



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 18, 2012

Ms. Susan Fillion  
Assistant County Attorney  
Harris County Attorney's Office  
1019 Congress, 15th Floor  
Houston, Texas 77002

OR2012-20392

Dear Ms. Fillion:

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# 474577 (C.A. File No. 12PIA0501).

The Harris County Constable's Office Precinct 1 (the "constable's office") received a request for a named deputy constable's personnel file. You indicate the constable's office will withhold some of the requested information pursuant to section 552.0038(c) of the Government Code and previous determinations granted in Open Records Decision No. 684 (2009).<sup>1</sup> You claim other responsive information is exempted from disclosure under sections 552.101, 552.102, 552.117, 552.1175, 552.130, 552.136, 552.147, and 552.152 of

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<sup>1</sup>Section 552.0038(c) of the Government Code provides that a governmental entity that maintains records of a participant in a retirement system's retirement program in cooperation with or on behalf of a retirement system is not required to accept or comply with a request for such information or to seek an opinion from the attorney general because the records are exempt from the provisions of the Act. *See* Gov't Code § 552.0038(c). Open Records Decision No. 684 authorizes all governmental bodies to withhold specified categories of information without the necessity of requesting a decision under the Act, including a Form I-9 and its attachments under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code, a W-4 form under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code, a fingerprint under section 552.101 in conjunction with section 560.003 of the Government Code, a Texas license plate number under section 552.130 of the Government Code, and an e-mail address of a member of the public under section 552.137 of the Government Code. *See* ORD 684 at 14-15; *see also* Open Records Decision No. 673 at 7-8 (2001) (listing elements of second type of previous determination under Gov't Code § 552.301(a)).

the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the information you submitted.<sup>3</sup>

We first note some of the submitted information was created after the date of the constable's office's receipt of the present request for information. The Act does not require a governmental body to release information that did not exist when it received a request or create responsive information.<sup>4</sup> Thus, the submitted information that was created after the date of receipt of the present request is not responsive to the request. This decision does not address the public availability of that information, which we have marked, and the constable's office need not release that information in response to the present request.

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. You claim section 552.101 in conjunction with constitutional and common-law privacy. Constitutional privacy protects two types of interests. See *Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987)*; see also *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). The first is the interest in independence in making certain important decisions related to the "zones of privacy" pertaining to marriage, procreation, contraception, family relationships, and child rearing and education that have been recognized by the United States Supreme Court. See *Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981); ORD 455 at 3-7. The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. See *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual's privacy interest against the public's interest in the information. See ORD 455 at 7. Constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492).

Common-law privacy 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

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<sup>2</sup>As you also initially raised section 552.108 of the Government Code but have provided no arguments for the applicability of that exception, this decision does not address section 552.108. See Gov't Code §§ 552.301(e)(1)(A), .302.

<sup>3</sup>This letter ruling assumes the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the constable's office to withhold any information that is substantially different from the submitted information. See Gov't Code §§ 552.301(e)(1)(D), .302; *Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988)*.

<sup>4</sup>See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); *Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983)*.

encompasses the specific 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 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). Personal financial information related only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. See *Open Records Decision Nos. 600* at 9-12 (1992), *545* at 4 (1990), *523* at 4 (1989), *373* at 4 (1983). Although we have concluded a compilation of a private individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person, and is generally not of legitimate concern to the public, criminal history information compiled by a law enforcement agency in the process of hiring a peace officer is a matter of legitimate public interest. Cf. *United States 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).

We note the submitted personnel records pertain to a peace officer employed by the constable's office. 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), *473* at 3 (1987) (fact that public employee received less than perfect or even very bad evaluation not private), *470* at 4 (1987) (job performance does not generally constitute public employee's private affairs), *405* at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest), *329* (1982) (reasons for employee's resignation ordinarily not private). We have marked personal financial information we conclude is highly intimate or embarrassing and not a matter of legitimate public interest. The constable's office must withhold that information under section 552.101 of the Government Code in conjunction with common-law privacy. We find you have not demonstrated that any constitutionally protected privacy interest outweighs the public's interest in the remaining information at issue or that any of the remaining information is highly intimate or embarrassing and not a matter of legitimate public interest. We therefore conclude the constable's office may not withhold any of the remaining information under section 552.101 of the Government Code on the basis of constitutional or common-law privacy.

You also claim section 552.101 of the Government Code in conjunction with the common-law physical safety exception. For many years, this office held section 552.101, in conjunction with the common-law right to privacy, protected information from disclosure when “special circumstances” existed, such that disclosure of the information would place an individual in imminent danger of physical harm. *See, e.g.*, Open Records Decision Nos. 169 (1977) (special circumstances required to protect information must be more than mere desire for privacy or generalized fear of harassment or retribution), 123 (1976) (information protected by common-law right of privacy if disclosure presents tangible physical danger). The Texas Supreme Court has held, however, freedom from physical harm does not fall under the common-law right to privacy. *See Tex. Dep’t of Pub. Safety v. Cox Tex. Newspapers, L.P. & Hearst Newspapers, LLC*, 343 S.W.3d 112 (Tex. 2011) (“freedom from physical harm is an independent interest protected under law, untethered to the right of privacy”). Instead, the court recognized in *Cox*, for the first time, a separate common-law physical safety exception to required disclosure that exists independent of the common-law right to privacy. *Id.* at 118. Pursuant to this common-law physical safety exception, “information may be withheld [from public release] if disclosure would create a substantial threat of physical harm.” *Id.* In applying this new standard, the court noted “deference must be afforded” law enforcement experts regarding the probability of harm, but further cautioned that “vague assertions of risk will not carry the day.” *Id.* at 119. You seek to withhold some of the submitted information, including records related to the deputy constable’s outside employment, on this basis. You have not sufficiently demonstrated, however, that a substantial risk of physical harm would result from disclosure of any of the information at issue. We therefore conclude the constable’s office may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.

Section 552.102 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). The constable’s office must withhold the date of birth we have marked 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(a)(2). 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 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 also note a post office box

number is not a "home address" for purposes of section 552.117.<sup>5</sup> We have marked information under section 552.117 of the Government Code the constable's office must withhold pursuant to section 552.117(a)(2) to the extent the information pertains to a peace officer currently or formerly employed by the constable's office, including an officer's cellular telephone or pager number if he pays for the cellular telephone or pager service with his personal funds.

To the extent section 552.117(a)(2) is not applicable to the marked information, section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code §§ 552.117(a)(1), .024. Section 552.117(a)(1) also encompasses an official's or employee's personal cellular telephone or pager number if the official or employee pays for the cellular telephone or pager service with his or her personal funds. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to Gov't Code § 552.117 not applicable to numbers for cellular mobile phones installed in county officials' and employees' private vehicles and intended for official business). 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). Information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or 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 official or employee who did not timely request confidentiality under section 552.024. Therefore, to the extent the information we have marked under section 552.117 of the Government Code is not protected by section 552.117(a)(2), the constable's office must withhold the information pursuant to section 552.117(a)(1) to the extent the current or former employees concerned timely requested confidentiality for the information under section 552.024 of the Government Code, including an employee's cellular telephone or pager number if he pays for the cellular telephone or pager service with his personal funds.

Section 552.1175 of the Government Code also protects information related to a peace officer, as defined by article 2.12 of the Code of Criminal Procedure. *See* Gov't Code § 552.1175(a). Section 552.1175(b) provides as follows:

(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

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<sup>5</sup>*See* Gov't Code § 552.117; Open Records Decision No. 622 at 4 (1994) (legislative history makes clear purpose of Gov't Code § 552.117 is to protect public employees from being harassed *at home*) (citing House Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985); Senate Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985)) (emphasis added).

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.

*Id.* § 552.1175(b). Section 552.1175(b) encompasses an individual's personal cellular telephone or pager number if he or she falls within the scope of section 552.1175(a) and pays for the cellular telephone or pager service with his or her personal funds. We have marked information the constable's office must withhold under section 552.1175 of the Government Code to the extent it falls within the scope of section 552.1175(b) and pertains to a peace officer currently or formerly employed by another governmental entity who timely elects to restrict access to the information under section 552.1175(b), including an officer's cellular telephone number if he pays for the cellular telephone service with his 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 or a motor vehicle title or registration issued by an agency of this state or another state or country. *See id.* § 552.130(a)(1)-(2). We have marked driver's license and motor vehicle information the constable's office must withhold under section 552.130 of the Government Code.

Section 552.136 of the Government Code states that "[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"). We have marked a bank account number the constable's office must withhold under section 552.136 of the Government Code.

Section 552.147 of the Government Code provides "[t]he social security number of a living person is excepted from" required public disclosure under the Act.<sup>6</sup> *Id.* § 552.147(a). We agree any submitted social security numbers that are not protected by section 552.117 of the Government Code may be withheld under section 552.147 of the Government Code.

Section 552.152 of the Government Code provides as follows:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from [required public disclosure] if, under the specific circumstances pertaining to the

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<sup>6</sup>We note section 552.147(b) authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision under the Act.

employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

*Id.* § 552.152. Although you also seek to withhold information related to the deputy constable's outside employment under section 552.152, we find you have not sufficiently demonstrated release of the information at issue would subject the deputy constable to a substantial threat of physical harm. We therefore conclude the constable's office may not withhold any of the remaining information under section 552.152 of the Government Code.

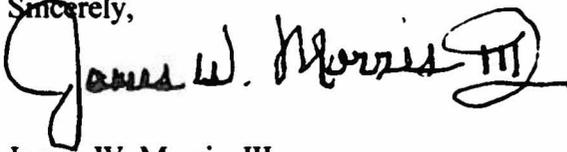
Lastly, we note some of the remaining information appears to be protected by copyright law. A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See* Open Records Decision No. 180 at 3 (1977); *see also* Open Records Decision No. 109 (1975). A custodian of public records also must comply with copyright law, however, and is not required to furnish copies of records that are copyrighted. *See* ORD 180 at 3. A member of the public who wishes to make copies of copyrighted materials 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 constable's office (1) must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy; (2) must withhold the marked date of birth under section 552.102(a) of the Government Code; (3) must withhold the information we have marked under section 552.117 of the Government Code pursuant to section 552.117(a)(2) to the extent it pertains to a peace officer currently or formerly employed by the constable's office, including the officer's cellular telephone or pager number if he pays for the cellular telephone or pager service with his personal funds; (4) must withhold the information we have marked under section 552.117 pursuant to section 552.117(a)(1) to the extent it pertains to a current or former employee of the constable's office who timely requested confidentiality for the information under section 552.024 of the Government Code, including the employee's cellular telephone or pager number if he pays for the cellular telephone or pager service with his personal funds; (5) must withhold the information we have marked under section 552.1175 of the Government Code to the extent it falls within the scope of section 552.1175(b) and pertains to a peace officer currently or formerly employed by another governmental entity who timely elects to restrict access to the information under section 552.1175(b), including an officer's cellular telephone number if he pays for the cellular telephone service with his personal funds; (6) must withhold the marked driver's license and motor vehicle information under section 552.130 of the Government Code; (7) must withhold the marked bank account number under section 552.136 of the Government Code; and (8) may withhold any submitted social security numbers that are not protected by section 552.117 under section 552.147 of the Government Code. The constable's office must release the rest of the submitted information but may only release any copyrighted information 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\\_or1.php](http://www.oag.state.tx.us/open/index_or1.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,

A handwritten signature in black ink that reads "James W. Morris, III". The signature is written in a cursive style with a large, stylized initial "J".

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/bhf

Ref: ID# 474577

Enc: Submitted documents

c: Requestor  
(w/o enclosures)