



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 18, 2010

Mr. Bill Burnett  
Criminal District Attorney  
San Jacinto County  
1 State Highway 150, Room 21  
Coldspring, Texas 77331

OR2010-02490

Dear Mr. Burnett:

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# 369199.

The San Jacinto County Sheriff's Office (the "sheriff") received seven requests from five requestors for information, including videos, related to a specified incident, a named individual, specified traffic citations, deputies' activities during a specified time, specified policies and training, specified communications received by the sheriff, and specified autopsy reports. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note you have not submitted any information pertaining to the requests for videos related to the specified incident and radio call recordings between deputies. To the extent this information existed on the date the sheriff received this request, we assume you have released it. If you have not released this information, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, we note a portion of the submitted information, which we have marked, is not responsive to the instant requests for information. This ruling will not address such non-responsive information and the department need not release it in response to this request.

Section 552.103 of the Government Code provides in part:

(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.

Gov't Code § 552.103(a), (c). A governmental body that raises section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Open Records Decision No. 452 at 4 (1986)*. To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. *Open Records Decision No. 555 (1990)*; *see Open Records Decision No. 518 at 5 (1989)* (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See Open Records Decision No. 331 (1982)*.

The sheriff received the first five requests for information on November 10, 11, and 12, 2009. You inform us that the sheriff received two letters from a law firm representing the family and the estates of the deceased asserting liability on the part of the sheriff related to the handling of the incident at issue. However, we note, and the submitted information

reflects, that the sheriff did not receive the law firm's first letter until November 17, 2009. Based on your representations and our review, we find the sheriff failed to demonstrate that it reasonably anticipated litigation at the time it received the first five requests for information. Therefore, we find that the sheriff may not withhold any information responsive to these requests under section 552.103 of the Government Code. However, we note the sheriff received the last two requests on November 17 and 18, 2009. Therefore, we conclude the sheriff reasonably anticipated litigation when it received the last two requests for information. You assert the documents responsive to these requests relate to the litigation because they pertain to the incident at issue and form the basis of the anticipated litigation against the sheriff. Thus, we find that the sheriff has established section 552.103 is applicable to any information that is only responsive to the last two requests. Accordingly, the sheriff may generally withhold this information under section 552.103 of the Government Code.

However, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Further, the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer realistically anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We note that section 552.007 of the Government Code prohibits selective disclosure of information. Thus, a governmental body cannot withhold information from a requestor that it has voluntarily made available to another member of the public unless the information is confidential by law. *See* Gov't Code § 552.007(b). As a general rule, therefore, if a governmental body releases information to any member of the public, the Act's exceptions to disclosure are waived unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See* Open Records Decision Nos. 490 (1988), 400 (1983). Section 552.103 of the Government Code is a discretionary exception to disclosure that protects the governmental body's interests and which may be waived. *See 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 section 552.103); *See also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). Therefore, because the sheriff may not withhold any information that is responsive to the first five requests under section 552.103, the sheriff may also not withhold any of this same information to the extent it is responsive to the last two requests. *See* Gov't Code § 552.007(b). Accordingly, with the exception of the information responsive to the first five requests, for which section 552.103 has been waived, the sheriff may withhold the submitted information under section 552.103 of the Government Code.

To the extent the information is not covered under section 552.103 of the Government Code, we note that portions of the remaining information may be excepted from disclosure under sections 552.101, 552.117, 552.1175, 552.130, 552.136 and 552.137 of the Government

Code.<sup>1</sup> Section 552.101 of the Government Code exempts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses laws that make criminal history record information (“CHRI”) confidential. CHRI generated by the National Crime Information Center or by the Texas Crime Information Center is confidential under federal and state law. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 at 7 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI the Department of Public Safety (“DPS”) maintains, except DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov’t Code § 411.083. 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. Similarly, 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. *See id.* § 411.082(2)(B) (term CHRI does not include driving record information). Accordingly, the sheriff must withhold the CHRI we have marked under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code and federal law.

Section 552.101 of the Government Code also encompasses section 58.007 of the Family Code. Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997, are confidential under section 58.007. For purposes of section 58.007, “child” means a person who is ten years of age or older and under seventeen years of age. *See* Fam. Code § 51.02(2). Section 58.007 provides in pertinent part as follows:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are

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<sup>1</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

separate and distinct from controls to access electronic data concerning adults; and

(3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapters B, D, and E.

*Id.* § 58.007(c). Upon review, we find that some of the remaining submitted information consists of juvenile law enforcement records involving conduct that occurred after September 1, 1997. It does not appear that any of the exception in section 58.007 apply to these records. We note that some of the remaining information may also pertain to juvenile offenders. However, this information does not reflect the ages of the offenders involved. Because we are unable to determine the ages of the offenders involved in these records, we must rule conditionally. To the extent the information we have marked and identified constitutes records of juvenile suspects or offenders engaged in delinquent conduct or conduct indicating a need for supervision who are ten years of age or older and under seventeen years of age, they are confidential pursuant to section 58.007(c) of the Family Code and must be withheld in their entirety under section 552.101 of the Government Code. However, to the extent this information pertains to suspects or offenders who are not ten years of age or older and under seventeen years of age, the sheriff may not withhold any of this submitted information under section 552.101 on the basis of section 58.007.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information if it (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 types 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 held that the 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 notes that individual has significant privacy interest in compilation of one's criminal history). Furthermore, we find that the compilation of a private citizen's criminal history is generally not of legitimate concern to the public. We note, however, that records relating to routine traffic violations are not considered criminal history record information. *Cf. Gov't Code* § 411.082(2)(B) (criminal history record information does not include driving record information). This office has also found certain kinds of medical information or information indicating disabilities or specific illnesses are 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). In addition, this office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from required public disclosure. See Open Records Decision Nos. 600 (1992), 545 (1990), 523 (1989) (individual's mortgage payments, assets, bills, and credit history). Upon review, we find that the information we have marked and identified must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

The remaining information contains photographs of the crime scene, including deceased individuals. We note that common-law privacy is a personal right that lapses at death and does not protect information that is related only to a deceased individual. See *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); Open Records Decision No. 272 at 1 (1981) (privacy rights lapse upon death). The United States Supreme Court has determined, however, that surviving family members can have a privacy interest in information relating to their deceased relatives. See *Nat'l Archives & Records Admin. v. Favish*, 124 S. Ct. 1570 (2004). In this instance, we have received representations from attorneys representing surviving family members asserting a privacy interest in the release of the death scene photographs. After reviewing these comments, and the submitted information, we find that the family members' privacy interest in the photographs of their deceased relatives outweighs the public's interest in the disclosure of this information. Thus, the sheriff must withhold the submitted photographs we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.<sup>2</sup>

Section 552.101 also encompasses constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. ORD 455 at 4. The first type protects an individual's autonomy within "zones of privacy," which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). In Open Records Decision No. 430 (1985), our office determined that the list of inmate visitors is protected by constitutional privacy because people have a First Amendment right to correspond with prisoners, and the release of that information would threaten that right. We have marked and identified inmate visitor information that the

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<sup>2</sup>However, we note that in this instance, one of the requestors of the photographs at issue is the attorney representing the deceaseds' family. Thus, this requestor has a special right of access to the photographs at issue. See Gov't Code § 552.023(a) (person or person's authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and is protected from public disclosure by laws intended to protect person's privacy interests). Accordingly, in this instance, the photographs at issue may not be withheld from this requestor on the basis of privacy.

sheriff must withhold under section 552.101 of the Government Code in conjunction with constitutional privacy.

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.<sup>3</sup> Gov't Code § 552.117(a)(2). Section 552.117 also encompasses a personal cellular telephone number, provided that a governmental body does not pay for the cellular phone service. *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). We note, however, the protection afforded by section 552.117 does not extend to information relating to a deceased family member. *Cf.* Attorney General Opinions JM-229, H-917 (1976) ("We are . . . of the opinion that the Texas courts would follow the almost uniform rule of other jurisdictions that the right of privacy lapses upon death."); Open Records Decision No. 272 (1981). Upon review, we note that some of the information may be subject to section 552.117(a)(2). We note that section 552.117(a)(2) only applies to records that a governmental body is holding in an employment capacity. We are unable to determine from the information provided whether the information at issue relates to currently licensed peace officers. Thus, we must rule conditionally. Accordingly, if the individuals at issue are currently licensed peace officers, then the sheriff must withhold the information we have marked and identified under section 552.117(a)(2). If the individuals at issue are not currently licensed peace officers, section 552.117(a)(1) may apply to the information we have marked under section 552.117(a)(2).

Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former 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 this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). The sheriff 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 individuals at issue elected to keep their information confidential pursuant to section 552.024 of the Government Code prior to the sheriff receiving the requests at issue. If the individuals made a timely election under section 552.024, the sheriff must withhold the information we have marked under section 552.117(a)(1). If the individuals did not make timely elections under section 552.024, the information that we have marked under section 552.117(a)(1) may not be withheld under that exception.

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<sup>3</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

We note section 552.1175 of the Government Code may apply to a portion of the remaining information. Section 552.1175 provides in part:

(b) Information that relates to the home address, home telephone number, or social security number of [a peace officer as defined by article 2.12 of the Code of Criminal Procedure or a county jailer as defined by section 1701.001 of the Occupations Code], 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). Section 552.1175 also encompasses personal cellular telephone numbers if the cellular telephone service is not paid for by a governmental body. *See* ORD 506 at 5-6. The remaining information includes the personal information of individuals who appear to be peace officers and county jailors who are not employees of the sheriff. To the extent these individuals are currently licensed peace officers under article 2.12 of the Code of Criminal Procedure or county jailers under section 1701.001 of the Occupations Code who elect to restrict access to the information in accordance with section 552.1175(b), the sheriff must withhold the information we have identified under section 552.1175 of the Government Code. However, the sheriff may only withhold the marked cellular telephone numbers if the individuals at issue paid for the cellular telephone service with personal funds. To the extent these individuals are not currently licensed peace officers under article 2.12 of the Code of Criminal Procedure or county jailers under section 1701.001 of the Occupations Code or do not elect to restrict public access to the information in accordance with section 552.1175(b), the sheriff may not withhold the identified information under section 552.1175.

Next, we note some of the remaining information is subject to 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 [or] a motor vehicle title or registration issued by an agency of this state." Gov't Code § 552.130(1), (2). The sheriff must withhold the Texas motor vehicle information we have identified under section 552.130 of the Government Code.

Section 552.136(b) of the Government Code states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." *Id.* § 552.136. An access device number is one that may be used to (1) obtain money, goods, services, or another thing of value, or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument, and includes an account number. *Id.* § 552.136(a).

We find that the lock box combination, which we have identified, constitutes an access device number for the purposes of section 552.136. Thus, the sheriff must withhold the identified combination under section 552.136.

Section 552.137 of the Government Code states that “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its public disclosure. *Id.* § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). The remaining information contains e-mail addresses that are not the type specifically excluded by section 552.137. Accordingly, the sheriff must withhold the e-mail addresses we have marked under section 552.137 in the remaining information, unless the owners of the addresses have affirmatively consented to their release. *See id.* § 552.137(b).

In summary, with the exception of the information responsive to the first five requests, the sheriff may withhold the submitted information under section 552.103 of the Government Code. The sheriff must withhold the following information: 1) the CHRI we have marked under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code, 2) the information we have marked and identified under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code, to the extent this information constitutes records of juvenile suspects or offenders engaged in delinquent conduct or conduct indicating, 3) the information we have marked and identified under section 552.101 of the Government Code in conjunction with common-law privacy, 4) the information we have marked under section 552.101 of the Government Code in conjunction with constitutional privacy, 5) the Texas motor vehicle information we have marked and identified under section 552.130 of the Government Code, 6) the combination we have identified under section 552.136 of the Government Code, and 7) the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the addresses have affirmatively consented to their release.<sup>4</sup> If the individuals at issue are currently licensed peace officers whose information the sheriff holds in an employment capacity, then the sheriff must withhold the information we have marked and identified under section 552.117(a)(2). If the individuals at issue are not licensed peace officers but made a timely election under section 552.024, the sheriff must withhold the information we have marked under section 552.117(a)(1). The sheriff must withhold the information we have identified under section 552.1175 to the extent the individuals at issue are peace officers or county jailers who elect to restrict access to the information in accordance with section 552.1175(b); however, the sheriff may only withhold the marked

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<sup>4</sup>We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a Texas driver's license numbers and license plate numbers under section 552.130 of the Government Code and e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

cellular telephone numbers if the individuals at issue paid for the cellular telephone service with personal funds. The remaining information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Tamara Wilcox  
Assistant Attorney General  
Open Records Division

TW/dls

Ref: ID# 369199

Enc. Submitted documents

c: Requestors  
(w/o enclosures)