



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 16, 2013

Ms. Cheryl Elliott Thornton
Assistant County Attorney
Harris County Attorney's Office
1019 Congress, 15th Floor
Houston, Texas 77002

OR2013-14352

Dear Ms. Thornton:

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# 496504 (CA File No. 13PIA0260).

The Harris County Constable's Office, Precinct 1 (the "constable's office") received a request for the personnel file of a named individual, as well as any complaints or disciplinary actions involving that individual. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.111, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the district's obligations under the Act. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. *See* Gov't Code § 552.301. Pursuant to section 552.301(b) of the Government Code, the governmental body must request a ruling from this office and state the exceptions to disclosure that apply within ten business days after receiving the request. *See id.* § 552.301(b). While you raised section 552.108 within the ten-business-day time period as required by subsection 552.301(b), you did not raise sections 552.101, 552.102, 552.111, and 552.117 within that time. Thus, the constable's office failed to comply with the requirements mandated by subsection 552.301(b) of the Government Code as to its arguments under sections 552.101, 552.102, 552.111, and 552.117 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 of the Government Code 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. *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 (Tex. App.—Austin 1990, no writ); *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). Section 552.111 of the Government Code is discretionary in nature; it serves only to protect a governmental body's interests and may be waived. *See* Open Records Decision No. 677 at 10 (2002) (attorney work-product privilege under section 552.111 or Texas Rule of Civil Procedure 192.5 is not compelling reason to withhold information under section 552.302); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Thus, in failing to comply with section 552.301, the constable's office has waived its argument under section 552.111 and may not withhold the submitted information on that basis. Because sections 552.101, 552.102, and 552.117 of the Government Code can provide compelling reasons to withhold information, we will consider the applicability of these exceptions to the submitted information. Furthermore, we will consider your timely raised argument under section 552.108 of the Government Code.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(17) provides for the required public disclosure of "information that is also contained in a public court record." Gov't Code § 552.022(a)(17). We have marked a court-filed document that is subject to subsection 552.022(a)(17) of the Government Code. This information must be released unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(17). You raise section 552.108 of the Government Code for this information. However, section 552.108 is a discretionary exception to disclosure that protects the governmental body's interests and does not make information confidential under the Act. *See id.* § 552.007; Open Record Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). Accordingly, the constable's office may not withhold the information subject to section 552.022 of the Government Code under section 552.108. You also raise sections 552.101, 552.102, and 552.117 of the Government Code. As these sections can make information confidential under the Act, we will consider the applicability of these exceptions to the court-filed documents. We will also address the applicability of section 552.108 to the information not subject to section 552.022.

We first address your argument under section 552.108(a)(1) of the Government Code for the information not subject to section 552.022 of the Government Code. Section 552.108 exempts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). We note the information at issue consists of personnel records and documents used in an internal investigation. Section 552.108 generally is not applicable to

purely administrative records that did not result in a criminal investigation or prosecution. See *City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App. 2002, no pet.); *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor not applicable to internal investigation that did not result in criminal investigation or prosecution); Open Records Decision No. 562 at 10 (1990). However, you state the information at issue relates to a pending criminal investigation. Based upon this representation, we conclude section 552.108(a)(1) is applicable and the release of the remaining information would interfere with the detection, investigation, or prosecution of crime. See *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); see also Open Records Decision No. 474 at 4-5 (1987) (section 552.108 may be invoked by any proper custodian of information relating to pending investigation or prosecution of criminal conduct). Therefore, the constable's office may withhold the information not subject to section 552.022 under section 552.108(a)(1) of the Government Code.¹

We next address your arguments for the information subject to section 552.022(a)(17) of the Government Code. 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. Section 552.101 encompasses the doctrine of constitutional privacy. Constitutional privacy consists of two inter-related types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. See *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977); Open Records Decision Nos. 600 at 3–5 (1992), 478 at 4 (1987), 455 at 3–7 (1987). The first type protects an individual's autonomy within "zones of privacy," which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. ORD 455 at 4. The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* at 7. The scope of information protected by constitutional privacy is narrower than that under the common-law doctrine of privacy; constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985)). Upon review, we find no portion of the information at issue falls within the zones of privacy or otherwise implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the constable's office may not withhold any portion of the court-filed document under section 552.101 in conjunction with constitutional privacy.

Section 552.102 of the Government Code exempts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwanted invasion of personal privacy." Gov't Code § 552.102(a). We understand you assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101

¹As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

of the Government Code. Section 552.101 encompasses 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). See *Indus. Found.*, 540 S.W.2d at 685. In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the Third Court of Appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court expressly disagreed with *Hubert's* interpretation of section 552.102(a) and held its privacy standard differs from the *Industrial Foundation* test under section 552.101. See *Tex. Comptroller of Pub. Accounts*, 354 S.W.3d at 342 (Tex. 2010). The Supreme Court then considered the applicability of section 552.102, and 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 *id.* at 346. Upon review, we find none of the information at issue is subject to section 552.102(a) of the Government Code and none of it may be withheld on that basis.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home addresses, home telephone numbers, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with section 552.024 or section 552.1175 of the Government Code. Gov't Code § 552.117(a). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. In this instance, it is unclear whether the information we have marked pertains to a currently licensed peace officer as defined by article 2.12. Accordingly, if the individual whose information is at issue is currently a licensed peace officer as defined by article 2.12, then the constable's office must withhold the court-filed document we have marked under section 552.117(a)(2) of the Government Code. If the individual whose information is at issue is not a licensed peace officer, then the constable's office may not withhold the marked information under section 552.117(a)(2).

If the individual at issue is not a licensed peace officer, then her personal information may be subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the same information belonging to a current or former official or employee of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *Id.* § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. See *Open Records Decision No. 530 at 5* (1989). Therefore, the 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 on which the request for this information was made. Therefore, to the extent the individual whose information is at issue is not a currently licensed police officer and timely requested confidentiality under section 552.024, the constable's office must withhold the court-filed document we have marked under section 552.117(a)(1) of the Government Code. If the individual whose information is at issue did not timely requested confidentiality under

section 552.024, then the constable's office may not withhold the marked information under section 552.117(a)(1).

In summary, with the exception of the information subject to section 552.022(a)(17) of the Government Code, the constable's office may withhold the submitted information under section 552.108(a)(1) of the Government Code. If the individual whose information is at issue is currently a licensed peace officer as defined by article 2.12, then the constable's office must withhold the court-filed document we have marked under section 552.117(a)(2) of the Government Code. If the individual whose information is at issue is not a currently licensed police officer and timely requested confidentiality under section 552.024 of the Government Code, the constable's office must withhold the court-filed document we have marked under section 552.117(a)(1) of the Government Code. If the individual whose information is at issue is not a currently licensed police officer and did not timely request confidentiality under section 552.024 of the Government Code, the court-filed document we have marked must be released pursuant to section 552.022(a)(17) of the Government Code.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/tch

Ref: ID# 496504

Enc. Submitted documents

c: Requestor
(w/o enclosures)