ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 8, 2011

Mr. Robert Henneke
Kerr County Attorney
700 Main Street, Suite BA-103
Kerrville, Texas 78028

OR2011-11389

Dear Mr. Henneke:

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# 426636.

The Kerr County Sheriff's Department (the "department") received a request for personnel records regarding a named former sheriff's deputy. You claim the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, and 552.117 of the Government Code.[1] We have considered the exceptions you claim and reviewed the information you submitted.

We first note some 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). Thus, the completed reports and evaluations we have marked must be released pursuant to section 552.022(a)(1) unless they are excepted from disclosure under section 552.108 or expressly confidential under other law. We note the department does not claim section 552.108. Section 552.022(a)(15) provides for required disclosure of "information regarded as open to the public under an agency's policies," unless the information is expressly confidential under other law. *Id.* § 552.022(a)(15). Thus, the job description we

[1]Although you also raise section 552.1175 of the Government Code, we note section 552.117 is the relevant exception.

have marked must be released pursuant to section 552.022(a)(15), if the department considers job descriptions to be open to the public under its policies, unless the information is expressly confidential under other law. Section 552.103 of the Government Code, which you claim, is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *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 Gov't Code § 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 expressly confidential for purposes of section 552.022(a)(1) and (15). Therefore, the department may not withhold any of the information encompassed by section 552.022(a)(1) under section 552.103. Likewise, the job description may not be withheld under section 552.103 if it is considered to be open to the public under the department's policies for purposes of section 552.022(a)(15). We note you also claim sections 552.101, 552.102, and 552.117 of the Government Code, which are other law that makes information confidential for purposes of section 552.022(a)(1) and (15). We also note some of the information encompassed by section 552.022(a)(1) falls within the scope of section 552.130 of the Government Code, which is a confidentiality provision for purposes of section 552.022(a).[2] Accordingly, we will address the applicability of sections 552.101, 552.102, 552.117, and 552.130 to the information encompassed by section 552.022(a). Additionally, we will address your claim under section 552.103 for the remaining information at issue.

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 exception encompasses information other statutes make confidential, including the Americans with Disabilities Act of 1990 (the "ADA"). *See* 42 U.S.C. §§ 12101 *et seq*. The ADA provides a covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of the applicant and may condition an offer of employment on the results of the examination, provided that information about the medical conditions and medical histories of applicants or employees must be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. *See* 42 U.S.C. § 12112(d)(3)(B); *see also* 29 C.F.R. § 1630.14(b); Open Records Decision No. 641 (1996). We therefore conclude the department must withhold the physical examination report we have marked under section 552.101 of the Government Code in conjunction with the ADA.

The information encompassed by section 552.022(a)(1) also includes an F-5 form ("Report of Separation of Licensee") submitted to the Texas Commission on Law Enforcement Officer Standards and Education ("TCLEOSE") under subchapter J of chapter 1701 of the

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[2]This office will raise section 552.130 on behalf of a governmental body, as this section is a mandatory exception to disclosure. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

Occupations Code. Section 1701.454 of the Occupations Code governs the public availability of an F-5 form and provides as follows:

> (a) A report or statement submitted to [TCLEOSE] under this subchapter is confidential and is not subject to disclosure under Chapter 552, Government Code, unless the person resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses.
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> (b) Except as provided by this subchapter, a [TCLEOSE] member or other person may not release the contents of a report or statement submitted under this subchapter.

Occ. Code § 1701.454. The submitted F-5 form does not appear to be subject to release under the statute. We therefore conclude the department must withhold the F-5 form, which we have marked, under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

Section 552.101 of the Government Code also encompasses common-law privacy, which protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both elements of the test must be established. *Id.* at 681-82. Common-law privacy protects certain types of personal financial information. Financial information relating only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 545 at 4 (1990) ("In general, we have found the kinds of financial information not excepted from public disclosure by common-law privacy to be those regarding the receipt of governmental funds or debts owed to governmental entities"), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), 373 at 4 (1983) (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis). We have marked personal financial information encompassed by section 552.022(a)(1) that is highly intimate or embarrassing and not a matter of legitimate public interest. The department must withhold that information under section 552.101 of the Government Code in conjunction with common-law privacy.

You also contend some of the submitted information is private under section 552.102(a) of the Government Code, which 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). In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court of appeals ruled

the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. The Texas Supreme Court has expressly disagreed with *Hubert's* interpretation of section 552.102(a), however, and has held the privacy standard under section 552.102(a) differs from the *Industrial Foundation* test under section 552.101. *See Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163 at *5 (Tex. Dec. 3, 2010). The Supreme Court then considered the applicability of section 552.102(a) and held it excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Id.* at *10. We have marked information the department must withhold under section 552.102(a) of the Government Code.

The information encompassed by section 552.022(a)(1) also includes information protected by sections 552.117 and 552.130 of the Government Code. Section 552.117(a)(2) excepts from disclosure the home address, home telephone number, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the officer has family members, regardless of whether the officer complies with sections 552.024 or 552.1175 of the Government Code. *See* Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)). Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. We have marked information relating to a peace officer the department must withhold under section 552.117(a)(2) of the Government Code.

Section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle title or registration issued by an agency of this state or another state or country. *See* 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). We have marked motor vehicle information the department must withhold under section 552.130 of the Government Code.

Next, we address your claim under section 552.103 of the Government Code for the submitted information that is not encompassed by section 552.022(a). 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.
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> . . .
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> (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 claims section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. 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).

You state the rest of the submitted information is related to two criminal cases pending in the county court at law of Kerr County. You indicate the cases were pending when the department received the present request for information. You explain the former sheriff's deputy to whom the remaining information pertains is now an officer of the Kerrville Police Department. You state the former deputy made the arrest that resulted in the pending charges and will be a testifying witness at the trials. We note the department is not a party to the pending cases and thus does not have a litigation interest in the cases for purposes of section 552.103. *See* Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990) (statutory predecessor to Gov't Code § 552.103 only applies when governmental body is party to litigation). Under these circumstances, we require an affirmative representation from the governmental body with the litigation interest that it wants the information at issue withheld from disclosure under section 552.103. You inform us the requestor is an attorney for the defendant in the pending cases. You state the county anticipates the requestor "would make issue of [the former deputy's] training, experience, and qualifications reflected in [his] personnel file at trial [and] would attempt to use information within [the former deputy's] personnel file for impeachment purposes and to attack [the former deputy's] credibility." Thus, we understand you to assert, as county attorney for Kerr County, that release of the remaining information would interfere with the county's prosecution of the pending cases. Based on your representations, we conclude the department may withhold the submitted information that is not encompassed by section 552.022(a) of the Government Code on behalf of the county under section 552.103 of the Government Code.

In reaching this conclusion, we assume the opposing party in the pending cases has not seen or had access to any of the information in question. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. If the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We also 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).

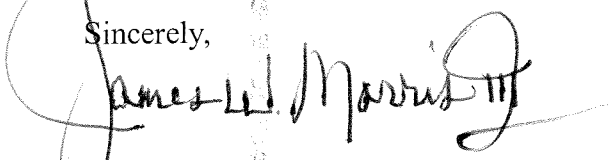
In summary, the department (1) must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the ADA, section 1701.454

of the Occupations Code, and common-law privacy; (2) must withhold the information we have marked under section 552.102(a) of the Government Code; (3) must withhold the information we have marked under section 552.117(a)(2) of the Government Code; (4) must withhold the information we have marked under section 552.130 of the Government Code; (5) must release the rest of the marked information encompassed by section 552.022(a)(1) of the Government Code; (6) must release the marked job description under section 552.022(a)(15) of the Government Code if it is considered to be open to the public under the department's policies; and (7) may withhold the rest of the submitted information under section 552.103 of the Government Code.[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,



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

JWM/em

Ref: ID# 426636

Enc: Submitted documents

c: Requestor
(w/o enclosures)

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[3]We note Open Records Decision No. 684 (2009) is a previous determination issued by this office authorizing all governmental bodies to withhold ten categories of information without the necessity of requesting an attorney general decision, including a Texas license plate number under section 552.130 of the Government Code.