



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 23, 2012

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

OR2012-04336

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# 448355.

The Kerr County Sheriff's Office (the "sheriff's office") received two requests from the same requestor for the personnel records of a sheriff's office deputy and a former deputy. You claim the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.117, and 552.1175 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information, which we have marked, is not responsive to the instant request because it does not pertain to records of the named deputy or former deputy. This ruling does not address the public availability of the non-responsive information, and the sheriff's office is not required to release such information in response to this request.

Next, we note some of the responsive information falls within the scope of section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or 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;

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(1), (17). The responsive information includes completed reports, completed evaluations, and a document filed with a court. The completed reports and evaluations must be released pursuant to section 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code, the Act, or other law. We note you do not claim section 552.108. In addition, a document that has been filed with a court is expressly public under section 552.022(a)(17) of the Government Code and may not be withheld unless it is confidential under other law. *See id.* § 552.022(a)(17). 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). Section 552.103 does not make information confidential under the Act. Therefore, the sheriff's office may not withhold any of the information encompassed by section 552.022 under section 552.103. Additionally, we note information that has been filed with a court is not protected by common-law privacy. *See Star-Telegram v. Walker*, 834 S.W.2d 54 (Tex. 1992) (common-law privacy not applicable to court-filed document). You also claim sections 552.101, 552.102, 552.117, and 552.1175 of the Government Code, which make information confidential under the Act. We also note some of the information encompassed by section 552.022 falls within the scope of section 552.130 of the Government Code, which also makes information confidential under the Act.¹ Accordingly, we will address the applicability of sections 552.101, 552.102, 552.117, 552.1175, and 552.130 to the information encompassed by section 552.022. 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 section encompasses information that other statutes make confidential, such as section 550.065(b) of the Transportation Code. The responsive information contains a CR-3 accident form subject to section 550.065. This section provides that, except as provided by subsection (c) or subsection (e), accident reports are privileged and confidential. Transp. Code § 550.065. Section 550.065(c)(4) of the Transportation Code, however,

¹The 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).

requires 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). In this instance, 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 we have marked under section 552.101 in conjunction with section 550.065(b).

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. The type of information considered intimate or 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. *Id.* 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 No. 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure). Upon review, we find some of the information subject to section 552.022(a)(1) of the Government Code is highly intimate or embarrassing and not a matter of legitimate public interest. Accordingly, the sheriff's office must withhold this information, which we have marked, under section 552.101 in conjunction with common-law privacy. However, we find none of the remaining information subject to section 552.022(a)(1) is highly embarrassing or intimate information and of no legitimate public concern. Consequently, the sheriff's office may not withhold any of the remaining information at issue under section 552.101 in conjunction with common-law privacy.

You also raise section 552.102 of the Government Code in conjunction with the doctrine of common-law privacy. *See Indus. Found.*, 540 S.W.2d at 685. 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 Third Court of Appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court has disagreed with *Hubert's* interpretation of section 552.102(a) and held its privacy standard differs from the *Industrial Foundation* test. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336, 342 (Tex. 2010). The 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 346. Having carefully reviewed the information at issue, we have marked the information that must be withheld under section 552.102(a). The remaining information subject to section 552.022

of the Government Code is not excepted under section 552.102(a) and may not 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, emergency contact information, social security number, and family member information regardless of whether the peace officer made an election under section 552.024 of the Government Code. Gov't Code § 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 have marked information pertaining to the named deputy and former deputy. The sheriff's office must withhold the marked information pertaining to the named deputy under section 552.117(a)(2). Additionally, to the extent the former deputy is currently a licensed peace officer, the sheriff's office must withhold the marked information pertaining to him under section 552.117(a)(2).

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024. *See* Gov't Code § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request under section 552.024 the information be kept confidential. You have submitted an election form showing the named former deputy elected to keep his personal information confidential. Thus, to the extent the named former deputy is no longer a licensed peace officer, the sheriff's office must withhold the marked information pertaining to the former deputy under section 552.117(a)(1).

Section 552.1175 of the Government Code also excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of, among other individuals, a peace officer as defined by article 2.12 of the Code of Criminal Procedure if the officer elects to restrict such information. Gov't Code § 552.1175(a)(1), (b). Section 552.1175 applies to information a governmental body does not hold in its capacity as an employer. Upon review, we find none of the remaining information subject to section 552.022 of the Government Code pertains to peace officers who are not employees of the sheriff's office. Accordingly, none of the remaining information subject to section 552.022 may be withheld pursuant to section 552.1175.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's or driver's license or permit, a motor vehicle title or registration, or a personal

identification document issued by an agency of this state or another state or country is excepted from public release. *Id.* § 552.130(a). Accordingly, the sheriff's office must withhold the information we have marked under section 552.130.

Next, we address your claim under section 552.103 of the Government Code for the responsive information that is not encompassed by section 552.022(a)(1). 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.

...

(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 responsive information is related to a criminal case pending in the county court at law of Kerr County. You inform us this case was pending when the sheriff's office received the present request for information. You state the deputy and former deputy at issue were present during the arrest that resulted in the pending charges and will be potential testifying witnesses at the trial. We note the sheriff's office is not a party to the pending case and thus does not have a litigation interest in the case 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 case. You state the county anticipates the requestor “would make issue of [the deputies’] training, experience, and qualifications reflected in their personnel files at trial [and] would attempt to use information within their personnel files for impeachment purposes and to attack the [d]eputies’ credibility.” Thus, we understand you to assert, as county attorney for Kerr County, that release of the remaining responsive information would interfere with the county’s prosecution of the pending case. Based on your representations, we conclude the sheriff’s office may withhold the remaining responsive information that is not encompassed by section 552.022 of the Government Code on behalf of the county under section 552.103.²

In reaching this conclusion, we assume the opposing party in the pending case 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, with regards to the information we marked as being subject to section 552.022(a)(1) of the Government Code, the sheriff’s office must (1) withhold the CR-3 accident report form under section 552.101 of the Government Code in conjunction with section 550.065(b) of the Transportation Code, (2) withhold the information we have marked under section 552.101 in conjunction with common-law privacy, (3) withhold the information we have marked under section 552.102(a) of the Government Code, (4) withhold the marked information pertaining to the named deputy, as well as the former deputy to the extent he is currently a licensed peace officer, under section 552.117(a)(2) of the Government Code, (5) withhold the marked information pertaining to the former deputy under section 552.117(a)(1) of the Government Code, to the extent he is no longer a licensed peace officer, (6) the information we have marked under section 552.130 of the Government Code, and (7) release the remaining information subject to section 552.022.³ The remaining responsive information may be withheld under section 552.103 of the Government Code.

²As our ruling for this information is dispositive, we need not address your remaining arguments against its release.

³We note the information being released 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(b).

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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/ag

Ref: ID# 448355

Enc. Submitted documents

c: Requestor
(w/o enclosures)