



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 19, 2011

Mr. John Kelley
Director
Morris County Community Supervision and Corrections Department
500 Broadnax Street
Daingerfield, Texas 75638

OR2011-13488

Dear Mr. Kelley:

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# 430283.

The Morris County Community Supervision and Corrections Department (the "department") received a request for (1) a copy of a named probation officer's personnel file, (2) the names and cause numbers for each individual currently supervised by this officer, and (3) a copy of a specified department telephone bill, including all incoming and outgoing calls. You state the department has released the requested telephone bill, which includes a detailed account of all outgoing calls. You also state the department has no record of incoming calls.¹ You indicate a portion of the submitted information is not subject to the Act. You also claim the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.103 of the Government Code.² We have considered your arguments and reviewed the submitted representative sample of information.³

¹We note the Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

²We understand you to assert sections 552.101 and 552.103 of the Government Code based on the substance of your arguments.

³We assume 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 those records contain substantially different types of information than that submitted to this office.

Initially, we note some of the submitted information is not responsive to the request because it was created after the date the request was received. This decision does not address the public availability of the non-responsive information, which we marked, and that information need not be released in response to the present request.

Next, you indicate a portion of the submitted information is not subject to the Act. The Act generally requires the disclosure of information maintained by a “governmental body.” *See* Gov’t Code § 552.021. Although the Act’s definition of a “governmental body” is broad, it specifically excludes “the judiciary.” *See id.* § 552.003(1)(A)-(B). In Open Records Decision No. 646 (1996), this office determined that a community supervision and corrections department is a governmental body for the purposes of the Act and that its administrative records, such as personnel records and other records reflecting day-to-day management decisions, are subject to the Act. ORD 646 at 5. We further concluded, however, that specific records held by a community supervision and corrections department regarding individuals on probation and subject to the direct supervision of a court are not subject to the Act because such records are held on behalf of the judiciary. *Id.*; *see* Gov’t Code § 552.003.

You inform us the information at issue pertains to probationers who are under the supervision of the department. Based on your representations and our review, we find this information, which we have marked, constitutes records held by the department on behalf of the judiciary and is not subject to disclosure under the Act. *See* ORD 646 at 2-3; *see also Benavides v. Lee*, 665 S.W.2d 151 (Tex. App.—San Antonio 1983, no writ) (in determining whether governmental entity falls within judiciary exception, attorney general looks to whether governmental entity maintains relevant records as agent of judiciary with regard to judicial, as opposed to administrative, functions).

Next, we must address the department’s procedural obligations under the Act. Section 552.301 of the Government Code prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(e), a governmental body that receives a request for information it wishes to withhold under the Act is required to submit to this office within fifteen-business-days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See* Gov’t Code § 552.301(e). You state the department received the instant request for information June 20, 2011. Accordingly, the department’s fifteen-business-day deadline was July 12, 2011. However, the envelope containing the written request for information and the representative sample of the specific information requested bears a meter mark showing it was mailed on July 13, 2011. *See id.* § 552.308(a) (describing rules for calculating submission dates of documents sent via first class United States mail). Thus, we find the department failed to comply with the requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *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, 381-82 (Tex. App.—Austin 1990, no writ); Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). We note section 552.103 of the Government Code is discretionary in nature. Section 552.103 serves only to protect a governmental body's interests, and may be waived; as such, it does not constitute a compelling reason to withhold information for purposes of section 552.302. *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 Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (waiver of discretionary exceptions). Thus, no portion of the remaining information may be withheld under section 552.103. However, because sections 552.101 and 552.102 of the Government Code can provide compelling reasons to withhold information, we will consider the applicability of your claims under these exceptions for the remaining information. We note some of this information may be subject to sections 552.117, 552.130, 552.136, and 552.137 of the Government Code, which can also provide compelling reasons to withhold information.⁴ Accordingly, we will also consider the applicability of these sections to the remaining information.

You raise section 552.101 of the Government Code in conjunction with section 76.006(g) of the Government Code for the remaining information. Section 552.101 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 that other statutes make confidential. Section 76.006(g) provides that "[a] document evaluating the performance of an officer of the department who supervises defendants placed on community supervision is confidential." *Id.* § 76.006(g). The term "department" in this section "means a community supervision and corrections department established under [chapter 76 of the Government Code]." *Id.* § 76.001(4). Upon review, we find the submitted employee evaluation form, which we have marked, evaluates the performance of an officer of the department for purposes of section 76.006(g). Accordingly, the department must withhold the marked employee evaluation form under section 552.101 in conjunction with section 76.006(g). However, we find that none of the remaining information evaluates the performance of an officer of the department. Thus, no portion of the remaining information may be withheld under section 552.101 in conjunction with section 76.006(g).

⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Section 552.101 of the Government Code 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 established. *Id.* at 681-82. This office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally protected by common-law privacy. See Open Records Decision No. 600 (1992) (finding personal financial information to include employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care). We note, however, there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. See generally Open Record Decision No. 545 (1990) (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common-law privacy). Upon review, we conclude that the information we have marked is highly intimate or embarrassing and of no legitimate public interest. Therefore, the department must withhold this information under section 552.101 in conjunction with common-law privacy. However, none of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy.

You raise section 552.102 of the Government Code for the remaining information. This section 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 department must withhold the birth date we have marked in the remaining information under section 552.102(a).

We note portions of the remaining information are subject to section 552.117(a)(6) of the Government Code. This section excepts from disclosure the home address, home telephone number, emergency contact information, social security number, and family member information of an officer or employee of a community supervision and corrections department established under chapter 76 of the Government Code who performs a duty described by section 76.004(b), regardless of whether the officer or employee complies with section 552.024 or 552.1175 of the Government Code. 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)(6)). We note section 552.117 encompasses personal cellular telephone and home facsimile numbers, provided the employee pays for the cellular or facsimile service with his or her personal funds. See Open Records Decision No. 506 at 5-6 (1998) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). The submitted information reveals that the named probation officer supervises defendants

placed on community supervision, which is a duty described by section 76.004(b). *See* Gov't Code § 76.004(b). Accordingly, we conclude the department must withhold the officer's personal information, which we have marked, under section 552.117(a)(6). However, the department may only withhold the marked cellular telephone number and facsimile number if the officer pays for the cellular and facsimile services with personal funds.

We also note some of the remaining information is subject to section 552.130 of the Government Code. This section provides that information relating to a 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)(2)). Therefore, the department must withhold the vehicle identification numbers we have marked under section 552.130.

The remaining information includes an insurance policy number. Section 552.136 of the Government Code provides that "[n]otwithstanding any other provision of this chapter, 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. Gov't Code § 552.136(b), *see also id.* § 552.136(c) (defining "access device"). This office has determined that insurance policy numbers are subject to section 552.136. Accordingly, the department must withhold the insurance policy number we have marked under section 552.136.

Finally, the remaining information contains personal e-mail addresses. Section 552.137 of the Government Code 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). *Id.* § 552.137(a)-(c). The e-mail addresses at issue are not specifically excluded by section 552.137(c). As such, the e-mail addresses, which we have marked, must be withheld under section 552.137, unless the owners of the addresses have affirmatively consented to their release.⁵ *See id.* § 552.137(b).

In summary, we have marked the information that is not subject to disclosure under the Act. The department must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 76.006(g) of the Government Code and common-law privacy. The department must withhold the information we marked under section 552.102(a) of the Government Code. The department must withhold the information we marked under section 552.117 of the Government Code; however, the marked cellular telephone number and facsimile number may only be withheld if the officer pays for the cellular and facsimile services with personal funds. The department must withhold the information we marked under sections 552.130 and 552.136 of the Government Code. The

⁵We 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 an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

department must withhold the e-mail addresses we marked under section 552.137 of the Government Code, unless the owners have affirmatively consented to their disclosure. 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, 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# 430283

Enc. Submitted documents

c: Requestor
(w/o enclosures)