



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 16, 2013

Deputy Diane Huffman
Public Information Officer
Parker County Sheriff's Office
129 Hogle Street
Weatherford, Texas 78086

OR2013-06111

Dear Deputy Huffman:

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# 484307.

The Parker County Sheriff's Office (the "sheriff's office") received a request for ten categories of information pertaining to (1) investigations conducted by sheriff's office employees relating to two named individuals and a specified address; (2) the personnel files, cell phone records, and e-mail messages of any sheriff's office employees involved in any such investigations; and (3) the entire disciplinary and personnel file of any individual assigned to the sheriff's office's Special Crimes Unit during a specified time period. You indicate the sheriff's office has produced or will produce some of the information pursuant to our ruling in Open Records Letter No. 2013-00734 (2013).¹ Since the issuance of that ruling, you state the sheriff's office has located additional records that were responsive to the previous request for information. You inform us some of this information has been released, but claim some of this information, which you have submitted, is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.114, and 552.152 of the Government Code.²

¹See Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

²Although you do not raise section 552.102 of the Government Code, we understand you to claim this exception based on your markings. Further, although you raise section 552.151 of the Government Code, we note the 82nd Texas Legislature renumbered section 552.151 to section 552.152 of the Government Code. See Act of May 9, 2011, 82nd Leg., R.S., S.B. 1303, § 27.001(20). In addition, although you also raise section 552.302 of the Government Code, this section is not an exception to disclosure. See Gov't Code § 552.302 (providing that information is presumed public if governmental body that received request failed to comply with procedural requirements of 552.301 of the Government Code when requesting open records decision).

We have considered the exceptions you claim and reviewed the submitted information, a portion of which is a representative sample.³

Initially, we note the requestor has excluded officer personal contact information, other than an officer's name, officer social security numbers, and other specific identifying information from his request. We interpret officer contact information to be officer home addresses. Therefore, such information is not responsive to the request. This ruling does not address the public availability of the non-responsive information and the sheriff's office is not required to release non-responsive information in response to this request.

Next, we note you have submitted a college transcript for our review, which you argue is confidential pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code. The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA does not permit state and local educational authorities to disclose to this office, without parental or an adult student's consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. Consequently, education records that are responsive to a request for information under the Act should not be submitted to this office in unredacted form, that is, in a form in which "personally identifiable information" is disclosed. *See* 34 C.F.R. § 99.3 (defining "personally identifiable information"). FERPA governs the availability of student records held by educational institutions or agencies receiving federal funds, and applies only to student records in the custody of educational institutions and to records directly transferred from the educational institution to the third party. 34 C.F.R. § 99.33(a)(2).

We note the sheriff's office, which maintains the information at issue, is not an educational institution. *See* Open Records Decision No. 309 at 3 (1983) (City of Fort Worth is not "educational agency" within FERPA). You do not assert, nor does it appear from our review, the sheriff's office received this document directly from an educational institution. Therefore, the college transcript is not subject to FERPA and no portion of it may be withheld on that basis. Accordingly, we also do not address your argument under section 552.114 of the Government Code. Open Records Decision No. 539 (1990) (determining same analysis applies under section 552.114 and FERPA).

Next, we must address the sheriff's office's procedural obligations under the Act. Section 552.301 of the Government Code prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. *See* Gov't Code § 552.301. Section 552.301(b) requires that a governmental body ask for a decision from this office and state which exceptions apply to the requested information by the tenth business day after receiving the request. *See id.* § 552.301(b). Pursuant to section 552.301(e), a governmental body is required to

³We assume 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 those records contain substantially different types of information than that submitted to this office.

submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). The sheriff's office received the request for information on October 16, 2012. Accordingly, the sheriff's office's ten- and fifteen-business-day deadlines were October 30, 2012, and November 6, 2012, respectively. However, the sheriff's office did not submit its request for a decision regarding the additional records and the information required by section 552.301(e) until February 5, 2013. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Accordingly, we find the sheriff's office failed to comply with section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Although you raise section 552.108 of the Government Code for the responsive information, this is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). Therefore, the sheriff's office may not withhold any of the responsive information under section 552.108. However, because sections 552.101, 552.102, 552.117, 552.1175, and 552.152 of the Government Code can provide compelling reasons to withhold information, we will consider the applicability of these sections to the responsive information.⁴

Section 552.152 of the Government Code provides:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from the requirements of Section 552.021 if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

⁴The 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).

Gov't Code § 552.152. You assert the responsive information you have marked under section 552.152 relates to undercover sheriff's officers. You also claim the release of this information would subject these officers to a substantial threat of physical harm. Based on your representations and our review, we conclude you have demonstrated release of the responsive information we have marked and indicated would subject the officers to a substantial threat of physical harm. Therefore, the sheriff's office must withhold this information under section 552.152 of the Government Code. However, we find you have not demonstrated how release of the remaining responsive information would subject the officer's to a substantial threat of physical harm. Thus, none of this information may be withheld under section 552.152.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *See id.* § 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 satisfied. *Id.* at 681-82. The type of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office also has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See Open Records Decision No. 455* (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we find the responsive information we have marked is highly intimate or embarrassing and of no legitimate public interest. Accordingly, the sheriff's office must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find the remaining responsive information is either not highly intimate and embarrassing or is of legitimate public interest, or pertains to an individual who has been de-identified and whose privacy interests are thus protected. Accordingly, none of this information may be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.102(a) of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). The Texas Supreme Court has held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). Upon review, we agree the birth date you have marked must be withheld under section 552.102(a) of the Government Code.

We note some of the remaining responsive information is subject to section 552.117(a)(2) of the Government Code. This section excepts from disclosure the home address, home telephone number, emergency contact information, social security number, and family

member information of a peace officer, as defined by article 2.12 of the Code of Criminal Procedure, regardless of whether the peace officer made an election under section 552.024 of the Government Code. Gov't Code § 552.117(a)(2). Accordingly, the sheriff's office must withhold the information we have marked under section 552.117(a)(2) of the Government Code.

We also note portions of the remaining responsive information may be subject to sections 552.117(a)(1) and 552.1175 of the Government Code. 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 id.* § 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). 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. Thus, to the extent the individual whose responsive information we have marked under section 552.117(a)(1) timely requested confidentiality for her information under section 552.024 of the Government Code, the sheriff's office must withhold this information under section 552.117(a)(1) of the Government Code.

To the extent section 552.117(a)(1) is not applicable to the marked information, it may be excepted under section 552.1175. Section 552.1175 protects information related to a county jailer, as defined by section 1701.001 of the Occupations Code. *See* Gov't Code § 552.1175(a)(1)-(2). Section 552.1175 provides in part:

(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). Thus, to the extent section 552.117(a)(1) is not applicable to the information we have marked on that basis, the information we have marked under section 552.1175 of the Government Code must be withheld if it pertains to a county

jailer who elects to restrict access to the information at issue in accordance with section 552.1175(b).

In summary, the sheriff's office must withhold (1) the information we have marked and indicated under section 552.152 of the Government Code; (2) the birth date you have marked under section 552.102(a) of the Government Code; and (3) the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the individual whose information we have marked under section 552.117(a)(1) of the Government Code timely requested confidentiality for her information under section 552.024 of the Government Code, the sheriff's office must withhold this information under section 552.117(a)(1) of the Government Code. To the extent this section is not applicable to the information we have marked on that basis, the information we have marked under section 552.1175 of the Government Code must be withheld if it pertains to a county jailer who elects to restrict access to the information at issue in accordance with section 552.1175(b) of the Government Code. The sheriff's office must release the remaining information.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/bhf

Ref: ID# 484307

Enc. Submitted documents

c: Requestor
(w/o enclosures)