ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 9, 2013

Ms. Debra L. Goetz
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P.O. Box 3725
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OR2013-17523

Dear Ms. Goetz:

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# 501697.

The Hidalgo County Sheriff's Department (the "department"), which you represent, received two requests for information from different requestors The first requestor seeks certain information regarding a named former deputy. The second requestor also seeks information regarding the former deputy, as well as permits or documents allowing film crews to film a commercial for the sheriff at a specified location during a specified time period and visitor logs to the specified location for any production crew members filming the commercial during a specified time period. You indicate the department has released some information to the requestors. You claim a portion of the submitted information is not subject to the Act. Additionally, you claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.117, 552.130, 552.136, and 552.137 of the Government Code.[1] We have considered the exceptions you claim and reviewed the submitted information.

You assert some of the submitted information is not public information under the Act. The Act is applicable only to "public information." *See* Act of May 27, 2013, 83rd

[1]Although you also raise section 552.1175 of the Government Code, we note section 552.117 is the proper exception to raise for information held by the department in an employment context.

Leg., R.S., S.B. 1368, § 1 (to be codified as an amendment to Gov't Code § 552.002); Gov't Code § 552.021. Section 552.002(a) defines "public information" as

> information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:
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> (1) by a governmental body;
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> (2) for a governmental body and the governmental body:
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> (A) owns the information;
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> (B) has a right of access to the information; or
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> (C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or
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> (3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

Act of May 27, 2013, 83rd Leg., R.S., S.B. 1368, § 1 (to be codified as an amendment to Gov't Code § 552.002). Thus, virtually all of the information in a governmental body's physical possession constitutes public information and thus is subject to the Act. *Id.*; *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). Information that is collected, assembled, or maintained by a third party may be subject to disclosure under the Act if a governmental body owns, has a right of access, or spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information. *See* Act of May 27, 2013, 83rd Leg., R.S., S.B. 1368, § 1 (to be codified as an amendment to Gov't Code § 552.002); Open Records Decision No. 462 (1987); *cf.* Open Records Decision No. 499 (1988). Moreover, section 552.001 of the Act provides that it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. *See* Gov't Code § 552.001(a).

You claim the information you have submitted as Exhibits G and J is not subject to the Act because it consists of cellular telephone data obtained from two individuals' personal cellular telephones. However, you state the department obtained this information "as part of its criminal investigation . . . and then provided a copy of this data in its entirety to the internal

affairs unit." Thus, we find the information submitted as Exhibits G and J constitutes "information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by or for the department. *See id.* § 552.021. Therefore, the information in Exhibits G and J constitutes public information and is subject to the Act. Accordingly, we will address your submitted arguments against disclosure of this information, as well as the remaining submitted information.

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. You raise section 552.101 in conjunction with confidentiality provisions found in chapter 55 of the Code of Criminal Procedure for some of the submitted information. Articles 55.01 through 55.05 of the Code of Criminal Procedure provide for the expunction of criminal records in certain limited circumstances. Article 55.03 prescribes the effect of an expunction order and provides:

> When the order of expunction is final:
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> > (1) the release, maintenance, dissemination, or use of the expunged records and files for any purpose is prohibited;
> >
> > (2) except as provided in Subdivision (3) of this article, the person arrested may deny the occurrence of the arrest and the existence of the expunction order; and
> >
> > (3) the person arrested or any other person, when questioned under oath in a criminal proceeding about an arrest for which the records have been expunged, may state only that the matter in question has been expunged.

Crim. Proc. Code art. 55.03. Article 55.04 imposes sanctions for violations of an expunction order and provides in part:

> Sec. 1. A person who acquires knowledge of an arrest while an officer or employee of the state or of any agency or other entity of the state or any political subdivision of the state and who knows of an order expunging the records and files relating to that arrest commits an offense if he knowingly releases, disseminates, or otherwise uses the records or files.

Id. art. 55.04, § 1. This office has determined the expunction statute prevails over the Act. *See* Open Records Decision No. 457 at 2 (1987) (governmental body prohibited from releasing or disseminating arrest records subject to expunction order, as "those records are

not subject to public disclosure under the [Act]"). You contend some of the submitted information may contain information that is the subject of an expunction order, and you seek to withhold that information under article 55.03 of the Code of Criminal Procedure. You have submitted an expunction order pertaining to a portion of the information at issue. Thus, we agree the information to which the submitted expunction order pertains is confidential under article 55.03 of the Code of Criminal Procedure, and the department must withhold it on that basis under section 552.101 of the Government Code. However, you have not submitted a copy of an expunction order for the remaining information at issue. We nevertheless conclude to the extent the remaining information you have indicated is the subject of an expunction order, the department must withhold any such information under section 552.101 of the Government Code in conjunction with article 55.03 of the Code of Criminal Procedure. To the extent the information at issue is not the subject of an expunction order, the department may not withhold it under section 552.101 on the basis of article 55.03, and the department must dispose of any such information in accordance with the rest of this ruling.

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that did not result in conviction or deferred adjudication. *See* Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). We note section 552.108 is generally not applicable to the records of an internal affairs investigation that is purely administrative in nature and does not involve the investigation or prosecution of crime. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.); *Morales v. Ellen*, 840 S.W.2d 519 (Tex. 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 the information pertaining to internal affairs files 09-05-045 and 12-10-114 relates to criminal investigations conducted by the department. You further state these investigations did not result in conviction or deferred adjudication. Based on these representations and our review, we agree section 552.108(a)(2) is applicable to the information pertaining to internal affairs files 09-05-045 and 12-10-114, which we have marked.

You also state the information pertaining to internal affairs file 08-01-002 relates to a criminal investigation that did not result in conviction or deferred adjudication. However, we note the internal affairs file at issue relates to a criminal investigation of the named former deputy conducted by the McAllen Police Department. Section 552.108 may be invoked by the proper custodian of information relating to an investigation or prosecution

of criminal conduct. *See* Open Records Decision No. 474 at 4-5 (1987). Thus, where a governmental body has custody of information that would otherwise qualify for exception under section 552.108 as information relating to a concluded criminal case of a law enforcement agency, the custodian of the records may withhold the information if it provides this office with a demonstration that the information relates to the criminal case that has reached a conclusion other than a conviction or a deferred adjudication and a representation from the law enforcement agency that it wishes to have the information withheld. In this instance, you have not provided any such representation from the McAllen Police Department objecting to the release of this information. Accordingly, the department may not withhold the information pertaining to internal affairs file 08-01-002 under section 552.108(a)(2) of the Government Code.

Further, you generally assert section 552.108(a)(2) for some of the remaining information you have marked. However, you have not demonstrated how any of the remaining information at issue pertains to a concluded criminal investigation conducted by the department that did not result in conviction or deferred adjudication. Accordingly, we find the department may not withhold any of the remaining information you have marked under section 552.108(a)(2).

However, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e.*, 536 S.W.2d 559 (Tex. 1976). *See also* Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). We note basic information does not include the identifying information of victims, witnesses, or other involved parties, but does include the identities of complainants. Further, basic information does not include motor vehicle record information subject to section 552.130 of the Government Code. Thus, with the exception of the basic information, the department may withhold the information we have marked under section 552.108(a)(2) of the Government Code.[2]

Section 552.101 of the Government Code also encompasses chapter 411 of the Government Code, which makes confidential 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 that 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 that the Department of Public Safety ("DPS")

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[2]As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

maintains, except that DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *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. Thus, 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. Upon review, we find a portion of the remaining information, which we have marked, consists of CHRI that is confidential under section 411.083. Thus, the department must withhold the marked information under section 552.101 in conjunction with section 411.083 of the Government Code.

Section 552.101 of the Government Code also encompasses section 1701.306 of the Occupations Code, which provides:

> (a) [Texas Commission on Law Enforcement Officer Standards and Education ("TCLEOSE")] may not issue a license to a person as an officer or county jailer unless the person is examined by:
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> > (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.
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> (b) An agency hiring a person for whom a license as an officer or county jailer 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). Upon review, we find the department must withhold the L-2 Declaration of Medical Condition and L-3 Declaration of Psychological and Emotional Health forms we have marked in the remaining information under section 552.101 in

conjunction with section 1701.306 of the Occupations Code.[3] However, we find no portion of the remaining information at issue is confidential pursuant to section 1701.306, and the department may not withhold any of the remaining information at issue on that basis under section 552.101 of the Government Code.

Section 552.101 of the Government Code also encompasses section 1701.454 of the Occupations Code, which governs the public availability of information submitted to the TCLEOSE under subchapter J of chapter 1701 of the Occupations Code. Section 1701.454 provides as follows:

> (a) All information submitted to the [TCLEOSE] under this subchapter is confidential and is not subject to disclosure under Chapter 552, Government Code, unless the person resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses.
>
> (b) Except as provided by this subchapter, a [TCLEOSE] member or other person may not release information submitted under this subchapter.

Id. § 1701.454. The remaining information includes information that was submitted to TCLEOSE pursuant to subchapter J of chapter 1701 of the Occupations Code. Furthermore, the information at issue does not indicate the named former deputy resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses. Therefore, the department must withhold the F-5 forms we have marked in the remaining information under section 552.101 in conjunction with section 1701.454 of the Occupations Code. However, we find no portion of the remaining information was submitted to TCLEOSE pursuant to subchapter J of chapter 1701 of the Occupations Code. Accordingly, the department may not withhold any portion of the remaining information under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

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 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). Having carefully reviewed the

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[3]We note the L-2 and L-3 forms at issue were created prior to September 1, 2011. Although section 1701.306 was amended in 2011 by the 82nd Legislature, L-2 and L-3 forms created prior to September 1, 2011 are subject to the former version of section 1701.306, which was continued in effect for that purpose.

remaining information, we have marked information that must be withheld under section 552.102(a) of the Government Code.

Section 552.117(a)(2) of the Government Code excepts from public 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 peace officer has family members, regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code. *See* Gov't Code § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). We have marked information under section 552.117 that consists of the personal information of a peace officer who was employed by the department and the information is held in the employment context. In this instance, however, it is unclear whether the individual whose information is at issue is a currently licensed peace officer as defined by article 2.12 of the Code of Criminal Procedure. Accordingly, to the extent the individual whose information is at issue is a currently licensed peace officer as defined by article 2.12, the department must withhold the information 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 service is not paid for by a governmental body. Conversely, to the extent the individual whose information is at issue is no longer a licensed peace officers as defined by article 2.12, then the department may not withhold the marked information under section 552.117(a)(2).

If the information we marked under section 552.117 pertains to an individual who is no longer a licensed peace officer, then the marked information may be subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 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). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former 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 employee who did not timely request under section 552.024 the information be kept confidential. Therefore, to the extent the individual at issue is no longer a peace officer as defined by article 2.12 and to the extent this individual timely requested

confidentiality under section 552.024 of the Government Code, the department must withhold the marked information under section 552.117(a)(1) of the Government Code; however, the department may only withhold the marked cellular telephone number if the cellular service is not paid for by a governmental body. Conversely, to the extent the individual at issue is no longer a peace officer as defined by article 2.12 and did not timely request confidentiality under section 552.024, the department may not withhold the marked information under section 552.117(a)(1).[4]

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's or driver's license issued by an agency of this state or another state or country is excepted from public release. *See* Gov't Code § 552.130(a)(1). Accordingly, the department must withhold the driver's license information we have marked under section 552.130 of the Government Code.

In summary, the department must withhold the information pertaining to the submitted expunction order under section 552.101 of the Government Code in conjunction with article 55.03 of the Code of Criminal Procedure. To the extent the remaining information the department indicated is the subject of an expunction order, the department must withhold any such information under section 552.101 of the Government Code in conjunction with article 55.03 of the Code of Criminal Procedure. With the exception of basic information, the department may withhold the information we have marked under section 552.108(a)(2). The department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code and sections 1701.306 and 1701.454 of the Occupations Code. The department must withhold the information we have marked under section 552.102(a) of the Government Code. To the extent the individual whose information we have marked is a currently licensed peace officer as defined by article 2.12, the department must withhold the information we 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 service is not paid for by a governmental body. To the extent the individual at issue is no longer a peace officer as defined by article 2.12 of the Code of Criminal Procedure and to the extent this individual timely requested confidentiality under section 552.024 of the Government Code, the department must withhold the marked information under section 552.117(a)(1) of the Government Code; however, the department may only withhold the marked cellular telephone number if the service is not paid for by a governmental body. The department must withhold the information we have marked under section 552.130 of the Government Code. The department must release the remaining information.

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[4]Regardless of the applicability of section 552.117 of the Government Code, we note section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office. *See* Gov't Code § 552.147(b).

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,

Kristi L. Wilkins
Assistant Attorney General
Open Records Division

KLW/bhf

Ref: ID# 501697

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)