



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 13, 2012

Lieutenant Carol Taylor
Communications/Records Commander
Taylor County Sheriff's Office
450 Pecan Street
Abilene, Texas 79602-1692

OR2012-03734

Dear Lieutenant Taylor:

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# 447937.

The Taylor County Sheriff's Office (the "sheriff's office") received requests for personnel files related to a named former officer, internal investigations related to any disciplinary action taken against the officer, materials provided to, utilized by, considered by, or produced by an Incident Review Board considering the officer, and certain in-car videos and e-mails.¹ You advise the sheriff's office no longer has the officer's personnel file.² You claim the submitted information is excepted from disclosure under sections 552.103 and 552.108 of

¹You note the sheriff's office sought and received clarifications of the information requested. *See* Gov't Code § 552.222 (providing if a request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding when a governmental body, acting in good faith, requests a clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²We note the 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).

the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.103 of the Government Code 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.

...

(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 an exception to disclosure under 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, orig. proceeding); *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).*

In order to demonstrate that litigation is reasonably anticipated, the governmental body must provide this office "concrete evidence showing that the claim that litigation might ensue is more than a mere conjecture." *Open Records Decision No. 452 at 4 (1986).* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* We note the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. *See Open Records Decision No. 361 (1983).*

You state the sheriff's office reasonably anticipates litigation because the former officer has hired an attorney, the requestor, and the requestor referred to a document in his request as "exhibit A." You also submitted a letter from the requestor advising that he intends to appeal the decision to terminate his client by requesting a hearing before the sheriff. However, you have not explained how such an appeal is considered litigation for purposes of

section 552.103 of the Government Code. *See* Open Records Decision No. 588 (1991); *see also* Gov't Code § 552.301(e)(1) (requiring governmental body to explain applicability of raised exception). Thus, we find you have failed to establish the sheriff's office reasonably anticipated litigation when it received the present request for information. Therefore, none of the submitted information may be withheld on the basis of section 552.103 of the Government Code.

You raise section 552.108(b)(2) as an exception to disclosure of the submitted information. Section 552.108(b)(2) excepts from disclosure “[a]n 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 . . . if . . . 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(b)(2). A governmental body claiming section 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) (governmental body must provide comments explaining why exceptions raised should apply to information requested). We note section 552.108(b)(2) 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). You state the submitted information relates only to an internal record of the Incident Review Board investigation of the former officer. You further state the Incident Review Board investigation did not result in conviction or deferred adjudication. However, you do not indicate whether there was a criminal investigation or prosecution of the former officer. We therefore conclude you have failed to demonstrate the applicability of section 552.108(b)(2). Accordingly, the sheriff's office may not withhold any of the submitted information on the basis of section 552.108(b)(2) of the Government Code.

We understand you to raise section 552.108(b)(1) of the Government Code as an exception to disclosure of the submitted DVDs of in-car video footage. Section 552.108(b)(1) excepts from disclosure “[a]n 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 . . . 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) is intended to protect “information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State.” *City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no writ). To prevail on its claim that subsection 552.108(b)(1) excepts information from disclosure, a governmental body must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement.

Instead, the governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. *See* Open Records Decision No. 562 at 10 (1990) (construing statutory predecessor). In addition, generally known policies and techniques may not be withheld under section 552.108. *See, e.g.,* Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common law rules, and constitutional limitations on use of force are not protected under law enforcement exception), 252 at 3 (1980) (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* Open Records Decision No. 409 at 2 (1984) (construing statutory predecessor). You argue release of the submitted DVDs would disclose the fact that sheriff's office vehicles are equipped with an in-car video system and would allow for theft of or damage to the in-car video systems. Upon review, we find you have failed to demonstrate how release of the submitted DVDs would interfere with law enforcement and crime prevention under section 552.108(b)(1). Accordingly, the sheriff's office may not withhold the submitted DVDs under section 552.108(b)(1) of the Government Code.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."³ Gov't Code § 552.101. The submitted information contains L-2 Declaration of Medical Condition and L-3 Declaration of Psychological and Emotional Health forms required by the Texas Commission on Law Enforcement Officers Standards and Education ("TCLEOSE"). These forms are subject to section 1701.306 of the Occupations Code, which is encompassed by section 552.101 of the Government Code. Section 1701.306 provides:

(a) [TCLEOSE] may not issue a license to a person unless the person is examined by:

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a blood test or other medical test.

(b) An agency hiring a person for whom a license is sought shall select the examining physician and the examining psychologist or psychiatrist. The

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to [TCLEOSE]. A declaration is not public information.

Occ. Code § 1701.306(a)-(b). Thus, the sheriff's office must withhold the submitted L-2 and L-3 declarations, which we have marked, under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.

Section 552.101 of the Government Code also encompasses section 1701.454 of the Occupations Code, which governs the public availability of information submitted to TCLEOSE under subchapter J of chapter 1701 of the Occupations Code. Section 1701.454 provides as follows:

(a) All information submitted to [TCLEOSE] 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.

(b) Except as provided by this subchapter, a [TCLEOSE] member or other person may not release information submitted under this subchapter.

Id. § 1701.454. The submitted information contains four F-5 Report of Separation of Licensee reports. The F-5 reports state the officer at issue resigned or was terminated for reasons other than substantiated incidents of excessive force or violations of the law other than traffic offenses. Therefore, the sheriff's office must withhold the submitted F-5 reports, 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 also encompasses section 611.002 of the Health and Safety Code. Section 611.002 of the Health and Safety Code applies to “[c]ommunications between a patient and a professional, [and] records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional.” Health & Safety Code § 611.002; *see also id.* § 611.001 (defining “patient” and “professional”). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See id.* §§ 611.004, .0045; Open Records Decision No. 565 (1990). We have marked a mental health record related to the requestor's client that is subject to section 611.002 of the Health and Safety Code. The mental health record must be released if the requestor is authorized to obtain the record under sections 611.004 and 611.0045 of the Health and Safety Code. *See* Health & Safety Code § 611.004(a)(4) (professional may disclose confidential information to person who has patient's written consent).

Section 552.101 also encompasses the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code, which pertains to medical records. *See* Occ. Code

§§ 151.001-165.160. *See* Occ. Code §§ 151.001-165.160. 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 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. 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. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We have marked a medical record regarding the requestor's client in the submitted information that is subject to the MPA. The sheriff's office must withhold this information under section 552.101 of the Government Code in conjunction with section 159.002 of the Occupations Code unless it receives written consent for the release of the record that complies with sections 159.004 and 159.005 of the MPA.

Section 552.101 also encompasses section 550.065(b) of the Transportation Code, which states that except as provided by subsection (c), accident reports are privileged and confidential. *See* Transp. Code § 550.065. Section 550.065(c)(4) provides for the release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *Id.* § 550.065(c)(4). The submitted information contains a CR-3 accident report form. The requestor has not provided the sheriff's office with two of the three requisite pieces of information specified by the statute. Accordingly, the sheriff's office must withhold the CR-3 accident report form, which we have marked, under section 552.101 of the Government Code in conjunction with section 550.065(b) of the Transportation Code.

Section 552.101 also encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus Found. v. Tex Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included 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. 540 S.W.2d at 683. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 343 (1982) (references in emergency medical records to drug overdoses, acute alcohol intoxication, obstetrical or gynecological operations illnesses, convulsions or seizures, and emotional or mental distress), 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure). The submitted information contains information that is highly intimate or embarrassing and of no legitimate concern to the public. Therefore, the sheriff's office must withhold the information we have indicated on the DVD labeled "4/5" under section 552.101 of the Government Code in conjunction with common-law privacy.

The submitted documents, DVDs, and CDs contain information subject to section 552.130 of the Government Code. Section 552.130 of the Government Code provides that information related to a motor vehicle operator's license or driver's license, title, or registration issued by a Texas agency, or an agency of another state or country, is excepted from public release. Gov't Code § 552.130(a)(1), (2). Accordingly, the sheriff's office must withhold the information we have marked in the submitted documents and the information we have indicated on the submitted DVDs and CDs.

In summary, the sheriff's office must withhold the L-2 and L-3 forms we have marked under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code. The sheriff's office must withhold the F-5 reports we have marked under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code. The sheriff's office must release the marked mental health record if it receives proper authorization for release of the record under sections 611.004 and 611.0045 of the Occupations Code. The sheriff's office must release the marked medical record if it receives proper consent pursuant to the MPA. The sheriff's office must withhold the CR-3 form we have marked under section 552.101 of the Government Code in conjunction with section 550.065 of the Transportation Code. The sheriff's office must withhold the information we have indicated under section 552.101 of the Government Code in conjunction with common-law privacy. The sheriff's office must withhold the information we have marked in the submitted documents and the information we have indicated on the

submitted DVDs and CDs under section 552.130 of the Government Code. The remaining information must be released.⁴

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,



Jessica Marsh
Assistant Attorney General
Open Records Division

JM/em

Ref: ID# 447937

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴The requestor, as the authorized representative of the subject of the information, has a right of access to some of the information being released. See Gov't Code § 552.023(b) (governmental body may not deny access to person to whom information relates, or that person's representative, solely on grounds that information is considered confidential by privacy principles). Because this information would be confidential with respect to the general public, if the sheriff's office receives another request for this information from a different requestor, the sheriff's office must again seek a ruling from this office.