



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 26, 2010

Ms. Elizabeth Lutton
Legal Advisor
Dallas County Sheriff's Department
133 Riverfront LB-31
Dallas, Texas 75207-4313

OR2010-11171

Dear Ms. Lutton:

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# 387858.

The Dallas County Sheriff's Department (the "department") received a request for internal affairs information concerning the death of a named inmate of the county jail. 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 information you submitted.

You inform us that some or all of the submitted information was previously released to the plaintiff's counsel in the course of discovery in civil litigation. We note that the Act does not permit selective disclosure of information to the public. *See* Gov't Code §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). Information that has been voluntarily released to a member of the public may not subsequently be withheld from another member of the public, unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988). Section 552.103 of the Government Code, which the department claims, is a discretionary exception to public disclosure that protects a governmental body's interests and may be waived; as such, section 552.103 neither expressly prohibits the release of information to the public nor makes information confidential under law. *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

Gov't Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). This office has held, however, that an exchange of information among litigants in "informal" discovery is not a "voluntary" release of information for purposes of section 552.007. *See* Open Records Decision No. 579 (1990) (addressing statutory predecessor); *see also* Open Records Decision No. 454 at 2 (1986) (governmental body that disclosed information because it reasonably concluded that it had constitutional obligation to do so could still invoke statutory predecessor to Gov't Code § 552.108). Accordingly, we find that the disclosure of some or all of the submitted information in the course of discovery was not a voluntary disclosure of information to a member of the public under the Act. Therefore, we will consider the department's claim for the submitted information under section 552.103.

You also state that some of the requested information was the subject of Open Records Letter No. 2008-17283 (2008). We note that there has since been a change in the law, facts, and circumstances on which the previous ruling was based. We therefore conclude that the department may not withhold any of the submitted information on the basis of Open Records Letter No. 2008-17283. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 6-7 (2001) (listing elements of first type of previous determination under Gov't Code § 552.301(a)).

We next note that most of the submitted information falls within the scope of section 552.022 of the Government Code. 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). In this instance, most of the submitted information consists of completed investigations made of, for, or by the department. Thus, that information, which we have marked, must be released pursuant to section 552.022(a)(1), unless the information is expressly confidential under other law or excepted from disclosure under section 552.108. You do not claim an exception under section 552.108. Section 552.103, which you do claim, is discretionary and may be waived. *See Dallas Area Rapid Transit*, 4 S.W.3d at 475-76. As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022(a)(1). Therefore, the department may not withhold any of the marked information that is subject to section 552.022(a)(1) under section 552.103. We note that some of the information in question is or may be excepted from disclosure under sections 552.101, 552.117, 552.1175, and 552.137 of the Government Code.¹ As those exceptions are confidentiality provisions for the purposes of section 552.022(a)(1), we will address the applicability of those exceptions to the information encompassed by

¹Unlike other exceptions to disclosure under the Act, this office will raise sections 552.101, 552.117, 552.1175, and 552.137 on behalf of a governmental body, as these exceptions are mandatory and may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

section 552.022(a)(1). We also will address the department's claim under section 552.103 for the remaining information at issue.

Section 552.101 of the Government Code excepts "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. Information acquired from a polygraph examination is confidential under section 1703.306 of the Occupations Code, which provides in part:

(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[.]

Occ. Code § 1703.306(a). We have marked information acquired from a polygraph examination that the department must withhold under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.

Section 552.101 of the Government Code also encompasses section 611.002 of the Health and Safety Code. This section is applicable to mental health records and provides in part:

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b); *see also id.* § 611.001 (defining "patient" and "professional"). Sections 611.004 and 611.0045 of the Health and Safety Code provide for access to information that section 611.002 makes confidential only by certain individuals. *See id.* §§ 611.004, .0045; Open Records Decision No. 565 (1990). We have marked a mental health record that the department must withhold under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code, unless the requestor is authorized to obtain that information under sections 611.004 and 611.0045.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that these types of information be kept confidential under section 552.024 of the Government Code. *See Gov't*

Code §§ 552.117, .024. We note that section 552.117(a)(1) is applicable to an employee's personal cellular telephone number if the employee pays for the cell phone service. *See* Open Records Decision No. 506 at 5-6 (1988). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request under section 552.024 that the information be kept confidential. Therefore, the department must withhold the information we have marked under section 552.117(a)(1) to the extent that the current or former employees concerned timely requested confidentiality for the marked information under section 552.024.

To the extent that section 552.117(a)(1) is not applicable to the marked information, it may be excepted from disclosure under section 552.1175 of the Government Code. This exception is applicable to information relating to a county jailer, as defined by section 1701.001 of the Occupations Code. *See* Gov't Code § 552.1175(a)(2). Section 552.1175(b) provides as follows:

(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(b). Section 552.1175 also encompasses a county jailer's personal cellular telephone number if the county jailer pays for the cell phone service with his personal funds. Thus, the department must withhold the information we have marked under section 552.1175 to the extent that the information pertains to a county jailer who elects to restrict access to the marked information in accordance with section 552.1175(b).

Section 552.137 of the Government Code provides 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 or the e-mail

address falls within the scope of section 552.137(c). *Id.* § 552.137(a)-(c). The department must withhold the e-mail address we have marked under section 552.137, unless the owner of the e-mail address has affirmatively consented to its public disclosure.²

Lastly, we address your claim under section 552.103 of the Government Code for the information that is not subject to section 552.022(a)(1). Section 552.103 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.

Id. § 552.103(a), (c). A governmental body that claims section 552.103 must provide relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. 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).*

You state, and have provided pleadings demonstrating, that on the date of its receipt of this request for information, the department was a party to civil litigation in the United States District Court for the Northern District of Texas styled *Bailey v. Dallas County, Tex., at al.*, No. 3:09-cv-00865-K. You contend that the submitted information that is not subject to section 552.022(a)(1) is related to the pending litigation. Based on your representations and documentation and our review of the information at issue, we conclude that the department

²We note that 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 an e-mail address of a member of the public under section 552.137, without the necessity of requesting an attorney general decision.

may withhold the information that is not subject to section 552.022(a)(1) under section 552.103 of the Government Code. We have marked that information.

In reaching this conclusion, we assume that the opposing party in the pending litigation has not seen or had access to the marked information. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). If the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, then there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We also note that the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary: (1) under section 552.101 of the Government Code, the department must withhold the information we have marked under section 1703.306 of the Occupations Code and section 611.002 of the Health and Safety Code; (2) the department must withhold the information we have marked under section 552.117(a)(1) of the Government Code to the extent that the current or former employees concerned timely requested confidentiality for the marked information under section 552.024 of the Government Code; (3) to the extent that section 552.117(a)(1) is not applicable, the marked information must be withheld under section 552.1175 of the Government Code to the extent that the information pertains to a county jailer who elects to restrict access to the information in accordance with section 552.1175(b); (5) the marked e-mail address must be withheld under section 552.137 of the Government Code, unless the owner of the e-mail address has affirmatively consented to its public disclosure; and (6) the department may withhold the marked information that is not subject to section 552.022(a)(1) of the Government Code under section 552.103 of the Government Code.³ The rest of the submitted information must be released.

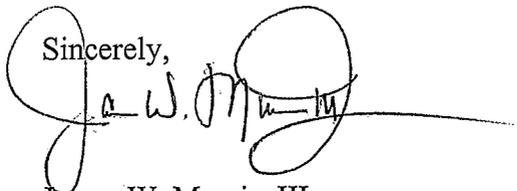
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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, 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

³If neither section 552.117(a)(1) nor section 552.1175 is applicable to the former employee's social security number, we 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.

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,

A handwritten signature in black ink, appearing to read "J. W. Morris, III". The signature is written in a cursive style with a long horizontal line extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/em

Ref: ID# 387858

Enc: Submitted documents

c: Requestor
(w/o enclosures)