



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

June 1, 2011

Ms. Susan Fillion
Assistant County Attorney
Harris County Attorney's Office
1019 Congress, 15th Floor
Houston, Texas 77002

OR2011-07715

Dear Ms. Fillion:

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# 419165 (C.A. File Number 11PIA0103).

The Harris County Constable, Precinct 5 (the "constable") received a request for information pertaining to a specified incident. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108, 552.117, 552.1175, 552.130, and 552.137 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note, and you acknowledge, the submitted information is subject to section 552.022(a)(1) of the Government Code, which provides:

the following categories of information are public information and not excepted from required disclosure under [the Act] unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The submitted information consists of a completed internal affairs investigation made by the constable. This information must be released under

¹Although, you initially raised sections 552.119 and 552.136 of the Government Code as exceptions to disclosure of the requested information, you have provided no arguments regarding the applicability of these sections. Since you have not submitted arguments concerning these exceptions, we assume that you no longer urge them. See Gov't Code §§ 552.301(b), (e), .302

section 552.022(a)(1), unless the information is excepted from disclosure under section 552.108 or expressly confidential under other law. You claim this information is excepted under section 552.103. However, this section is a discretionary exception that protects a governmental body's interests and is, therefore, not "other law" for purposes of section 552.022. *See id.* § 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 section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to section 552.103 subject to waiver). As such, section 552.103 is not "other law" that makes information confidential for the purposes of section 552.022, and the submitted information may not be withheld under that section. However, pursuant to section 552.022(a)(1), we will consider your claim under section 552.108 of the Government Code. Further, as sections 552.101, 552.102, 552.117, 552.1175, 552.130, and 552.137 of the Government Code constitute "other law" that makes information confidential for the purposes of section 552.022, we will also consider your arguments under those sections.

Section 552.108 of the Government Code provides in part the following:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

...

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication;

...

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

...

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code §§ 552.108(a)(2), (b)(2). Subsections 552.108(a)(2) and 552.108(b)(2) protect information that relates to a concluded criminal investigation or prosecution that did not result in conviction or deferred adjudication. *Id.* A governmental body claiming subsection 552.108(a)(2) or subsection 552.108(b)(2) must demonstrate the requested information relates to a criminal investigation that has concluded in a final result other than

a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). We note, and you acknowledge, the submitted information pertains to a completed internal affairs investigation made for or by the constable. Section 552.108 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). However, we note and you have informed this office, the internal affairs investigation at issue relates to a criminal investigation into a constable deputy by the Harris County District Attorney's Office (the "district attorney") that concluded with no charges. The submitted information reflects the constable did not conduct a criminal investigation into the deputy and the submitted internal affairs investigation was administrative in nature. Because the deputy was the subject of a criminal investigation by the district attorney, we find it is the district attorney, rather than the constable, that has the pertinent law enforcement interest in the submitted information. In these circumstances, this office requires a representation from the entity with the law enforcement interest stating that the entity wishes to withhold the information pursuant to section 552.108. *See Open Records Decision Nos. 586 (1991), 474 (1987)*. We have not received a representation from the district attorney that it objects to the release of the information at issue. We therefore determine the constable may not withhold any of the information at issue under subsection 552.108(a)(2) or subsection 552.108(b)(2) of the Government Code.

You also claim the standard operating procedures of the constable pertaining to the use of force and deadly force; accountability, discretion and delegation of responsibility; effecting an arrest; and high risk vehicle approach, which are contained in the internal affairs investigation file, are excepted under section 552.108(b)(1) of the Government Code. Section 552.108(b)(1) excepts from required public disclosure an internal record of a law enforcement agency maintained for internal use in matters relating to law enforcement or prosecution if "release of the internal record or notation would interfere with law enforcement or prosecution." Gov't Code § 552.108(b)(1). Section 552.108(b)(1) encompasses internal law enforcement and prosecution records, the release of which would interfere with on-going law enforcement and prosecution efforts in general. *See City of Fort Worth*, 86 S.W.3d at 327 (section 552.108(b)(1) protects information that, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws). This office has stated that under the statutory predecessor to section 552.108(b), a governmental body may withhold information that would reveal law enforcement techniques or procedures. *See, e.g.*, Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines would unduly interfere with law enforcement), 456 (1987) (release of forms containing information regarding location of off-duty police officers in advance would unduly interfere with law enforcement), 413 (1984) (release of sketch showing security measures to be used at next execution would unduly interfere with law enforcement), 409 (1984) (if information regarding certain burglaries exhibit a pattern that reveals investigative

techniques, information is excepted under predecessor to section 552.108), 341 (1982) (release of certain information from Department of Public Safety would unduly interfere with law enforcement because release would hamper departmental efforts to detect forgeries of drivers' licenses), 252 (1980) (predecessor to section 552.108 is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). Generally known policies and techniques may not be withheld under section 552.108. *See, e.g.*, ORD 531 at 2-3 (Penal Code provisions, common law rules, and constitutional limitations on use of force are not protected under predecessor to section 552.108), 252 at 3 (governmental body did not meet burden because it did not indicate why investigative procedures and techniques requested were any different from those commonly known). The determination of whether the release of particular records would interfere with law enforcement is made on a case-by-case basis. *See* ORD 409 at 2.

You state release of the standard operating procedures and use of force guidelines at issue "would aid and assist potential criminals in their efforts to evade and avoid detection and potentially escape criminal prosecution." You also state the release of the information at issue would interfere with law enforcement. Based on your arguments and our review, we find release of the information we have marked in the submitted standard operating procedures and guidelines would interfere with law enforcement. Accordingly, the constable may withhold the information we have marked under section 552.108(b)(1) of the Government Code. We find the constable has not demonstrated release of the remaining information at issue would interfere with law enforcement or crime prevention. Thus, the remaining information is not excepted from disclosure under section 552.108(b)(1).

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 section encompasses information protected by other statutes, such as the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code, which governs access to medical records. Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides in pertinent 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). This office has concluded 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). We have also found when a file is created as the result of a hospital stay, all the documents in the file relating to diagnosis and treatment constitute physician-patient communications or “[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician.” Open Records Decision No. 546 (1990). Medical records must be released upon the governmental body’s receipt of the patient’s signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. See Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. See Open Records Decision No. 565 at 7 (1990). We note the submitted information reveals that the requestor is the person whose medical records are at issue. We have marked the medical records that may only be released in accordance with the MPA.

Section 552.101 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). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. You claim the remaining portions of the internal affairs investigation file are confidential pursuant to common-law privacy. First, you cite to *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied). In *Ellen*, the court applied common-law privacy to an investigation of alleged sexual harassment in an employment context. The internal affairs investigation at issue in this instance does not pertain to an investigation of sexual harassment in an employment context. Rather, it involves an investigation into allegations a deputy used excessive force. Accordingly the court’s ruling *Ellen* is not applicable to submitted information and the constable may not withhold it in its entirety based on section 552.101 in conjunction with common-law privacy and the holding in *Ellen*.

We also understand you to assert that portions of the submitted information are confidential pursuant to common-law privacy. You contend that the deputy’s disciplinary history, the call logs and incident report, and other portions of the submitted information are confidential pursuant to common-law privacy. The types of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* include 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. *Industrial Foundation*, 540 S.W.2d at 683. This office has found that 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. *U.S. 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). Furthermore, we find that a compilation of a private citizen’s criminal

history is generally not of legitimate concern to the public. We note, in addition, this office has determined that other types of information also are private under section 552.101. *See generally* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private). You contend the “compilation of the deputy’s disciplinary history” is excepted under section 552.101 in conjunction with common-law privacy. We note that the deputy’s disciplinary history pertains to his work conduct as an employee of the constable, and does not consist of a criminal history compilation. As this office has stated on many occasions, the public generally has a legitimate interest in information concerning public employees and public employment. *See, e.g.,* Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs but in fact touches on matters of legitimate public concern), 470 at 4 (1987) (job performance does not generally constitute public employee’s private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of government employees), 405 at 2 (1983) (manner in which public employee’s job was performed cannot be said to be of minimal public interest), 329 (1982) (reasons for employee’s resignation ordinarily not private). Thus, we conclude the deputy’s disciplinary history is a matter of legitimate public interest and may not be withheld under section 552.101 in conjunction with common-law privacy.

You also contend the call logs and incident report must be withheld to protect the privacy interests of the individual who was arrested at the time of the events underlying the internal affairs investigation because the requestor knows the identity of the arrestee and the nature of the incident. Generally, only highly intimate information that implicates the privacy of an individual is withheld pursuant to common-law privacy. However, in certain instances, where it is demonstrated that the requestor knows the identity of the individual involved, as well as the nature of certain incidents, the entire report must be withheld to protect the individual’s privacy. Here, although you seek to withhold the call logs and incident report in their entirety, you have not demonstrated, nor does the information reflect, a situation in which the information must be withheld in its entirety on the basis of common-law privacy. Further, because the requestor specifically requested information about this specific incident, the request itself does not implicate the arrestee’s privacy interests as a compilation of his criminal history. We note the incident report and call logs are related to a criminal investigation by the constable. The public has a legitimate interest in knowing the general details of a crime. *See generally* *Lowe v. Hearst Communications, Inc.*, 487 F.3d 246, 250 (5th Cir. 2007) (noting a “legitimate public interest in facts tending to support an allegation of criminal activity” (citing *Cinel v. Connick*, 15 F.3d 1338, 1345-46 (5th Cir. 1994)); *Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177, 186-187 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (public has legitimate interest in details of crime and police efforts to combat crime in community). Thus, we find the information at issue is not highly intimate or embarrassing and a matter of no legitimate public concern. Accordingly, the submitted incident report and call logs may not be withheld under section 552.101 in conjunction with common-law privacy.

We note that the remaining information contains medical information pertaining to the requestor. Although the medical information would generally be withheld under section 552.101 in conjunction with common-law privacy, the requestor has a right of access under section 552.023 of the Government Code to this information. *See* Gov't Code § 552.023(a) (person has a special right of access, beyond right of general public, to information held by a governmental body that relates to person and is protected from public disclosure by laws intended to protect person's privacy interests); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual asks governmental body to provide her with information concerning herself). Accordingly, none of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy.

You also claim the remaining information is excepted from disclosure under section 552.102 of the Government Code. Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). Upon review, we find none of the remaining information is excepted under section 552.102(a) of the Government Code. Accordingly, none of the remaining information may be withheld on that basis.

Section 552.117(a)(2) of the Government Code excepts from public disclosure a peace officer's home address and telephone number, social security number, and family member information regardless of whether the peace officer made an election under section 552.024 of the Government Code. *Id.* § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *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 have marked information which may consist of the home telephone numbers or cellular telephone numbers of licensed peace officers employed by the constable. Accordingly, if the marked telephone numbers are home telephone numbers or cellular telephone numbers and the deputy pays for the cellular telephone service, then the constable must withhold the telephone numbers we have marked under section 552.117(a)(2) of the Government Code.

You also raise section 552.1175 of the Government Code, which provides in part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure

....

(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.

Gov't Code § 552.1175(a)-(b). We note that section 552.1175 only applies to information pertaining to currently licensed peace officers that are not employed by the constable or information the constable is not holding in an employment capacity. Upon review of your arguments and the information at issue, we find you have failed to demonstrate how any portion of the remaining information is confidential for the purposes of section 552.1175. Accordingly, none of the remaining information may be withheld on that basis.

Section 552.130 excepts from disclosure information that relates to a motor vehicle operator's license, driver's license, motor vehicle title, registration, or a personal identification document issued by a Texas agency. *Id.* § 552.130(a)(1)-(3). We note section 552.130 does not apply to out-of-state motor vehicle record information. Additionally, we note section 552.130 protects personal privacy. In this instance you have highlighted some Texas driver's license information pertaining to the requestor. The requestor has a right of access to her own Texas driver's license information under section 552.023 of the Government Code and it may not be withheld from her based on section 552.130. *See generally id.* § 552.023(b). However, upon review we find the constable must withhold the Texas motor vehicle record information and Texas personal identification information we have marked in the remaining information under section 552.130 of the Government Code.²

You also claim section 552.137 of the Government Code, which excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). Upon review, the remaining information does not contain any e-mail addresses. Accordingly, the constable may not withhold any information under section 552.137 of the Government Code.

In summary, the constable may withhold the information we have marked under section 552.108(b)(1) of the Government Code. The marked medical records may only be

²This office 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 number, a Texas license plate number, and the portion of a photograph that reveals a Texas license plate number under section 552.130, without the necessity of requesting an attorney general decision.

released in accordance with the MPA. If the telephone numbers we marked are home telephone numbers or cellular telephone numbers and the deputy pays for the cellular telephone service, then the constable must withhold the telephone numbers we have marked under section 552.117(a)(2) of the Government Code. The constable must withhold the information we have marked under section 552.130 of the Government Code. The remaining information must be released.³

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 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/em

Ref: ID# 419165

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³We note the remaining information contains social security numbers. 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. Gov't Code § 552.147. We also note the requestor has a special right of access to some of the information 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). Because such information may be confidential with respect to the general public, if the constable receives another request for this information from a different requestor, the constable must again seek a ruling from this office.