



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 27, 2010

Ms. Raethella Jones
Assistant District Attorney
Brazoria County
111 East Locust, Suite 408A
Angleton, Texas 77515

OR2010-16318

Dear Ms. Jones:

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# 398226 (Brazoria County File No. C72624).

The Brazoria County Sheriff's Office (the "sheriff") received a request for standards for acceptable conduct for deputies, several categories of information pertaining to a named sheriff's deputy, and several categories of information pertaining to citation 48093. You state the sheriff does not have information responsive to portions of the request.¹ You state the sheriff has released some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

Government Code. We have considered the exceptions you claim and reviewed the submitted information, a portion of which you state is a representative sample.²

Initially, we must address the sheriff's obligations under section 552.301 of the Government Code. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Subsection 552.301(e) provides that the governmental body must submit to this office, not later than the fifteenth business day after the date of its receipt of the request the specific information that the governmental body seeks to withhold or representative samples if the information is voluminous. Gov't Code § 552.301(e)(1)(D). We note that the request for information was stamped as received on August 9, 2010. Accordingly, the fifteen-business-day deadline was August 23, 2010. Although you submitted some of the responsive information on August 20, 2010, some of the information you submitted as Exhibit D consists of blank evaluation forms that you indicate are responsive to the request for records of training of the named deputy. However, we conclude that blank forms cannot serve as an adequate copy or representative sample of the information requested. Consequently, we find that the sheriff failed to comply with the procedural requirements of section 552.301(e)(1)(D) with respect to that information. Further, you did not submit information responsive to the request for records of the named deputy's "police checks (vehicles/persons) such as LEADS, NLETS, etc" until October 14, 2010. Accordingly, we find the sheriff failed to comply with section 552.301(e)(1)(D) with respect to the information you submitted on October 14, 2010.

Pursuant to section 552.302, this information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). This statutory presumption can generally be overcome when information is confidential by law or third-party interests are at stake. Open Records Decision No. 150 (1977). Although you seek to withhold the blank evaluation forms in Exhibit D under section 552.103 of the Government Code, that section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *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.) (section 552.103 may be waived); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). Because your claim under section 552.103 does not provide a compelling reason for non-disclosure under section 552.302, in failing to comply

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.

with section 552.301 you have waived that exception with respect to the request for records of training of the named deputy.³ Because section 552.101 of the Government Code can provide a compelling reason to withhold information, we will address your argument under section 552.101 for the information you submitted on October 14, 2010. We will also consider the sheriff's argument under section 552.103 of the Government Code for the remaining information.

You claim that the information you submitted on October 14, 2010, is excepted under section 552.101 of the Government Code, which excepts from disclosure "information that is considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses criminal history record information ("CHRI") generated by the National Crime Information Center (the "NCIC") or by the Texas Crime Information Center (the "TCIC"). 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 (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 that the Texas Department of Public Safety ("DPS") maintains, except that 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. Thus, 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). We note information relating to routine traffic violations is not excepted from release under section 552.101 of the Government Code on this basis. *Cf. id.* § 411.082(2)(B). You claim that the information at issue, which consists of license plate and driver's license checks, is CHRI. Upon review, we conclude that none of the submitted information consists of CHRI generated by the NCIC or the TCIC. Therefore, the sheriff may not withhold any of the information you submitted on October 14, 2010, under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code.

³We note, in any event, that any completed evaluations pertaining to the named deputy are made expressly public under section 552.022(a)(1) of the Government Code and may not be withheld under section 552.103 of the Government Code. *See* Gov't Code § 552.022(a)(1), *see also Dallas Area Rapid Transit*, 4 S.W.3d at 475-76.

We note, however, that the information you submitted on October 14, 2010, contains information subject to section 552.130 of the Government Code.⁴ 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[.]” *Id.* § 552.130(a)(1)-(2). Upon review, the sheriff must withhold the information we have marked under section 552.130 of the Government Code.

We also note that the information you submitted on October 14, 2010, contains an insurance policy number. Section 552.136 of the Government Code provides that “[n]otwithstanding any other provision of [the Act], 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(b); *see id.* § 552.136(a) (defining “access device”). Upon review, the insurance policy number we have marked must be withheld under section 552.136.

Next, we address your claim under section 552.103 of the Government Code for the remaining information. Section 552.103 provides in relevant part as follows:

(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). The purpose of section 552.103 is to protect the litigation interests of governmental bodies that are parties to the litigation at issue. *See id.* § 552.103(a); Open Records Decision No. 638 at 2 (1996) (section 552.103 only protects the litigation interests of the governmental body claiming the exception). 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

⁴The 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).

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 inform us that the submitted information relates to a criminal case that has a pending court or answer date. We note that the citation you submitted indicates that the case is pending in the Brazoria County Justice of the Peace Court Precinct 2, Place 1. We note that the sheriff is not a party to this pending criminal case. Thus, the sheriff does not have a litigation interest in the matter for purposes of section 552.103. In such a situation, we require an affirmative representation from the governmental body with the litigation interest that the governmental body wants the information at issue withheld from disclosure under section 552.103. However, you have not provided this office with an affirmative representation from any governmental body with a litigation interest that the governmental body wishes the information at issue to be withheld pursuant to section 552.103. Accordingly, the sheriff may not withhold the remaining information under section 552.103 of the Government Code. As you raise no further exceptions to its disclosure, the remaining information must be released.⁵

In summary, the sheriff must withhold the information we have marked under section 552.130 of the Government Code and section 552.136 of the Government Code.⁶ 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, or call the Office of the Attorney General's Open Government Hotline, toll free,

⁵We note that the requestor has a special right of access to her own Texas license plate number which is being released in this instance. Gov't Code § 552.023 (person or person's authorized representative has a special right of access to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person's privacy interests). We note that such information is confidential with respect to the general public. *See id.* § 552.130(a)(2).

⁶We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas driver's license numbers and Texas license plate numbers under section 552.130 of the Government Code and an insurance policy number under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

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,



Laura Ream Lemus
Assistant Attorney General
Open Records Division

LRL/eb

Ref: ID# 398226

Enc. Submitted documents

c: Requestor
(w/o enclosures)