



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 3, 2008

Ms. Holly C. Lytle
Assistant County Attorney
El Paso County
500 East San Antonio, Room 503
El Paso, Texas 79901

OR2008-07536

Dear Ms. Lytle:

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# 311844.

The El Paso County Sheriff's Office (the "sheriff"), the El Paso County Attorney's Office (the "county attorney"), the El Paso County District Attorney's Office (the "district attorney"), and the El Paso County District Clerk's Office (the "district clerk") received separate requests for information pertaining to a specified incident and two named individuals. You state that the sheriff and the county attorney do not maintain some of the requested information.¹ You also state that some of the requested information will be released. You inform us that some of the responsive information is the subject of Open Records Letter No. 2007-09117 (2007). On behalf of the sheriff, the county attorney, the district attorney, and the district clerk (collectively "the county"), you claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.108, 552.111, 552.114, 552.115, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, you indicate, and the documents reflect, that the submitted information includes records held by the district clerk as an agent of the judiciary. Records of the judiciary are not

¹We note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

subject to required public disclosure under the Act.² *See id.* §§ 552.003(1)(A), (B) (definition of “governmental body” under Act specifically excludes the judiciary), .021 (Act generally requires disclosure of information maintained by “governmental body”). Based on your representations and our review, we find the this information consists of records of the judiciary that are not subject to release under the Act. We therefore conclude the county need not release this information in response to the present request.³

Next, you note that some of the requested information was the subject of a previous ruling from this office. In Open Records Letter No. 2007-09117 (2007), this office determined that some of the information was confidential under section 552.101 in conjunction with section 261.201 of the Family Code. However, you inform us that, since we issued Open Records Letter No. 2007-09117, the information in question has been ordered expunged. Thus, because the facts and circumstances on which Open Records Letter No. 2007-09117 was based have changed, you may not rely on the prior ruling as a previous determination for any of the information at issue. *See* Open Records Decision No. 673 (2001) (for first type of previous determination, circumstances on which prior ruling was based must not have changed since the issuance of the ruling).

Next, we note that the county has failed to comply with section 552.301 of the Government Code in regards to the requests received by the district attorney and a representative of the county (the “representative”). Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information that it wishes to withhold. Pursuant to section 552.301(b), the governmental body must ask for the attorney general’s decision and state the exceptions that apply within ten business days after receiving the request. *See* Gov’t Code § 552.301(a), (b). Under section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for 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. *Id.* § 552.301(e)(1)(A)-(D).

You explain that the district attorney received its request on March 27, 2008. You also state that the district attorney was closed for a holiday on March 31, 2008. On April 10, 2008, the district attorney asked the requestor to clarify his request. *See id.* § 552.222 (providing that a governmental body may ask the requestor to clarify the request if what information is

²Records of the judiciary may be public pursuant to other sources of law. Attorney General Opinions DM-166 at 2-3 1992) (public has general right to inspect and copy judicial records), H-826 (1976); Open Records Decision No. 25 (1974); *see Star Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57 (Tex. 1992) (documents filed with courts are generally considered public and must be released).

³Because we find the Act is not applicable to the information at issue, we do not reach your other argument against disclosure of this information.

requested is unclear to the governmental body). The district attorney received the requestor's clarification on April 15, 2008. However, you did not submit your request for a decision from this office pertaining to the district attorney's request until April 18, 2008; accordingly, the county did not request a decision from this office within the ten-business-day period prescribed by subsection 552.301(b) for this information.⁴

We further note that in order for us to determine the statutory deadlines, a governmental body is required to submit to this office within fifteen business days of receiving an open records request a signed statement or other evidence showing the date the governmental body received the request. *See id.* § 552.301(e)(1)(C). The request sent to the representative is dated March 10, 2008. You do not state or otherwise provide evidence that the representative received this request on a different date. *See id.* § 552.301(e)(3). Thus, we must base your statutory deadlines by the request's date written by the requestor, March 10, 2008. We received your request for a ruling on March 27, 2008, and the information responsive to this request on April 4, 2008. Thus, the county failed to comply with the requirements mandated by section 552.301 for this information.

A governmental body's failure to comply with the procedural requirements of section 552.301 of the Government Code 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. *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 interest is demonstrated when some other source of law makes the information at issue confidential or third-party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Although you raise sections 552.108 and 552.111 of the Government Code for the representative's information, these sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See* Gov't Code § 552.007; Open Records Decision Nos. 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver), 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions), 177 (1977) (statutory predecessor to section 552.108 subject to waiver). Therefore, you may not withhold any portion of the representative's information under sections 552.108 and 552.111 of the Government Code. Because your claim under section 552.101 of the Government Code can provide a compelling reason for non-disclosure, we will consider the applicability of this exception to the information pertaining to the district attorney's and representative's requests. We will also consider whether any of the representative's information is protected under sections 552.114, 552.115, and 552.130 of the Government Code, as the applicability of these exceptions can provide a compelling reason for non-disclosure.

⁴We note that an appropriate request for clarification under section 552.222(b) merely tolls a governmental body's statutory deadlines under section 552.301 and does not initiate new ten and fifteen business day intervals in which to seek a decision. *See* Open Records Decision No. 663 at 2-5 (1999).

Next, we note that the submitted information includes a personal financial statement of the El Paso County District Attorney. Chapter 572 of the Government Code provides for the mandatory filing of personal financial statements by state officers with the Texas Ethics Commission and designates those statements as public records. *See* Gov't Code §§ 572.021 ("a state officer. . . shall file with the [Texas Ethics] commission a verified financial statement complying with Sections 572.022 through 572.0252"), .032 ("Financial statements filed under this subchapter are public records[.]") Under section 572.002, "a district attorney or criminal district attorney" is included in the definition of a "state officer" for the purposes of this chapter. *Id.* § 572.002(4)(E). Information that is expressly made public by statute may not be withheld pursuant to an exception to disclosure in the Act. *See* Open Records Decision Nos. 623 (1994), 525 (1989) (as a general rule, Act's exceptions do not apply to information made public by other statutes). Therefore, to the extent the submitted personal financial statement, which we have marked, was filed by the El Paso County District Attorney in accordance with chapter 572 of the Government Code, it is expressly public under section 572.032 of the Government Code and must be released without any redactions. To the extent the information at issue was not filed in accordance with chapter 572 of the Government Code, we will consider your arguments for this information.

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 information protected by other statutes, including confidentiality provisions such as those found in chapter 55 of the Code of Criminal Procedure. Articles 55.01 through 55.05 of the Code of Criminal Procedure provide for the expunction of criminal records in certain limited circumstances. Article 55.03 prescribes the effect of an expunction order and provides:

When the order of expunction is final:

- (1) the release, maintenance, dissemination, or use of the expunged records and files for any purpose is prohibited;
- (2) except as provided in Subdivision (3) of this article, the person arrested may deny the occurrence of the arrest and the existence of the expunction order; and
- (3) the person arrested or any other person, when questioned under oath in a criminal proceeding about an arrest for which the records have been expunged, may state only that the matter in question has been expunged.

Crim. Proc. Code art. 55.03. Article 55.04 imposes sanctions for violations of an expunction order and provides, in relevant part:

Sec. 1. A person who acquires knowledge of an arrest while an officer or employee of the state or of any agency or other entity of the state . . . and who

knows of an order expunging the records and files relating to that arrest commits an offense if he knowingly releases, disseminates, or otherwise uses the records or files.

Id. art. 55.04, § 1. This office has previously determined that the expunction statute prevails over the Act. *See* Open Records Decision No. 457 at 2 (1987) (governmental body prohibited from releasing or disseminating arrest records subject to expunction order, as “those records are not subject to public disclosure under the [Act]”). Having reviewed the submitted expunction order and the submitted information, we find that some of the submitted information is subject to the court-ordered expunction and is thus confidential under article 55.03 of the Code of Criminal Procedure. Additionally, we determine that the information subject to Open Records Letter No. 2007-09117 is subject to the court-ordered expunction and is thus confidential under article 55.03 of the Code of Criminal Procedure. Accordingly, the county must withhold the information we have marked as well as the information subject to Open Records Letter No. 2007-09117 under section 552.101 of the Government Code.⁵

You also raise section 552.101 in conjunction with section 261.201 of the Family Code. Chapter 261 of the Family Code is applicable to information that relates to reports and investigations of alleged or suspected child abuse or neglect. Section 261.201 provides in part:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a); *see also id.* § 261.001(1), (4) (defining “abuse” and “neglect” for purposes of Fam. Code ch. 261). You raise section 261.201 for some of the remaining information. However, after review of your arguments and the documents at issue, we find you have failed to establish that the information at issue consists of files, reports, records, communications, or working papers used or developed in an investigation under chapter 261;

⁵As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

therefore, this information is not confidential under section 261.201, and the county may not withhold it under section 552.101 on that ground.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *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 elements of the test must be established. *See id.* at 681-82. A compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Furthermore, a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. We have marked information that the county must withhold under section 552.101 in conjunction with common-law privacy.

You also claim section 552.108 for a portion of remaining information. Section 552.108 of the Government Code provides in relevant part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

...

(b) 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 is excepted from the requirements of Section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution[.]

Gov't Code § 552.108(a)(1), (b)(1). A governmental body claiming subsection 552.108(a)(1) or 552.108(b)(1) 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), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Subsection 552.108(a)(1) protects information, the release of which would interfere with a particular pending criminal investigation or prosecution, while subsection 552.108(b)(1) encompasses internal law enforcement and prosecution records, the release of which would

interfere with on-going law enforcement and prosecution efforts in general. You state that the information you seek to withhold under section 552.108 is related to an internal affairs investigation. Section 552.108 is generally not applicable to records of an administrative internal affairs investigation that did not result in a criminal investigation or prosecution. *See Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (addressing statutory predecessor). You do not indicate that the information at issue is related to an internal affairs investigation that resulted in a criminal investigation or prosecution. We therefore conclude that the county may not withhold any portion of the remaining submitted information under section 552.108 of the Government Code.

You assert that some of the remaining information is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 excepts from 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. This exception encompasses the deliberative process privilege. *See Open Records Decision No. 615 at 2 (1993)*. The purpose of section 552.111 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*, 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 a governmental body’s policymaking processes. *See ORD 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)*. Moreover, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See ORD 615 at 5*. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See Open Records Decision No. 313 at 3 (1982)* (addressing statutory predecessor).

You indicate that the information at issue consists of advice, opinions or recommendations concerning a policymaking issue. Upon review, we find that you have failed to explain how the information at issue, which generally involves routine administrative matters and factual information, constitutes advice, recommendations, opinions, or other material reflecting the policymaking processes of the county. Therefore, you may not withhold any portion of the remaining information under section 552.111.

You claim that the submitted birth certificate is excepted from disclosure under section 552.115 of the Government Code. Section 552.115 provides in part, "[a] birth or death record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official is excepted from the requirements of section 552.021[.]" Gov't Code § 552.115(a). We note that section 552.115 is applicable only to information maintained by the Vital Statistics Unit or a local registration official. *See* Open Records Decision No. 338 (1982) (finding that statutory predecessor to section 552.115 excepted only those birth and death records which are maintained by the bureau of vital statistics and local registration officials.) Because section 552.115 does not apply to information held by county, the submitted birth certificate may not be withheld on this basis and must be released.

Section 552.130 of the Government Code provides as follows:

(a) Information is excepted from [required public disclosure] if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state;

(2) a motor vehicle title or registration issued by an agency of this state; or

(3) a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document.

(b) Information described by Subsection (a) may be released only if, and in the manner, authorized by Chapter 730, Transportation Code.

Gov't Code § 552.130. Upon review, we determine that portions of the remaining records consist of Texas motor vehicle record information that is subject to section 552.130. Therefore, the county must withhold the information you have marked, in addition to the information we have marked, under section 552.130 of the Government Code.

We note that sections 552.1175 and 552.137 of the Government Code are applicable to some of the remaining information.⁶ Section 552.1175 of the Government Code provides in part the following:

(a) This section applies only to:

⁶The Office of the Attorney General 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).

(5) employees of a district attorney, criminal district attorney, or county or municipal attorney whose jurisdiction includes any criminal law or child protective services matters.

...

(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.

Id. § 552.1175(a)(5), (b). Thus, pursuant to section 552.1175, the county must withhold the information we have marked under section 552.1175 if the individuals at issue elect to restrict access to this information in accordance with section 552.1175(b). To the extent the individuals at issue do not elect to keep this information confidential, it may not be withheld on this basis.

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 id.* § 552.137 (a)-(c). The e-mail addresses at issue are not a type specifically excluded by section 552.137 (c). Accordingly, the county must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners have affirmatively consented to their disclosure.

Finally, we note that some of the remaining information appears to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of materials that are subject to copyright protection unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, (1) to the extent the marked personal financial statement was filed by the El Paso County District Attorney in accordance with chapter 572 of the Government Code it is expressly public under section 572.032 of the Government Code and must be released

without any redactions; (2) the county must withhold the information subject to Open Records Letter No. 2007-09117 as well as the information we have marked under article 55.03 of the Code of Criminal Procedure and common-law privacy in conjunction with section 552.101; (3) the county must withhold the information we have marked under section 552.1175 of the Government Code if the individuals at issue elect to restrict access to this information in accordance with section 552.1175(b); (4) the county must withhold the marked information under section 552.130; and (5) the county must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners have affirmatively consented to their disclosure. The remaining information must be released, but any information protected by copyright must be released in accordance with copyright law.⁷

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

⁷We note that the submitted information contains social security numbers. 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.

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,



Paige Savoie
Assistant Attorney General
Open Records Division

PS/ma

Ref: ID# 311844

Enc. Submitted documents

c: . Mr. Stuart Leeds
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(w/o enclosures)