



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 6, 2008

Mr. George A. Young
Assistant County Attorney
Harris County
1019 Congress, 15th Floor
Houston, Texas 77002

OR2008-15305

Dear Mr. Young:

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# 327310.

The Harris County Sheriff's Department (the "sheriff") received a request for the personnel files of a named currently employed deputy and a named former deputy. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.117, 552.130, 552.136, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you state the request includes questions. The Act does not require a governmental body to answer general questions, perform legal research, or create new information in response to a request for information. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). However, the Act does require the governmental body to make a good faith effort to relate a request to information that the governmental body holds or to which it has access. *See* Open Records Decision Nos. 563 at 8 (1990), 561 at 8-9 (1990), 555 at 1-2 (1990), 534 at 2-3 (1989). In this instance, we find that although some of the request is phrased as questions, it is sufficiently specific to enable the sheriff to identify any responsive information that is within its possession or control. *See* Open Records Decision No. 483 at 2 (1987) (stating that the Act requires no particular request form or "magic words"). As you have provided our office with responsive information, we will address your claimed exceptions.

Next, we note 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 that information filed with a court is generally a matter of public record that cannot be withheld from disclosure. *Id.* § 552.022(a)(17); *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54 (Tex. 1992). In this instance, the submitted information includes completed reports, investigations, and performance evaluations that are subject to section 552.022(a)(1), and a court-filed document that is subject to section 552.022(a)(17), all of which we have marked. Although you claim section 552.103 of the Government Code for this information, section 552.103 is not other law that makes information expressly confidential for the purposes of section 552.022(a)(1) and section 552.022(a)(17). *See* Gov’t Code § 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 No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the information that we have marked under sections 552.022(a)(1) and 552.022(a)(17) may not be withheld under section 552.103. However, because sections 552.101, 552.117, 552.130, 552.136, and 552.147 are “other law” for the purpose of section 552.022, we will consider the applicability of these exceptions to the documents that are subject to section 552.022, as well as the remaining information. We will also consider the sheriff’s claim under section 552.103 with respect to the remaining information that is not subject to section 552.022.

We will first address the information subject to section 552.022. 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 exception encompasses information that other statutes make confidential. Medical records are confidential under the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part:

(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). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004;

Open Records Decision No. 598 (1991). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Medical records may only be released in accordance with the MPA. *See* Open Records Decision No. 598 (1991). Upon review, we find the medical records we have marked may only be released in accordance with the MPA.

Section 1703.306 of the Occupations Code, which is also encompassed by section 552.101, 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. The requestor does not fall within any of the enumerated categories; therefore, the sheriff must withhold the polygraph information we have marked in the information subject to section 552.022 under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.

Section 552.101 also encompasses the doctrine of common-law privacy. Common-law privacy protects information that (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. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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. This office has found that some kinds of medical information or information indicating disabilities or specific illnesses is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we find the information we have marked within the information subject to section 552.022 is highly intimate or embarrassing and not of legitimate public concern. Therefore, the sheriff must withhold this information pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.

Next, we address your claims under sections 552.117 and 552.130 of the Government Code for the information subject to section 552.022. Section 552.117(a)(2) excepts from 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 of the Government Code. *See* Gov't Code § 552.117(a)(2). Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. Accordingly, the sheriff must withhold the information you have marked, as well as the information we have marked, pertaining to the currently employed deputy under section 552.117(a)(2). However, we are unable to determine from the information provided whether the former deputy at issue is currently a licensed peace officer. Thus, we must rule conditionally. If the former deputy is currently a licensed peace officer, the sheriff must withhold the information you have marked pertaining to him under section 552.117(a)(2) of the Government Code.

If the former deputy is not a currently licensed peace officer, section 552.117(a)(1) may apply to the information you have marked. 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. *Id.* § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The sheriff may only withhold information under section 552.117(a)(1) if the individual at issue elected confidentiality under section 552.024 prior to the date on which the request for this information was made. You do not inform us, nor can we determine from the submitted information, whether the former deputy elected to keep his personal information confidential pursuant to section 552.024 of the Government Code prior to the sheriff receiving the present request. Thus, if the former deputy made a

timely election under section 552.024, the sheriff must withhold the information you have marked pertaining to the former deputy under section 552.117(a)(1). If the former deputy did not make a timely election under section 552.024, the marked information at issue may not be withheld under section 552.117(a)(1) of the Government Code.

Section 552.130 excepts from disclosure information relating to a motor vehicle operator's or driver's license or permit or a motor vehicle title or registration issued by an agency of this state. See Gov't Code § 552.130(a)(1)-(2). The sheriff must withhold the Texas driver's license information that you have marked in the information subject to section 552.022 under section 552.130.

We will now address your claim under section 552.103 of the Government Code for the information not subject to section 552.022. Section 552.103 provides:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Id. § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state, and provide documentation showing, the sheriff received the request for information after a lawsuit styled *William A. Brown, Jr. v. Harris County, Texas, et al.*, Case No. 4:07-cv-00644 was filed in the United States District Court Southern District of Texas, Houston Division. Based upon your representation and our review, we conclude litigation to which the sheriff is a party was pending when the sheriff received the request. You

indicate the requested personnel files of the named deputies are related to the pending litigation because the deputies at issue are named as defendants in the pending lawsuit. Based on your representations and our review, we find the information that is not subject to section 552.022 is related to the pending litigation for the purposes of section 552.103. We therefore conclude the sheriff may withhold the submitted information that is not subject to section 552.022 under section 552.103 of the Government Code.¹

We note, however, that once the information at issue has been obtained by all parties to the pending litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, any information at issue that has either been obtained from or provided to all opposing parties in the pending litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the sheriff must withhold the marked medical records in accordance with the MPA. The sheriff must withhold the marked information that is confidential under section 552.101 of the Government Code in conjunction with (1) 1703.306 of the Occupations Code, and (2) common-law privacy. The sheriff must withhold the marked information pertaining to the currently employed deputy under section 552.117(a)(2) of the Government Code. If the former deputy is currently a licensed peace officer, the sheriff must also withhold the information you have marked pertaining to the former deputy under section 552.117(a)(2) of the Government Code. If the former deputy is no longer a licensed peace officer, but has made a timely election under section 552.024 of the Government Code, the sheriff must withhold the information you have marked pertaining to him under section 552.117(a)(1) of the Government Code. The sheriff must also withhold the information you have marked under section 552.130 of the Government Code. The sheriff may withhold the information not subject to section 552.022 of the Government Code under section 552.103 of the Government Code. The remaining information that is subject to section 552.022 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 file suit in

¹As our ruling is dispositive, we need not address your remaining arguments against disclosure.

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).

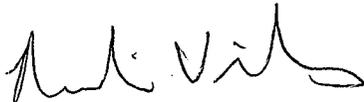
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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



Melaine J. Villars
Assistant Attorney General
Open Records Division

MJV/eeg

Ref: ID# 327310

Enc. Submitted documents

c: Ms. Peggy O'Hare
The Houston Chronicle
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(w/o enclosures)