordingly, the sheriff must withhold the Texas driver's license numbers we have marked under section 552.130 of the Government Code.

In summary, the sheriff must withhold: 1) the financial information we have marked in the background applications under section 552.102 of the Government Code; 2) the information we have marked in the commendation letter under section 552.101 of the Government Code in conjunction with common-law privacy; and 3) the Texas driver's license numbers we have marked under section 552.130 of the Government Code. The remaining information must be released to the requestor.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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,

Laura E. Ream
Assistant Attorney General
Open Records Division

LER/eeg

Ref: ID# 307892

Enc. Submitted documents

c: Mr. Tommy C. Wise
Wise & Wise
211 North Main Street
Weatherford, Texas 76086
(w/o enclosures)