



ATTORNEY GENERAL OF TEXAS
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September 4, 2012

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OR2012-13952

Dear Mr. Magee:

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# 463850.

The Hill County Sheriff's Office (the "sheriff's office"), which you represent, received a request for all information pertaining to a named individual. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information is subject to 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[.]

Gov't Code § 552.022(a)(1). The submitted information includes a completed evaluation that is subject to section 552.022(a)(1). The sheriff's office must release this information

¹You state you have withdrawn your assertion that the requested information is excepted from disclosure under sections 552.107, 552.108, and 552.111 of the Government Code.

pursuant to section 552.022(a)(1), unless it is excepted from disclosure under section 552.108 of the Government Code or is made confidential under the Act or other law. *See id.* You seek to withhold the information subject to section 552.022(a)(1) under sections 552.101 and 552.103 of the Government Code. We note section 552.103 is a discretionary exception and does not make information confidential under the Act. *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); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the information subject to section 552.022(a)(1) may not be withheld under section 552.103 of the Government Code. However, section 552.101 of the Government Code makes information confidential under the Act or other law. Thus, we will consider the applicability of section 552.101 for this information. We will also consider your argument under section 552.103 for the submitted information not subject to section 552.022(a)(1).

Section 552.103 of the Government Code provides, in relevant 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 has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information it seeks to withhold. To meet this burden, the governmental body must demonstrate: (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 that 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).

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving

a specific matter is realistically contemplated and is more than mere conjecture. *Id.* This office has found a pending complaint with the Equal Opportunity Employment Commission (“EEOC”) indicates litigation is reasonably anticipated. *See* Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982), 281 at 1 (1981).

You state, and provide documentation showing, prior to the sheriff’s office’s receipt of the instant request, the named individual filed discrimination claims against the sheriff’s office with the EEOC. Based on your arguments and our review of the information at issue, we find the sheriff’s office reasonably anticipated litigation on the date this request was received. You also state the information at issue pertains to the substance of the discrimination claims. Based on your representations and our review, we find the information at issue is related to the anticipated litigation. Therefore, section 552.103 is generally applicable to the information that is not subject to section 552.022(a)(1).

We note, however, the opposing party has seen or had access to much of the information at issue. The purpose of section 552.103 of the Government Code is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. *See* ORD 551 at 4-5 (1990). Thus, once the opposing party in anticipated litigation has seen or had access to information that is related to the litigation, 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 note the individual’s access to some of this information was only in the usual scope of her employment with the sheriff’s office. Such information is not considered to have been obtained by the opposing party to the litigation and, thus, may be withheld under section 552.103. However, we have marked the information not subject to section 552.022(a)(1) that the opposing party to the litigation has seen or had access to outside her usual scope of employment with the sheriff’s office, and the sheriff’s office may not withhold this marked information under section 552.103 of the Government Code. Thus, with the exception of the information we have marked, the sheriff’s office may withhold the information not subject to section 552.022(a)(1) under section 552.103.² We note the applicability of section 552.103 ends once the related litigation concludes or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). We note the information the opposing party has seen or had access to may be subject to sections 552.101, 552.102, 552.117, 552.130, 552.136, and 552.137 of the Government Code.³ Thus, we will address the applicability of these exceptions to this information and the applicability of section 552.101 to the information subject to section 552.022(a)(1).

²As our ruling is dispositive with respect to this information, we need not address your remaining arguments against disclosure of the information at issue.

³The 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 exempts 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 protected by other statutes, including section 6103(a) of title 26 of the United States Code, which renders tax return information confidential. *See* Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 600 (1992) (W-4 forms). Section 6103(b) defines the term “return information” as:

a taxpayer’s identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return or with respect to the determination of the existence, or possible existence, of liability . . . for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense[.]

26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term “return information” expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer’s liability under title 26 of the United States Code. *See Chamberlain v. Kurtz*, 589 F.2d 827, 840-41 (5th Cir. 1979); *Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *aff’d in part*, 993 F.2d 1111 (4th Cir. 1993). Consequently, the sheriff’s office must withhold the W-4 forms we have marked under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

Section 552.101 of the Government Code also encompasses the common-law right to 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 met. *Id.* at 681-82. Common-law privacy protects the types of information held to be intimate or embarrassing in *Industrial Foundation*. *See id.* 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 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). This office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (finding personal financial information to include designation of beneficiary of employee’s retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage,

mortgage payments, assets, bills, and credit history). Generally, information that either identifies or tends to identify a victim of sexual assault or other sex-related offense must be withheld under common-law privacy. *See* Open Records Decision Nos. 393 (1983), 339 (1982); *see also Morales v. Ellen*, 840 S.W.2d 519 (Tex. App — El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information).

The submitted information pertains to a former sheriff's office employee. As this office has stated on many occasions, the public generally has a legitimate interest in public employment and public employees, particularly those who are involved in law enforcement. *See* Open Records Decision No. 444 at 6 (1986) (public has genuine interest in information concerning law enforcement employee's qualifications and performance and circumstances of his termination or resignation); *see also* Open Records Decision Nos. 562 at 10 (1990) (personnel information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 470 at 4 (job performance does not generally constitute public employee's private affairs). We find the information we have marked is highly intimate or embarrassing and not a matter of legitimate public interest. The sheriff's office must withhold the marked information under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find none of the remaining information is highly intimate or embarrassing and of no legitimate public interest, and it may not be withheld under section 552.101 on that basis.

Section 552.102(a) 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 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.*, 354 S.W.3d 336 (Tex. 2010). Upon review, we find the dates of birth we have marked must be withheld under section 552.102(a) of the Government Code.

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 note a post office box number is not a "home address" for purposes of section 552.117. *See* Open Records Decision No. 622 at 6 (1994) (legislative history makes clear purpose of section 552.117 is to protect public employees from being harassed at home). If the individuals at issue are currently licensed peace officers as defined by article 2.12, the sheriff's office must withhold the information we have marked under section 552.117(a)(2) of the Government Code.

If the individuals are not currently licensed peace officers, section 552.117(a)(1) of the Government Code may apply to the information at issue. Section 552.117(a)(1) 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. If the individuals at issue are not currently licensed peace officers, but made timely elections under section 552.024, the sheriff's office must withhold the information we have marked under section 552.117(a)(1). If the individuals did not make timely elections under section 552.024, the marked information may not be withheld under section 552.117(a)(1).

Section 552.130 of the Government Code provides that information relating to a motor vehicle operator's or driver's license or permit issued by an agency of this state or another state or country is excepted from public release. Gov't Code § 552.130(a)(1). The sheriff's office must withhold the driver's license number we have marked under section 552.130 of the Government Code.

Section 552.136(b) of the Government Code provides, "[n]otwithstanding any other provision of [the Act], 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." *Id.* § 552.136(b); *see id.* § 552.136(a) (defining "access device"). This office has concluded insurance policy numbers constitute access device numbers for purposes of section 552.136. Thus, the sheriff's office must withhold the information we have marked under section 552.136 of the Government Code.

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). *See id.* § 552.137(a)-(c). The e-mail address at issue is not excluded by subsection (c). Therefore, the sheriff's office must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.

In summary, with the exception of the information we have marked, the sheriff's office may withhold the submitted information under section 552.103 of the Government Code. The sheriff's office must withhold the W-4 forms we have marked under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code. The sheriff's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The sheriff's office must withhold the dates of birth we have marked under section 552.102(a) of the Government Code. If the individuals at issue are currently licensed peace officers as defined by

article 2.12, the sheriff's office must withhold the information we have marked under section 552.117(a)(2) of the Government Code. If the individuals at issue are not currently licensed peace officers, but made timely elections under section 552.024, the sheriff's office must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The sheriff's office must withhold the information we have marked under sections 552.130 and 552.136 of the Government Code and the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure. The remaining information, including the information subject to section 552.022(a)(1) of the Government Code, 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,



Nneka Kanu
Assistant Attorney General
Open Records Division

NK/bhf

Ref: ID# 463850

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴We note Open Records Decision No. 684 (2009) is a previous determination authorizing all governmental bodies to withhold ten categories of information, including W-4 forms under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code and 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.