



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 15, 2012

Ms. Elizabeth Lutton
Legal Advisor
Dallas County Sheriff's Department
133 North Riverfront Boulevard, LB-31
Dallas, Texas 75207-4313

OR2012-12874

Dear Ms. Lutton:

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# 461968.

The Dallas County Sheriff's Department (the "department") received a request for disciplinary reports, complaints, and internal affairs investigation records regarding four named officers of the department. You claim the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the information you submitted.

We first note some of the submitted information neither consists of nor pertains to a disciplinary report, a complaint, or an internal affairs investigation. Therefore, that information, which we have marked, is not responsive to the present request for information. This decision does not address the public availability of information that is not responsive to the request, and the department need not release such information in response to the request.

We also note a variety of information has been redacted from the responsive records you submitted. Section 552.301 of the Government Code prescribes procedures a governmental body must follow in asking this office to determine whether requested information is excepted from public disclosure. *See* Gov't Code § 552.301(a). Section 552.301(e) requires a governmental body to submit the specific information at issue to this office, or representative samples if the information is voluminous, unless the governmental body is authorized to withhold the information pursuant to sections 552.024(c), 552.130(c),

552.136(c), or 552.147(b) of the Government Code or a previous determination.¹ *See id.* § 552.301(e)(1)(D); Open Records Decision No. 673 (2001) (previous determinations). In this instance, we are able to ascertain the nature of the redacted information and will determine whether it is excepted from public disclosure. In the future, the department should refrain from redacting any information from records submitted to this office in connection with a request for a decision under the Act, unless the department has specific authority to withhold the information pursuant to a statute or a previous determination. *See Gov't Code* §§ 552.301(a), .302; ORD 673.

We next note most of the responsive 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 excepted from disclosure under section 552.108 of the Government Code or made confidential under the Act or other law. *Gov't Code* § 552.022(a)(1). In this instance, most of the submitted information is contained in completed investigations made by the department, which we have marked. You do not claim an exception to disclosure under section 552.108 of the Government Code. Although you seek to withhold the information encompassed by section 552.022(a)(1) under section 552.103 of the Government Code, that section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *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 *Gov't Code* § 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 does not make information confidential for purposes of section 552.022(a)(1). Therefore, the department may not withhold any of the responsive information encompassed by section 552.022(a)(1) under section 552.103 of the Government Code. We note sections 552.101, 552.102, 552.117, and 552.130 of the Government Code are applicable to

¹Section 552.024(c) authorizes a governmental body to withhold a current or former official or employee's home address and home telephone number, emergency contact information, social security number, and information that reveals whether the employee has family members, to the extent the employee chooses not to allow public access to the information, without requesting a decision. *See Gov't Code* § 552.024(c). Section 552.130(c) authorizes a governmental body to redact information protected by section 552.130(a)(1) and (3) without requesting a decision. *See id.* § 552.130(c); *see also id.* § 552.130(d)–(e) (requestor may appeal governmental body's decision to withhold information under section 552.130(c) to attorney general, and governmental body withholding information pursuant to section 552.130(c) must provide notice to requestor). Section 552.136(c) authorizes a governmental body to redact information protected by section 552.136(b) without requesting a decision. *See id.* § 552.136(d)–(e) (requestor may appeal governmental body's decision to withhold information under section 552.136(c) to attorney general, and governmental body withholding information pursuant to section 552.136(c) must provide notice to requestor). Section 552.147 authorizes a governmental body to redact a living person's social security number without requesting a decision. *See id.* § 552.147(b). Open Records Decision No. 684 (2009) is a previous determination issued by this office authorizing all governmental bodies to withhold several categories of information without requesting a decision. Open Records Decision No. 670 (2001) grants a previous determination authorizing all governmental bodies to withhold personal information related to a peace officer under the statutory predecessor to section 552.117(a)(2) of the Government Code. *See* ORD 670 at 6.

some of the information encompassed by section 552.022(a)(1).² As those sections make information confidential for purposes of section 552.022(a)(1), we will address sections 552.101, 552.102, 552.117, and 552.130. We also will address your claim under section 552.103 for the responsive information that is not subject to section 552.022(a)(1).

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 governmental body that claims an exception to disclosure under section 552.103 bears 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 contend the responsive information that is not encompassed by section 552.022(a)(1) is related to a pending criminal prosecution. You do not inform us, however, that the department either is or could become a party to the prosecution. *See Gov't Code § 552.103(a), (c); Open Records Decision No. 575 at 2 (1990)* (“To warrant protection under [Gov't Code § 552.103], the information must be related to pending or reasonably anticipated litigation to which the [governmental body claiming the exception] is a party.”). Under such circumstances, we require an affirmative representation from the governmental entity with the litigation interest that it wishes to have the information at issue withheld from

²This office will raise sections 552.101, 552.102, 552.117, and 552.130 on behalf of a governmental body, as these sections are mandatory exceptions to disclosure. *See Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).*

disclosure under section 552.103. Because you have not provided such a representation, we conclude the department may not withhold any of the responsive information under section 552.103 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.” Gov’t Code § 552.101. This exception 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 encompasses the specific types of information held to be intimate or embarrassing in *Industrial Foundation*. *See* 540 S.W.2d at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has determined other types of information also are private under section 552.101. *See generally* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private). We have marked information 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.

Section 552.102(a) of the Government Code 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 has 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. *See Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336, 348 (Tex. 2010). We have marked a birth date the department must withhold under section 552.102(a) of the Government Code.

Section 552.117(a)(2) of the Government Code 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* Gov’t Code §§ 552.117, .024. Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. We note section 552.117(a)(2) protects a peace officer’s personal cellular telephone number or pager number if the officer pays for the cellular telephone or pager service with his or her personal funds. *See* Open Records Decision No. 670 at 6 (2001). We have marked information the department must withhold under section 552.117(a)(2) of the Government Code, provided that any cellular telephone number at issue belongs to an officer who pays for the cellular telephone service with the officer’s personal funds.

Section 552.130 of the Government Code excepts from disclosure information related to a motor vehicle operator’s or driver’s license or permit issued by an agency of this state or

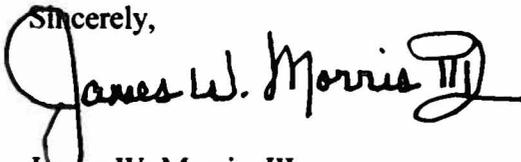
another state or country. *See* Gov't Code § 552.130(a)(1). We have marked driver's license information the department must withhold under section 552.130 of the Government Code.

In summary, the department must withhold (1) the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy; (2) the marked birth date under section 552.102(a) of the Government Code; (3) the information we have marked under section 552.117(a)(2) of the Government Code, provided that any cellular telephone number at issue belongs to an officer who pays for the cellular telephone service with the officer's personal funds; and (4) the marked driver's license information under section 552.130 of the Government Code. The department must release the rest of the responsive information.

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/bhf

Ref: ID# 461968

Enc: Submitted documents

c: Requestor
(w/o enclosures)