



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 11, 2008

Mr. David M. Swope
Assistant County Attorney
Harris County Attorney's Office
1019 Congress, 15th Floor
Houston, Texas 77002

OR2008-09456

Dear Mr. Swope:

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# 315594.

The Harris County Sheriff's Office (the "sheriff") received three requests from two requestors for information related to a death in custody, including the personnel files of officers involved in the incident. You state that some responsive information has been released to the requestors. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.117, 552.130, 552.136, 552.140, and 552.147 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹We 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. We further note that, although you did not timely raise section 552.140 of the Government Code, this provision may constitute a compelling reason to withhold information, and we will address your arguments under this exception. *See* Gov't Code §§ 552.301,.302.

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Initially, we note that section 552.022 of the Government Code is applicable to some of the submitted information. Section 552.022(a)(1) provides for required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[.]” unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov’t Code § 552.022(a)(1). Section 552.022(a)(17) provides for required public disclosure of “information that is also contained in a public court record[.]” unless the information is expressly confidential under other law. *Id.* § 552.022(a)(17). In this instance, the submitted information includes completed reports and evaluations that are subject to section 552.022(a)(1) and a court record that is subject to section 552.022(a)(17). The submitted information also contains a job description, which is usually open to the public as part of a job posting. This information is expressly public under section 552.022(a)(15), which provides for required public disclosure of information regarded as open to the public under an agency’s policies. *Id.* § 552.022(a)(15). If the sheriff regards the submitted job description as open to the public, then the sheriff may withhold this information only to the extent it is made confidential under “other law.” Section 552.103 is not other law that makes information expressly confidential for the purposes of section 552.022(a). *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov’t Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). Likewise, section 552.108 is not other law that makes information confidential for the purposes of section 552.022(a)(15) or section 552.022(a)(17). *See* Open Records Decision Nos. 586 (1991) (governmental body may waive section 552.108), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). Therefore, the completed reports and evaluations may not be withheld under section 552.103, and the job description and court record may not be withheld under section 552.103 or section 552.108. However, we will consider the sheriff’s claim under section 552.108 with respect to the remaining information, including the information that is subject to section 552.022(a)(1). Further, sections 552.101, 552.117, 552.130, 552.136, and 552.140 are “other laws” that make information confidential for purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will address your arguments under these exceptions for the information subject to section 552.022 as well as for the remaining information. We also will consider the sheriff’s claim under section 552.103 with respect to the remaining information that is not subject to section 552.022(a)(1).

We first address your claim under section 552.117 for the information subject to section 552.022. Section 552.117(a)(2) excepts from public disclosure the home address, home telephone 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. Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. To the extent that the information we have marked relates to a peace officer, it must be withheld from disclosure under section 552.117(a)(2).

If the employee whose information is at issue is not a peace officer, but is a county jailer as defined by section 1701.001 of the Occupations Code, some of the information subject to section 552.022 may be excepted from disclosure under section 552.1175 of the Government Code. *See* Gov't Code § 552.1175(a)(2). Section 552.1175(b) provides as follows:

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(b). Thus, to the extent that the information subject to section 552.022 relates to a county jailer who elected to restrict access to the information in accordance with section 552.1175, the information we have marked is excepted from disclosure under section 552.1175(b).

To the extent the information subject to section 552.022 is not excepted from public disclosure under section 552.117 or section 552.1175, we address your claim under section 552.130 of the Government Code. Section 552.130 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[.]" Gov't Code § 552.130(a)(1). Section 552.130(a)(1) is applicable to information that relates to a Texas driver's license number. Thus, if sections 552.117 and 552.1175 are not applicable to the information subject to section 552.022, the Texas driver's license number we have marked must be withheld under section 552.130.

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 the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part the following:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the

information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b), (c). Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *Id.* §§ 159.004, 159.005. Medical records pertaining to a deceased patient may only be released upon the signed consent of the deceased's personal representative. *See id.* § 159.005(a)(5). Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). We have marked the portion of the submitted information that constitutes medical records of the deceased individual and that may only be released in accordance with the MPA. Open Records Decision No. 598 (1991).

Section 552.101 also encompasses section 560.003 of the Government Code, which provides that "[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act]." *Id.* § 560.003; *see id.* § 560.001(1) ("biometric identifier" means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry). Section 560.002 of the Government Code provides, however, that "[a] governmental body that possesses a biometric identifier of an individual . . . may not sell, lease, or otherwise disclose the biometric identifier to another person unless . . . the individual consents to the disclosure[.]" *Id.* § 560.002(1)(A). Thus, as an attorney for the deceased individual's estate, the requestor has a right of access to the inmate's fingerprints under section 560.002(1)(A). *See* Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Although the sheriff seeks to withhold the fingerprints under sections 552.103 and 552.108 of the Government Code, the exceptions to disclosure found in the Act are generally not applicable to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the sheriff must release the fingerprints that we have marked to this requestor pursuant to section 560.002 of the Government Code.

You claim that the remaining information is excepted from public disclosure under section 552.108 of the Government Code. This section excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime." Gov't Code § 552.108(a)(1). 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 id.* §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). We note that this exception is generally not applicable to the records of an internal affairs investigation that is purely administrative in nature and that does not involve the investigation or prosecution of crime. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.), *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable

to internal investigation that did not result in criminal investigation or prosecution). You state that the remaining information pertains to a pending criminal case. You also submitted an affidavit signed by the Special Assistant to the sheriff, stating that the matter is the subject of an open investigation and “will [likely] be reviewed by a Harris County Grand Jury[,]” and that release of the submitted information would interfere with the detection, investigation, or prosecution of this incident. Based upon these representations, we conclude that release of the submitted information 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. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Thus, section 552.108(a)(1) is applicable to the remaining information.

However, section 552.108 does not except from disclosure “basic information about an arrested person, an arrest, or a crime.” Gov’t Code § 552.108(c). Section 552.108(c) refers to the basic information held to be public in *Houston Chronicle*. *See* 531 S.W.2d at 186-88; *see also* Open Records Decision No. 127 (1976) (summarizing types of information made public by *Houston Chronicle*). Thus, with the exception of basic information, the sheriff may withhold the remaining information pursuant to section 552.108(a)(1).

In summary, to the extent that the information subject to section 552.022 relates to a peace officer, the information we have marked must be withheld from disclosure under section 552.117(a)(2) of the Government Code. If the employee whose information is at issue is not a peace officer, but is a county jailer who elected to restrict access to the information in accordance with section 552.1175, the information we have marked is excepted from disclosure under section 552.1175(b). If sections 552.117 and 552.1175 are inapplicable, the sheriff must withhold the Texas driver’s license number we have marked in the information subject to section 552.022 under section 552.130 of the Government Code. The medical records of the deceased individual, which we have marked, may only be released in accordance with the MPA. The sheriff must release the marked fingerprints pursuant to section 560.002 of the Government Code. With the exception of basic information, the sheriff may withhold the remaining information under section 552.108(a)(1) of the Government Code. As our ruling is dispositive, we need not address your remaining arguments against disclosure, except to note that, generally, basic information held to be public in *Houston Chronicle* is not excepted from public disclosure under section 552.103 of the Government Code. *See* Open Records Decision No. 597 (1991).

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). If the governmental body does not file suit over 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).

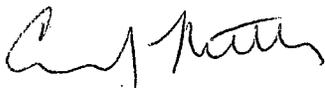
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,



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Assistant Attorney General
Open Records Division

CN/ma

Ref: ID# 315594

Enc. Submitted documents

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