



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 4, 2008

Ms. Michelle Rangel
Assistant County Attorney
Fort Bend County Attorney's Office
301 Jackson Street, Suite 728
Richmond, Texas 77469-3108

OR2008-12193

Dear Ms. Rangel:

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# 320732.

The Fort Bend County Attorney's Office (the "county attorney") received a request for three categories of information pertaining to the termination of a specified former deputy with the Fort Bend Sheriff's Office (the "sheriff"). You claim that the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.130, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We first address your argument against the disclosure of the submitted polygraph 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." *Id.* § 552.101. Section 552.101 encompasses information made confidential under other statutes, such as section 1703.306 of the Occupations Code, which provides as follows:

- (a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

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

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

Occ. Code § 1703.306. We have marked the portion of the submitted information that was acquired from a polygraph examination; this information is confidential under section 1703.306. In this instance, however, we understand from your argument that the requestor is the attorney of the polygraph examinee. Thus, if the county attorney receives a written designation by the examinee pursuant to section 1703.306(a)(1), the county attorney has the discretion to release the submitted polygraph information of the requestor's client pursuant to section 1703.306(a)(1). *See* Open Records Decision No. 481 at 9 (1987) (predecessor to section 1703.306 permits, but does not require, examination results to be disclosed to examinees). Otherwise, the marked information must be withheld under section 552.101 of the Government Code.

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that did not result in conviction or deferred adjudication. *See* Gov't Code § 552.108(a)(2). In this instance, the submitted information consists of two completed internal affairs investigations made for or by the sheriff. We note that this exception is generally not applicable to records of an internal affairs investigation that is purely administrative in nature and 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). Case number IA112807-01 pertains to an internal affairs investigation that you acknowledge did not involve a criminal investigation

and that was purely administrative in nature. Therefore, section 552.108 is not applicable to case number IA112807-01. However, you state and provide a representation from the sheriff that the other submitted internal affairs investigation, case number IA032608-02, involved a criminal investigation that did not result in criminal charges. You therefore contend that case number IA032608-02 pertains to a concluded investigation that did not result in conviction or deferred adjudication. Based on your representations and our review, we find that section 552.108(a)(2) is applicable to case number IA032608-02 in this instance.

We note that 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). Basic information refers to the information held to be public in *Houston Chronicle Publishing 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). See Open Records Decision No. 127 (1976) (summarizing types of information made public by *Houston Chronicle*). Thus, with the exception of basic information, the county attorney may withhold case number IA032608-02 from disclosure under section 552.108(a)(2).¹ As our ruling is dispositive of case number IA032608-02, we need not address your remaining arguments against its disclosure.

We now address your arguments against the disclosure of the remaining internal affairs investigation file, case number IA112807-01. Section 552.101 of the Government Code also encompasses section 411.083 of the Government Code. Criminal history record information (“CHRI”) generated by the National Crime Information Center (“NCIC”) or by the Texas Crime Information Center (“TCIC”) is confidential. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. See Gov't Code § 411.083. Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety (“DPS”) maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. See *id.* Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. See *generally id.* §§ 411.090 - .127. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. However, information relating to routine traffic violations is not excepted from release under section 552.101 of the Government Code on this basis. Cf. *id.* § 441.082(2)(B). Upon review, we determine that no portion of the remaining information constitutes CHRI generated by either the TCIC or NCIC databases. Therefore, no portion of the remaining information is confidential under chapter 411.

¹We note that you have the discretion to release all or part of the remaining information in the criminal investigation file that is not otherwise confidential by law. Gov't Code § 552.007.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts the publication 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. 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. 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). This office has found that a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. However, we note that the remaining internal affairs investigation file contains the criminal history information of a former sheriff's deputy. This office has found that the public has a legitimate interest in information relating to employees of governmental bodies and their employment qualifications and job performance. *See* Open Records Decision Nos. 562 at 10 (1990), 542 at 5 (1990); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). Because the deputy's compiled criminal history information was gathered in the course of his employment, there is a legitimate public interest in this information. Therefore, the county attorney may not withhold the compiled criminal history information under section 552.101 in conjunction with common-law privacy.

We note that some of the remaining information may be subject to section 552.117 of the Government Code.² Section 552.117(a)(2) excepts from disclosure the home address, home telephone number, social security number, and the family member information of a peace officer as defined by article 2.12 of the Code of Criminal Procedure regardless of whether the officer requested confidentiality under section 552.024 or 552.1175 of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Section 552.117 also encompasses personal cellular telephone numbers, provided that the cellular telephone service is paid for by the employee with his or her own funds. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). In this instance, we are unable to determine from the information provided whether the former deputy at issue is still a licensed

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

peace officer. In addition it is unclear whether the cellular telephone service for the number at issue was paid for by the former deputy for his personal use or by the sheriff for official use. Thus, we must rule conditionally. Accordingly, if the former deputy at issue is still a licensed peace officer and the cellular telephone service was not paid for by the sheriff, then the county attorney must withhold the marked cellular telephone number in the deputy's personnel records under section 552.117(a)(2).

If the former deputy at issue is not a currently licensed peace officer, section 552.117(a)(1) may apply to the marked cellular telephone number. The county attorney may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. The submitted information does not reflect whether the former deputy elected to keep his telephone number confidential pursuant to section 552.024 of the Government Code prior to the county attorney receiving the request at issue. If the former deputy made a timely election under section 552.024 and the cellular telephone service was not paid for by the sheriff, the county attorney must withhold the marked cellular telephone number in the deputy's personnel records under section 552.117(a)(1). If the former deputy did not make a timely election under section 552.024, or if the sheriff paid for the cellular telephone service, the marked cellular telephone number may not be withheld under section 552.117(a)(1).

You also claim that the remaining internal affairs investigation file contains Texas motor vehicle information excepted from disclosure under section 552.130 of the Government Code. Section 552.130 excepts from disclosure information relating to a Texas motor vehicle driver's license or permit and a Texas motor vehicle title or registration. Gov't Code § 552.130. Upon review, however, we find that the remaining internal affairs investigation file does not contain any Texas motor vehicle information. Therefore, none of the remaining internal affairs investigation file may be withheld under section 552.130.

Finally, you claim that the remaining internal affairs investigation file contains social security numbers subject to section 552.147 of the Government Code. Section 552.147 provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. *Id.* § 552.147. Upon review, however, we find that the remaining internal affairs investigation file does not contain any information subject to section 552.147, and none may be withheld on this basis.

In summary, the county attorney has the discretion to release the marked polygraph information of the requestor's client pursuant to section 1703.306(a)(1) of the Occupations Code. Otherwise, the marked information must be withheld under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. With the exception of basic information, the county attorney may withhold case number IA032608-02 under section 552.108(a)(2). If the former deputy is still a licensed peace officer and the cellular telephone service was not paid for by the sheriff, then the county attorney must

withhold the marked cellular telephone number in the deputy's personnel records under section 552.117(a)(2). If the former deputy is not currently a licensed peace officer but made a timely election under section 552.024 and the cellular telephone service was not paid for by the sheriff, the county attorney must withhold the marked cellular telephone number under section 552.117(a)(1). If the former deputy did not make a timely election under section 552.024 or if the sheriff paid for the cellular telephone service, the marked cellular telephone number may not be withheld under section 552.117(a)(1). 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). 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,



Laura E. Ream
Assistant Attorney General
Open Records Division

LER/jb

Ref: ID# 320732

Enc. Submitted documents

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