



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 23, 2012

Ms. Myrna S. Reingold
Legal Department
Galveston County
722 Moody, 5th Floor
Galveston, Texas 77550-2317

OR2012-05776

Dear Ms. Reingold:

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# 451245.

The Galveston County Constable's Office, Precinct 7 (the "constable's office") received a request for copies of communications, call logs, and litigation documents related to a named former deputy. You state you have released some of the requested information. You claim the remaining requested information is excepted from disclosure under sections 552.103, 552.108, 552.117, 552.1175, 552.137, and 552.147 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the information you seek to withhold under section 552.103 of the Government Code is included in the information you state you have released to the requestor. Section 552.007 of the Government Code provides that, if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983)

¹Although you also raise section 552.101 of the Government Code, you have provided no arguments regarding the applicability of this section. Therefore, we assume you no longer assert section 552.101 of the Government Code. *See* Gov't Code §§ 552.301(b), (e), .302.

(governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Section 552.103 does not prohibit the release of information or make information confidential by law. *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. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived). Thus, the constable's office may not now withhold the information we have marked under section 552.103. However, we will consider your arguments for any submitted information not previously released to the requestor.

Section 552.103 of the Government Code provides in part the following:

(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 constable's office has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date of the receipt of the request for information and (2) the information at issue is related to the pending or anticipated 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 constable's office must meet both prongs of this test for information to be excepted under section 552.103(a).

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* This office has stated that a pending Equal Employment Opportunity Commission ("EEOC") complaint indicates that litigation is reasonably anticipated. *See* Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You inform us, and provide documentation showing, that prior to the constable's office's receipt of the instant request, the named deputy at issue filed an EEOC complaint against the constable's office. You state the information marked under section 552.103 relates to the EEOC complaint. Based on your representations and our review, we find you have demonstrated that the information you have marked under section 552.103 is related to litigation that was reasonably anticipated at the time the constable's office received the request for information. Thus, we conclude section 552.103(a) of the Government Code is applicable and, with the exception of the document that was previously released, the constable's office may withhold the information you have marked under section 552.103.

We note that 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 that litigation to obtain it through discovery procedures. *See* ORD 551 at 4-5. Therefore, if the opposing party has seen or had access to information relating to anticipated litigation through discovery or otherwise, there is no interest in withhold such information from public disclosure. Open Records Decision No. 349 (1982), 320 (1982). However, information accessed by the opposing party in the usual scope of employment is not considered to have been obtained by the opposing party to the anticipated litigation and thus, may be withheld under section 552.103. We note the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 at 3 (1982).

Section 552.108(a) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime.” Gov’t Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov’t Code §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). We note section 552.108 is generally not applicable to information relating to an administrative investigation that did not result in a criminal investigation or prosecution. *See 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); *see also* Open Records Decision No. 350 at 3-4 (1982). You state that the information marked under section 552.108 relates to a pending criminal investigation and release of the information would interfere with that investigation. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Based on your representations and our review, we conclude section 552.108(a)(1) is applicable to the information you have marked under section 552.108 of the Government Code and it may be withheld on that basis.

You seek to withhold the cellular telephone numbers of a Galveston County Sheriff's Office deputy and the City of Dickinson police chief under section 552.108. Section 552.108(b)(1) of the Government Code excepts from required public disclosure an internal record of a law enforcement agency 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). A governmental body that seeks to withhold information under section 552.108(b)(1) must sufficiently explain how and why the release of the information would interfere with law enforcement and crime prevention. *See id.* § 552.301(e)(1)(A); *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.) (section 552.108(b)(1) protects information that, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws); Open Records Decision Nos. 562 at 10 (1990), 531 at 2 (1989). In Open Records Decision No. 506 (1988), this office determined that the statutory predecessor to section 552.108(b) excepted from disclosure "cellular mobile phone numbers assigned to [governmental body] officials and employees with specific law enforcement responsibilities." Open Records Decision No. 506 at 2 (1988). We noted that the purpose of the cellular telephones was to ensure immediate access to individuals with specific law enforcement responsibilities and that public access to these numbers could interfere with that purpose. *Id.* However, you have provided no representation from the Galveston County Sheriff's Office or the Dickinson Police Department that the release of the work cellular telephone number of the sheriff's deputy or the cellular telephone number of the chief of police would interfere with law enforcement and crime prevention. As such, these cellular telephone numbers may not be withheld under section 552.108(b)(1) of the Government Code.

Section 552.117(a)(2) of the Government Code excepts from public 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 peace officer has family members, regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code. *See* 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 note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). In this instance, the information at issue concerns peace officers as defined by article 2.12. You inform us the cellular telephones at issue are personal telephones. Therefore, the constable's office must withhold the information we have marked under section 552.117(a)(2) of the Government Code.

Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, emergency contact information, 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 of the Government Code. *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 provided documentation showing the individual at issue timely requested confidentiality under section 552.024. Therefore, the constable's office must withhold the personal cellular telephone number we have marked under section 552.117(a)(1).

Section 552.1175 of the Government Code applies to information that the constable's office does not hold in an employment context that concerns peace officers as defined by Article 2.12, Code of Criminal Procedure. Gov't Code § 552.1175(a)(1). If the requested information concerns an individual listed in section 552.1175(a), then section 552.1175(b) provides:

(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:

(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.

Gov't Code § 552.1175(b). Section 552.1175 also excepts from disclosure the personal cellular telephone number of peace officers if the service is not paid for by a governmental body. *See* ORD 506. We have marked the City of Dickinson police chief's cellular telephone number under section 552.1175. To the extent that the number is a personal cellular telephone number, service of which is paid for with personal funds, the constable's office must withhold this number under section 552.1175 if the police chief elects to restrict access to this information in accordance with section 552.1175(b).

Section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle operator's or driver's license or permit or motor vehicle title or registration

issued by an agency of this state or another state or country.² Gov't Code § 552.130(a). Therefore, the constable's office must withhold the license plate number we have marked pursuant to section 552.130.

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 owner of the e-mail address consents to its release or the e-mail address falls within the scope of section 552.137(c). *See id.* § 552.137(a)-(c). Section 552.137 is not applicable to the work e-mail address of an employee of a governmental body because such an address is not that of the employee as a "member of the public" but is instead the address of the individual as a government employee. The constable's office must withhold the e-mail addresses you have marked under section 552.137 of the Government Code unless the owners affirmatively consent to their public disclosure.³

Section 552.147 of the Government Code provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. *Id.* § 552.147(a). Therefore, the constable's office may withhold the social security numbers you have marked under section 552.147(a).⁴

In summary, with the exception of the previously released page, the constable's office may withhold the information you have marked under section 552.103(a) of the Government Code. The constable's office may withhold the information you have marked under section 552.108(a)(1) of the Government Code. The constable's office must withhold the information we have marked under section 552.117(a)(2) of the Government Code. The constable's office must withhold the personal cellular telephone number we have marked under section 552.117(a)(1). The constable's office must withhold the cellular telephone number we have marked under section 552.1175 if the number is a personal cellular telephone number, service of which is paid for with personal funds and the police chief elects to restrict access to this information in accordance with section 552.1175(b) of the Government Code. The constable's office must withhold the license plate number we have

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

³We note Open Records Decision No. 684 (2009) is 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 opinion.

⁴We note 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. *Id.* § 552.147(b).

marked under section 552.130 of the Government Code. The constable's office must withhold the e-mail addresses you have marked under section 552.137 of the Government Code unless the owners affirmatively consent to their public disclosure. The constable's office may withhold the social security numbers you have marked under section 552.147(a) of the Government Code. 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,



Benjamin A. Bellomy
Assistant Attorney General
Open Records Division

BAB/sdk

Ref: ID# 451245

Enc. Submitted documents

c: Requestor
(w/o enclosures)