



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 26, 2012

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

OR2012-15362

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# 466020.

The Dallas County Sheriff's Department (the "department") received a request for a named sheriff deputy's personnel file.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We first address your argument the General Orders of the department prohibit the release of a pending internal investigation. 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. A governmental body may not promulgate a rule that designates information as being confidential, so as to bring the information within the scope of section 552.101, unless the governmental body has been given specific statutory authority to do so. *See* Open Records Decision Nos. 594 at 2-3 (1991) (city ordinance cannot operate to make information confidential when not excepted by Act), 263 (1981) (city ordinance may not conflict with Act); *see also Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976) (agency rule may not make information confidential in circumvention of Act). You have not directed our attention to any law, nor are we aware of

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<sup>1</sup>A portion of the request requires the department to answer a question. The Act does not require a governmental body to answer general questions, perform legal research, or create new information in response to a request for information. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990).

any, that authorizes the department to make information confidential for purposes of the Act. Thus, the department has failed to demonstrate how the General Orders constitute "law" for purposes of section 552.101, and none of the submitted information may be withheld on that basis. *See* Gov't Code § 552.101.

Section 552.108(b)(1) of the Government Code 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[.]" *Id.* § 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, 327 (Tex. App.—Austin 2002, no writ). To demonstrate the applicability of this exception, a 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* Gov't Code § 552.301(e)(1)(A) (providing that governmental body must adequately explain how information at issue falls within scope of claimed exception). This office has concluded section 552.108(b) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.,* Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (section 552.108 is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). Section 552.108(b)(1) is not applicable, however, to generally known policies and procedures. *See, e.g.,* ORD Nos. 531 at 2-3 (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

You state the named deputy's personnel file is currently under review in an internal affairs administrative investigation being conducted by the department concerning the deputy's alleged misconduct. 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 "no decision has been made at this point whether the [i]nternal [a]ffairs investigation will be referred to the Criminal Investigation Section for a criminal investigation." Thus, by your own statements, you acknowledge a criminal investigation has not been, and may not be, initiated. Accordingly, you have failed to show the internal affairs investigation at issue is related to an ongoing criminal investigation. Further, you do not explain, and we are unable to discern from the information at issue, how release of any of the administrative information would interfere with law enforcement and crime prevention. Consequently, you have failed to demonstrate the applicability of section 552.108(b)(1) to the submitted information, and none of it may be withheld on that basis.

Section 552.101 of the Government Code encompasses information made confidential by other statutes, such as chapter 411 of the Government Code, which pertains to criminal history record information (“CHRI”) generated by the National Crime Information Center or by the Texas Crime Information Center. *See* Gov’t Code § 411.083(a). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual laws with respect to the CHRI it generates. *See id.* Section 411.083 of the Government Code deems confidential CHRI the Texas Department of Public Safety (“DPS”) maintains, except DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code.<sup>2</sup> *See* Gov’t Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-.127. Similarly, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 in conjunction with chapter 411, subchapter F of the Government Code. We note CHRI does not include driving record information. *See id.* § 411.082(2)(B). Upon review, we find the information we have marked constitutes CHRI for purposes of chapter 411. The department must withhold the marked information under section 552.101 in conjunction with section 411.083. However, we find none of the remaining information constitutes CHRI for purposes of chapter 411, and the department may not withhold any of the remaining information under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses chapter 560 of the Government Code, which provides that a governmental body may not release biometric identifier information except in certain limited circumstances. *See id.* §§ 560.001 (defining “biometric identifier” to include fingerprints and records of hand geometry), .002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), .003 (providing that biometric identifiers in possession of governmental body are exempt from disclosure under the Act). You do not inform us, and the submitted information does not indicate, that section 560.002 permits the disclosure of the submitted fingerprints. Therefore, the department must withhold the fingerprints we marked under section 552.101 in conjunction with section 560.003 of the Government Code.

Section 552.101 of the Government Code also encompasses section 1701.306 of the Occupations Code, which makes confidential the L-2 Declaration of Medical Condition and L-3 Declaration of Psychological and Emotional Health forms required by the Texas

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<sup>2</sup>Although you raise section 411.085 of the Government Code, that provision merely provides the penalties for the “Unauthorized Obtaining, Use, or Disclosure of Criminal History Record Information.” Gov’t Code § 411.085. Section 411.083 is applicable to the dissemination of CHRI.

Commission on Law Enforcement Officer Standards and Education ("TCLEOSE").  
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 physical examination, 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 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). The department must withhold the L-2 Declaration of Medical Condition and L-3 Declaration of Psychological and Emotional Health forms we have marked under section 552.101 in conjunction with section 1701.306 of the Occupations Code.

Section 552.101 of the Government Code also encompasses section 1703.306 of the Occupations Code, which provides:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

(1) the examinee or any other person specifically designated in writing by the examinee;

(2) the person that requested the examination;

(3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;

(4) another polygraph examiner in private consultation; or

(5) any other person required by due process of law.

(b) The [Texas Department of Licensing and Regulation] or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

*Id.* § 1703.306. We have marked information that was acquired from a polygraph examination and is, therefore, within the scope of section 1703.306. It does not appear the requestor falls into any of the categories of individuals who are authorized to receive the polygraph information under section 1703.306(a). Accordingly, the department must withhold the information we have marked under section 552.101 in conjunction with section 1703.306 of the Occupations Code.

Section 552.101 of the Government Code also encompasses section 611.002 of the Health and Safety Code, which provides “[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, are confidential.” Health & Safety Code § 611.002(a). Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See id.* § 611.001(2). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* ORD 565. These sections permit disclosure of mental health records to a patient, a person authorized to act on the patient’s behalf, or a person who has the written consent of the patient. *See* Health & Safety Code §§ 611.004-.0045. Upon review, we find the information we have marked constitutes mental health records that are confidential under section 611.002 of the Health and Safety Code. Therefore, the marked information may only be released in accordance with sections 611.004 and 611.0045 of the Health and Safety 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 section 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. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are generally highly intimate or embarrassing. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Additionally, this office has found financial information that does not relate to a financial

transaction between an individual and a governmental body ordinarily satisfies the first requirement of the test for common-law privacy. For example, information related to an individual's mortgage payments, assets, bills, and credit history is generally protected by the common-law right to privacy. *See* Open Records Decision Nos. 545 (1990), 523 (1989); *see also* ORD 600 (public employee's withholding allowance certificate, designation of beneficiary of employee's retirement benefits, direct deposit authorization, and employee's decisions regarding voluntary benefits programs are protected under common-law privacy). However, this office also has found a legitimate public interest in information relating to employees of governmental bodies and their employment qualifications and job performance. *See* Open Records Decision Nos. 542 at 5 (1990), 470 at 4 (public has legitimate interest in job qualifications and performance of public employees); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). Finally, a compilation of an individual's criminal history is also highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Upon review, we find the information we have marked is highly intimate or embarrassing and of no legitimate public interest. Accordingly, the department must withhold the marked information under section 552.101 in conjunction with common-law privacy. However, we find none of the remaining information is private, and it may not be withheld under section 552.101 on that basis.

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."<sup>3</sup> 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, at 347-48 (Tex. 2010). Having carefully reviewed the remaining information, we find the department must withhold the information we have marked under section 552.102(a).<sup>4</sup>

Section 552.117(a)(2) of the Government Code excepts from public disclosure a peace officer's home address and telephone number, social security number, family member information, and emergency contact 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

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

<sup>4</sup>As our ruling for this information is dispositive, we need not address your argument against its disclosure.

of the Code of Criminal Procedure. We note section 552.117 encompasses a cellular telephone number, provided the cellular telephone service is not paid for with public funds. *See Open Records Decision No. 506 at 5-6 (1988)* (statutory predecessor to section 552.117 of the Government Code not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Accordingly, the department must withhold the personal information of the named deputy, which we have marked, under section 552.117(a)(2) of the Government Code; however, the department may only withhold the marked cellular telephone number if the cellular telephone service is not paid for with public funds.<sup>5</sup>

We note the remaining information includes information that may be subject to section 552.1175 of the Government Code, which applies to information pertaining to peace officers the department does not hold in an employment context and provides, in part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure[.]

...

(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' Code § 552.1175(a)(1), (b). We have marked addresses and telephone numbers that may belong to licensed peace officers not employed by the department. The department must only withhold the information we marked under section 552.1175 if it consists of the home addresses and telephone numbers of licensed peace officers and the peace officers elect to restrict access to the information pertaining to them in accordance with section 552.1175(b). If the marked information does not consist of the home addresses and telephone numbers of peace officers not employed by the department or no elections are made, the department may not withhold the marked information under section 552.1175.

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<sup>5</sup>As our ruling for this information is dispositive, we need not address your argument against disclosure of the deputy's social security number.

Section 552.130(a)(1) of the Government Code exempts from disclosure information that relates to a motor vehicle operator's or driver's license issued by an agency of this state or another state or country. *Id.* § 552.130(a)(1). Therefore, the department must withhold the driver's license information we have marked under section 552.130.

Section 552.137 of the Government Code provides that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). *Id.* § 552.137(a)-(c). Section 552.137 is not applicable to an e-mail address provided to a governmental body on a letterhead or an e-mail address maintained by a governmental entity for one of its officials or employees. *See id.* § 552.137(a), (c)(4). Upon review, we find the e-mail address we have marked is not of the types specifically excluded by section 552.137(c) of the Government Code. Accordingly, the department must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner of the marked e-mail address affirmatively consents to its disclosure.

We note some of the remaining information appears to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with sections (1) 411.083 of the Government Code, (2) 560.003 of the Government Code, (3) 1701.306 of the Occupations Code, and (4) 1703.306 of the Occupations Code. The department may only release the marked mental health records in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. The department must also withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and section 552.102(a) of the Government Code. The department must withhold the marked personal information of the named deputy under section 552.117(a)(2) of the Government Code; however, the department may only withhold the marked cellular telephone number if the cellular telephone service is not paid for with public funds. If the information we marked consists of the home addresses and telephone numbers of licensed peace officers not employed by the department and the peace officers elect to restrict access to this information in accordance with section 552.1175(b) of the Government Code, the department must withhold the marked information under section 552.1175 of the Government Code. The department must also withhold the information we marked under section 552.130 of the Government Code. Unless the owner of the marked e-mail address affirmatively consents to its disclosure, the department must withhold the marked e-mail

address under section 552.137 of the Government Code. The remaining information must be released, but any information protected by copyright may only be released in accordance with copyright law.

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](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# 466020

Enc. Submitted documents

c: Requestor  
(w/o enclosures)