ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 30, 2013

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

OR2013-18901

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# 504168 (C.A. File No. 13PIA0422).

The Harris County Sheriff's Office (the "sheriff's office") received a request for the employment history records and information "concerning education, suspensions, or revocation of license or records of disciplin[e], or training" of a named deputy. The sheriff's office claims the requested information is excepted from disclosure under sections 552.101, 552.102, 552.108, and 552.117 of the Government Code.[1] We have considered the claimed exceptions and reviewed the submitted information.

Initially, we must address the procedural obligations of the sheriff's office under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(e) of the Government Code, a governmental body must submit to this office within fifteen business days of receiving an open records request a copy or representative sample of the specific information requested. Gov't Code § 552.301(e)(1)(D). The sheriff's office received the request for information on August 19, 2013, and you inform us the information responsive to the request consists

[1]Although you also raise section 552.111 of the Government Code, you have not submitted arguments explaining how this exception applies to the submitted information. Therefore, we presume the sheriff's office no longer asserts this exception. *See* Gov't Code §§ 552.301, .302. In addition, although you also raise section 552.1175 of the Government Code as an exception to disclosure, we note section 552.117 of the Government Code is the proper exception to raise for information the sheriff's office holds in an employment capacity.

of (1) the named deputy's personnel file and (2) an ongoing Internal Affairs Division investigation file. Although you submitted the responsive personnel file, as of the date of this letter, you have not submitted the responsive Internal Affairs Division investigation file. Thus, the sheriff's office failed to comply with section 552.301 regarding the responsive Internal Affairs Division investigation file.

Generally, a governmental body's failure to comply with section 552.301 results in the waiver of the claimed exceptions. *See generally id.* § 552.302. Section 552.108 of the Government Code is a discretionary exception to disclosure that protects a governmental body's interests. *See* Open Records Decision No. 177 (1977) (statutory predecessor to section 552.108 subject to waiver). Thus, by failing to comply with section 552.301, the sheriff's office has waived section 52.108 for the Internal Affairs Division investigation file. *See* Open Records Decision No. 665 at 5 (2000) (untimely request for decision resulted in waiver of discretionary exceptions). Furthermore, because the sheriff's office has not submitted the information at issue to this office for our review, we have no basis for finding it confidential under the claimed mandatory exceptions. Therefore, we have no choice but to order the sheriff's office to release the responsive Internal Affairs Division investigation file in accordance with section 552.302 of the Government Code. If the sheriff's office believes this information is confidential and may not lawfully be released, the sheriff's office must challenge this ruling in court pursuant to section 552.324 of the Government Code.

You assert the submitted personnel file is excepted from disclosure under section 552.108 of the Government Code. Section 552.108 of the Government Code provides in relevant part the following:

> (a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:
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> > (1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]
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> > . . .
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> (b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:
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> > (1) release of the internal record or notation would interfere with law enforcement or prosecution[.]

Gov't Code § 552.108(a)(1), (b)(1). A governmental body claiming section 552.108(a)(1) or 552.108(b)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), (b)(1), 552.301(e)(1)(A);

see also Ex parte Pruitt, 551 S.W.2d 706 (Tex. 1977). However, section 552.108 is generally not applicable to an internal administrative investigation involving a law enforcement officer that did not result in a criminal investigation or prosecution. *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, 525-26 (Tex. 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 Nos. 562 at 10 (1990), 350 at 3-4 (1982). You generally assert the submitted information pertains to pending investigations. However, this information pertains to purely administrative and personnel matters. You have not explained or otherwise demonstrated how release of the information would interfere with the detection, investigation, or prosecution of crime. Therefore, we find the sheriff's office has failed to demonstrate the applicability of section 552.108(a)(1) or 552.108(b)(1) to the submitted information. Consequently, the sheriff's office may not withhold it from release on either of those grounds.

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. This section encompasses information protected by other statutes. Chapter 560 of the Government Code provides a governmental body may not release fingerprint information except in certain limited circumstances. *See id.* §§ 560.001 (defining "biometric identifier" to include fingerprints), .002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), .003 (biometric identifiers in possession of governmental body exempt from disclosure under the Act). You do not inform us, and the submitted information does not indicate, section 560.002 permits the disclosure of the submitted fingerprint information. Therefore, the sheriff's office must withhold this information, which we have marked, under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code.[2]

Section 552.101 of the Government Code also encompasses section 1703.306 of the Occupations Code, which provides the following:

> (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:
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> > (1) the examinee or any other person specifically designated in writing by the examinee;

[2]We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold specified categories of information, including a fingerprint under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code, without the necessity of requesting an attorney general opinion.

(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.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Occ. Code § 1703.306. The submitted information contains polygraph information that is confidential under section 1703.306, and the requestor does not appear to have a right of access to the information under that section. Accordingly, the sheriff's office must withhold this information, which we have marked, under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) 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. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. The doctrine of common-law privacy protects a compilation of an individual's criminal history, which is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *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). Furthermore, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. However, criminal history information provided by a sheriff's office deputy as part of an application for employment with the sheriff's office is not compiled by a governmental body. Further, when an deputy's criminal history information is compiled in the course of the deputy's pre-employment screening, there is a legitimate public interest in the information. However,

this office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. *See* Open Records Decision Nos. 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). We note the scope of a public employee's privacy is narrow. *See* Open Records Decision No. 423 at 2 (1984). Upon review, we find some of the submitted information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the sheriff's office must withhold this information, which we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy. However, we conclude the remaining information is not confidential under common-law privacy, and the sheriff's office may not withhold it under section 552.101 on that ground.

Section 552.101 of the Government Code also encompasses the doctrine of constitutional privacy. Constitutional privacy consists of two interrelated 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. Open Records Decision No. 455 at 4 (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. *Id.* 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.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). Upon review, we find you have failed to demonstrate how any portion of the remaining information falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Consequently, the sheriff's office may not withhold any of the remaining information under section 552.101 in conjunction with constitutional privacy.

You also claim the remaining information is excepted from disclosure under section 552.102 of the Government Code. Section 552.102(a) 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). We understand you to assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 of the Government Code, which is discussed above. *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 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 has expressly disagreed with *Hubert*'s interpretation of section 552.102(a) and held the privacy standard under section 552.102(a) differs from the *Industrial Foundation* test under section 552.101. *See Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The Supreme Court also considered the applicability of section 552.102(a) and held it excepts from disclosure the dates of birth of

state employees in the payroll database of the Texas Comptroller of Public Accounts. *See id.* at 348. Having carefully reviewed the information at issue, we have marked the information that must be withheld under section 552.102(a) of the Government Code. The remaining information is not excepted under section 552.102(a) and may not 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.[3] Gov't Code § 552.117(a)(2). The sheriff's office must withhold the information we have marked under section 552.117(a)(2) of the Government Code.

Some of the remaining information is excepted from disclosure under section 552.130 of the Government Code.[4] Section 552.130(a) provides the following:

> Information is excepted from the requirements of Section 552.021 if the information relates to:
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> (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state or another state or country;
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> (2) a motor vehicle title or registration issued by an agency of this state or another state or country; or
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> (3) a personal identification document issued by an agency of this state or another state or country or a local agency authorized to issue an identification document.

Id. § 552.130(a). The sheriff's office must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.[5]

Section 552.136(b) of the Government Code provides that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that

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[3]"Peace officer" is defined by article 2.12 of the Texas Code of Criminal Procedure.

[4]The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987).

[5]We note section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsection 552.130(a) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e).

is collected, assembled, or maintained by or for a governmental body is confidential." *Id.* § 552.136(b). This office has determined an insurance policy number is an access device number for purposes of section 552.136. ORD 684 at 9. Thus, the sheriff's office must withhold the insurance policy number we have marked under section 552.136 of the Government Code.

To conclude, the sheriff's office must release the responsive Internal Affairs Division investigation file in accordance with section 552.302 of the Government Code. The sheriff's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code, section 1703.306 of the Occupations Code, and common-law privacy. The sheriff's office must also withhold the information we have marked under sections 552.102(a), 552.117(a)(2), 552.130, and 552.136 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.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,

James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/tch

Ref: ID# 504168

Enc. Submitted documents

c: Requestor
(w/o enclosures)