



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 12, 2013

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

OR2013-05934

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# 483814.

The Dallas County Sheriff's Department (the "sheriff's department") received a request for twelve categories of information related to named individuals and specified sheriff's department positions. You state you have released some of the requested information to the requestor. You claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.<sup>1</sup>

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.

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<sup>1</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(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 that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date the governmental body received 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, 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.). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a). *See* ORD 551 at 4.

To demonstrate that litigation is reasonably anticipated, the governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body’s receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.<sup>2</sup> Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). This office has stated a pending complaint with the Equal Employment Opportunity Commission (the “EEOC”) indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

In this instance, you state the sheriff’s department reasonably anticipated litigation because the requestor has filed a complaint of discrimination with the EEOC. However, we note the sheriff’s department was not notified of the complaint until after its receipt of the instant request for information. Consequently, we find you have failed to demonstrate litigation was reasonably anticipated when the sheriff’s department received the request for information. *See* Gov’t Code § 552.103(c) (litigation must be pending or reasonably anticipated at the

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<sup>2</sup>In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

time the governmental body receives the request for information). As such, none of the information you have submitted may be withheld under section 552.103 of 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." *Id.* § 552.101. This section encompasses information made confidential by other statutes. Section 552.101 encompasses section 1703.306 of the Occupations Code, which provides in relevant part:

(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.

Occ. Code § 1703.306(a)-(b). We have marked polygraph information in the submitted information. It does not appear the requestor falls into any of the categories of individuals authorized to receive the polygraph information under section 1703.306(a). Thus, the marked information is confidential under section 1703.306 and must be withheld under section 552.101 of the Government Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law 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 established. *Id.* at 681-82. This office has found that the following types of information are excepted from required public disclosure under

common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); and personal financial information not relating to the financial transaction between an individual and a governmental body. *See generally* Open Records Decision Nos. 600 at 9-10 (1992) (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, 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), 455 at 9 (1987) (employment applicants salary information not private). However, this office has noted the public has a legitimate interest in information relating to those who are involved in law enforcement. *See, e.g.*, Open Records Decision Nos. 562 at 10 (1990) (personnel file 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), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of law enforcement employees), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest). Upon review, we find the information we have marked is highly intimate or embarrassing information of no legitimate public concern and must be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.102(a) of the Government Code exempts 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) exempts 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 (Tex. 2010). Upon review, we find the sheriff's department must withhold the dates of birth we have marked under section 552.102(a) of the Government Code.

Section 552.117(a)(2) of the Government Code exempts 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>3</sup> We have marked information under section 552.117 of the Government Code the sheriff's department 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 sheriff's department, including an officer's cellular telephone or pager number if he or she pays for the cellular telephone or pager service with his or her 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, if the information we have marked under section 552.117 of the Government Code is not protected by section 552.117(a)(2), the sheriff's department 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 or she pays for the cellular telephone or pager service with his or her personal funds.

We note some of the remaining information may be subject to section 552.1175 of the Government Code. Section 552.1175 applies to information that the sheriff's department does not hold in an employment context that concerns the following individuals:

- (1) peace officers as defined by Article 2.12, Code of Criminal Procedure;
- (2) county jailers as defined by Section 1701.001, Occupations Code;

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<sup>3</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).

- (3) current or former employees of the Texas Department of Criminal Justice or of the predecessor in function of the department or any division of the department;
- (4) commissioned security officers as defined by Section 1702.002, Occupations Code;
- (5) employees of a district attorney, criminal district attorney, or county or municipal attorney whose jurisdiction includes any criminal law or child protective services matters;
- (6) officers and employees of a community supervision and corrections department established under Chapter 76 who perform a duty described by Section 76.004(b);
- (7) criminal investigators of the United States as described by Article 2.122(a), Code of Criminal Procedure;
- (8) police officers and inspectors of the United States Federal Protective Service; and
- (9) current and former employees of the office of the attorney general who are or were assigned to a division of that office the duties of which involve law enforcement.

Gov't Code § 552.1175(a). If the information at issue 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.

*Id.* § 552.1175(b). Subsection 552.1175(b) encompasses an individual's personal cellular telephone number if he or she falls within the scope of subsection 552.1175(a) and the cellular service is not paid for by a governmental body. We have marked information the sheriff's department must withhold under section 552.1175 of the Government Code if the individuals to whom the information pertains are individuals described by

subsection 552.1175(a), the information falls within the scope of subsection 552.1175(b), and they elect to restrict access to their information in accordance with subsection 552.1175(b). If any of the individuals are not an individual described by subsection 552.1175(a), the information does not fall within the scope of subsection 552.1175(b), or no election is made, the sheriff's department may not withhold that individual's information under section 552.1175 of the Government Code.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or a personal identification document issued by an agency of this state or another state or country is excepted from public release. *Id.* § 552.130. Upon review, we find the sheriff's department must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

Section 552.136(b) 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). This office has determined that insurance policy numbers are access device numbers for purposes of section 552.136. *See id.* § 552.136(a) (defining "access device"). Therefore, the sheriff's department 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 addresses at issue are not excluded by subsection (c). Therefore, the sheriff's department must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners have affirmatively consented to their public disclosure.<sup>4</sup>

In summary, the sheriff's department must withhold the polygraph information we have marked under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. The sheriff's department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The sheriff's department must withhold the dates of birth we have marked under section 552.102(a) of the Government Code. The sheriff's department must withhold the information we have marked under section 552.117(a)(2) of the Government Code to the extent the information pertains to a peace officer currently or formerly employed by the sheriff's department, including an officer's cellular telephone or pager number if he or she

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<sup>4</sup>We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold certain 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 decision.

pays for the cellular telephone or pager service with his or her personal funds. 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) of the Government Code, the sheriff's department must withhold the information pursuant to section 552.117(a)(1) to the extent the current or former employees concerned timely requested confidentiality, including an employee's cellular telephone or pager number if he or she pays for the cellular telephone or pager service with his or her personal funds. The sheriff's department must withhold the information we have marked under section 552.1175 of the Government Code if the individuals to whom the information pertains are individuals described by subsection 552.1175(a) of the Government Code and the information falls within the scope of subsection 552.1175(b) of the Government Code and they elect to restrict access to their information in accordance with subsection 552.1175(b) of the Government Code. The sheriff's department must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code. The sheriff's department must withhold the information we have marked under section 552.136 of the Government Code. The sheriff's department must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners have affirmatively consented to their public disclosure. 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](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,



Vanessa Burgess  
Assistant Attorney General  
Open Records Division

VB/dls

Ref: ID# 483814

Enc. Submitted documents

c: Requestor  
(w/o enclosures)