ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 3, 2011

Ms. Vanessa A. Gonzalez
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402 West 12th Street
Austin, Texas 78701

OR2011-11155

Dear Ms. Gonzalez:

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# 425855.

Bandera County (the "county") received a request for all personnel records and investigative reports pertaining to a named former deputy sheriff. You indicate the county has released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.119 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the county's obligations under section 552.301 of the Government Code, which prescribes the procedural obligations that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires that a governmental body ask for a decision from this office and state which exceptions apply to the requested information by the tenth business day after receiving the request. Gov't Code § 552.301(b). While you raised sections 552.101, 552.103, and 552.119 of the Government Code within the ten-business-day time period as required by subsection 552.301(b), you did not raise section 552.108 of the Government Code until after the ten-business-day deadline had passed. Thus, the county failed to comply with the requirements mandated by subsection 552.301(b) as to its argument under section 552.108 of the Government Code. Generally, if a governmental body fails to timely raise an exception, that exception is waived. *See generally id.* § 552.302; Open Records Decision No. 663 at 5 (1999) (untimely request for decision

resulted in waiver of discretionary exceptions). Section 552.108 of the Government Code is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 177 at 3 (1997) (statutory predecessor to section 552.108 subject to waiver). Thus, in failing to timely raise section 552.108 for the requested information, the county has waived its argument under that section. However, we will consider your timely raised arguments against disclosure under sections 552.101, 552.103, and 552.119 of the Government Code for the submitted information.

Next, we note portions of the submitted information are subject to section 552.022 of the Government Code. Section 552.022 provides in pertinent part:

> (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:
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> > (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). Exhibits C, H, and R are part of a completed internal investigation, and Exhibit J contains completed evaluations. Pursuant to section 552.022(a)(1) of the Government Code, these records are expressly public unless they are either excepted under section 552.108 of the Government Code or are expressly confidential under other law. Section 552.103 of the Government Code is a discretionary exception that protects a governmental body's interest and 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); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Consequently, Exhibits C, H, J, and R may not be withheld under section 552.103 of the Government Code. Because section 552.101 of the Government Code is other law for purposes of section 552.022, we will consider your arguments under section 552.101 for Exhibits C, H, and J. We will also determine whether any of the information in Exhibit R may be withheld from disclosure.

Next, however, we will address your claim that the information not subject to section 552.022 is excepted from disclosure under section 552.103 of the Government Code. This section provides, in relevant 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). The 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 is 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). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You provide documentation showing the county received the request for information after a lawsuit styled *Mario Hernandez v. Bandera County, and Sheriff Weldon Tucker, in his official capacity,* Civil Action No. SA10CA0949, was filed in the United States District Court for the Western District of Texas, San Antonio Division. Based upon your representation and our review, we find litigation involving the county was pending when it received the request. You inform us the pending litigation involves the named former employee's claim that he was wrongfully terminated by the Bandera County Sheriff's Office (the "sheriff"). You also inform us the submitted information is related to the pending litigation because it pertains to this individual's employment and termination from the sheriff. Based on your representations and our review, we conclude the information not subject to section 552.022 is related to the pending litigation for purposes of section 552.103.

We note, however, 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 the litigation to obtain such information through discovery procedures. *See* ORD 551 at 4-5. Thus, information that has been obtained from or provided to the opposing party may not be withheld from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). In this instance, some of the submitted records reflect that they were obtained from or provided to the opposing party in the pending litigation. Thus, Exhibits B, D, I, N, P, Q, S, and a portion of the information in Exhibit M may not be withheld under section 552.103 of the Government Code. The records in Exhibit G were accessed by the opposing party only in the usual scope of his employment with the sheriff. Such information is not considered to have been provided to the opposing party and thus

Exhibit G may be withheld under section 552.103. The remaining marked records may also be withheld under section 552.103.[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 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 established. *Id.* at 681-82. The remaining information pertains solely to the former employee's qualifications, work conduct, job performance, and dismissal. This office has stated in numerous decisions that there is a legitimate public interest in information pertaining to the background and actions of public employees and the conditions for their continued employment. *See* Open Records Decisions Nos. 542 (1990), 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow). Therefore, the county may not withhold any of the remaining information under section 552.101 in conjunction with common-law privacy.

You claim Exhibit H is confidential under section 58.007 of the Family Code. Section 552.101 also encompasses information protected by other statutes, such as section 58.007. This section provides in relevant part:

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

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[1]As our ruling for this information is dispositive, we need not address your remaining arguments against its disclosure. However, we note 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).

> (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.

Fam. Code § 58.007(c). Juvenile law enforcement records relating to delinquent conduct that occurred on or after September 1, 1997, are confidential under section 58.007(c). *See id.* § 51.03(a) (defining "delinquent conduct"). For purposes of section 58.007(c), a "child" is a person who is ten years of age or older and under seventeen years of age. *See id.* § 51.02(2). These records in Exhibit H pertain to allegations that a sixteen-year-old committed assault in March 2009. Thus, we find this information involves a child allegedly engaged in delinquent conduct that occurred after September 1, 1997. You do not indicate, nor does it appear, that any of the exceptions in section 58.007 apply to the information. Accordingly, Exhibit H is confidential pursuant to section 58.007(c) of the Family Code, and the county must withhold it under section 552.101 of the Government Code.

Section 552.101 also encompasses section 1701.454 of the Occupations Code, which provides, in relevant part, "[a] report or statement submitted to the [Texas Commission on Law Enforcement Officer Standards and Education] under this subchapter is confidential and is not subject to disclosure under [the Act], unless the person resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses." Occ. Code § 1701.454(a). Exhibit M contains F-5 Report of Separation of License Holder forms. These forms do not reflect the individual was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses. Therefore, the county must withhold the F-5 forms we marked under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

You argue the records contained in Exhibits P and T are confidential under the federal Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. §§ 1320d-1320d-8, which is also encompassed by section 552.101. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 ("Privacy Rule"); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, except as provided by parts 160 and 164 of the Code of Federal Regulations. *See id.* § 164.502(a). This office has addressed the interplay of the Privacy Rule and the Act. In Open Records Decision No. 681 (2004), we noted section 164.512 of title 45 of the Code of Federal Regulations provides a covered entity may use or disclose protected health information to the extent such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted the Act "is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public." *See* ORD 681 at 8; *see also*

Gov't Code §§ 552.002, .003, .021. We, therefore, held the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. *See Abbott v. Tex. Dep't of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App.—Austin 2006, no pet.); ORD 681 at 9; *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Thus, because the Privacy Rule does not make information that is subject to disclosure under the Act confidential, the county may withhold protected health information from the public only if the information is confidential by law or an exception in subchapter C of the Act applies.

Section 552.101 also encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. 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.

Id. § 159.002(b), (c). Information 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 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 must be released upon the patient's signed, written consent, provided 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. Upon review, we find the doctor's note submitted as Exhibit T is a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that was created by a physician. Accordingly, the county may only release Exhibit T in accordance with the MPA.

We note some of the remaining information is subject to section 552.117 of the Government Code. Section 552.117(a)(2) excepts from disclosure the current and former home addresses and telephone numbers, emergency contact information, social security number, and family member information regarding a peace officer regardless of whether the officer requested

confidentiality under section 552.024 or section 552.1175 of the Government Code.[2] Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § (a)(2)). We note that an individual's personal post office box number is not a "home address" for purposes of section 552.117, and therefore may not be withheld under section 552.117. *See* Open Records Decision No. 622 at 6 (1994) (legislative history makes clear that purpose of section 552.117 is to protect public employees from being harassed at *home*) (citing House Committee on State Affairs, Bill Analysis, H.B. 1979, 69th Leg. (1985) (emphasis added)). Section 552.117 does encompass personal cellular telephone numbers, provided the cellular telephone service is paid for by the employee with his or her own funds. *See* Open Records Decision No. 670 at 6 (2001) (extending section 552.117 exception to personal cellular telephone number and personal pager number of employee who elects to withhold home telephone number in accordance with section 552.024). Accordingly, the personal information of peace officers we marked must be withheld under section 552.117(a)(2) of the Government Code.

Some of the remaining records contain telephone numbers of peace officers who are not employed by the county. Section 552.1175 of the Government Code provides in part:

> (a) This section applies only to:
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> > (1) peace officers as defined by Article 2.12, Code of Criminal Procedure[.]
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> (b) Information that relates to the home address, home telephone number, emergency contact information, 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:
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> > (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.

Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 3 (to be codified as an amendment to Gov't Code § 552.1175(b)). We note section 552.1175 encompasses a peace officer's personal cellular telephone number only if the service for the number is paid for by the officer with his or her own funds. *See* Open Records Decision No. 670 at 6 (2001). You do not inform this office, nor does the submitted information indicate, whether the officers at issue have elected with the county to keep their telephone numbers confidential in

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[2]"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

accordance with section 552.1175(b). Accordingly, if these peace officers elect to restrict access to their cellular telephone numbers in accordance with section 552.1175(b), the county must withhold the marked numbers under section 552.1175 of the Government Code.

The remaining information includes driver's license information and motor vehicle title and registration information that is confidential under section 552.130 of the Government Code. This section provides that information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency, or an agency of another state or country, is excepted from public release. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 4 (to be codified as an amendment to Gov't Code § 552.130(a)(1), (2)).[3] Therefore, the county must withhold the driver's license, title, and registration information we marked under section 552.130 of the Government Code.

Finally, the remaining information contains the former employee's birth date. Section 552.102 of the Government Code 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). The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex. & The Dallas Morning News, Ltd.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). Accordingly, the marked birth date must be withheld under section 552.102(a) of the Government Code. As you raise no other exceptions to disclosure, the remaining information must be released.

In summary, the county may withhold Exhibits A, E, F, G, K, L, and O, and the records we marked in Exhibit M, under section 552.103 of the Government Code. Exhibit H must be withheld under section 552.101 of the Government Code in conjunction with 58.007(c) of the Government Code. The county must withhold the marked F-5 forms under section 552.101 in conjunction with section 1701.454 of the Occupations Code. Exhibit T may only be released in accordance with the MPA. The county must withhold the marked driver's license information and motor vehicle title and registration information under section 552.130 of the Government Code. The marked birth date must be withheld under section 552.102 of the Government Code. The personal information of the peace officers we marked under section 552.117(a)(2) of the Government Code must be withheld. Finally, the county must withhold the telephone numbers we marked under section 552.1175 of the Government Code to the extent this information relates to peace officers who elect to restrict access to the information in accordance with section 552.1175(b). The remaining information must be released.

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[3]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 a Texas driver's license number, a copy of a Texas driver's license, and a Texas license plate number under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.

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,

Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/eb

Ref: ID# 425855

Enc. Submitted documents

c: Requestor
(w/o enclosures)