



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 11, 2013

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

OR2013-21526

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# 508980 (C.A. File No. 13PIA0520).

The Harris County Constable, Precinct 7 (the "constable's office") received a request for information from the personnel file of the requestor's client pertaining to his termination or resignation from the constable's office. The constable's office claims the requested information is excepted from disclosure under sections 552.102, 552.103, 552.108, 552.111, 552.117, and 552.1175 of the Government Code. We have considered the claimed exceptions and reviewed the submitted information.

Initially, we note some of the requested information may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2013-16986 (2013). In Open Records Letter No. 2013-16986, we determined the constable's office must withhold some information under section 552.130 of the Government Code, but must release the remaining information at issue. We have no indication the law, facts, and circumstances on which the prior ruling was based have changed. Accordingly, to the extent the information in the current request is identical to the information previously requested and ruled upon by this office, we conclude the constable's office must continue to rely on Open Records Letter No. 2013-16986 as a previous determination and withhold or release the information in accordance with that ruling. To the extent the submitted

information is not subject to Open Records Letter No. 2013-16986, we will address your arguments against disclosure.

We must next address the obligations of the constable'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(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. Gov't Code § 552.301(b). The constable's office received the request for information on September 26, 2013. Thus, the ten-business-day deadline of the constable's office under section 552.301(b) was October 10, 2013. Although you timely raised sections 552.102, 552.108, 552.111, 552.117, and 552.1175 of the Government Code, you did not raise section 552.103 of the Government Code until October 16, 2013. Therefore, the constable's office failed to comply with the procedural requirements mandated by section 552.301(b) in raising section 552.103.

Generally, a governmental body's failure to comply with section 552.301 results in the waiver of the claimed exceptions. *See id.* § 552.302. Section 552.103 of the Government Code is discretionary in nature. It serves only to protect a governmental body's interests. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Accordingly, the constable's office has waived section 552.103 and may not withhold any of the submitted information on that basis.

We next note the submitted information contains completed evaluations that are subject to section 552.022(a)(1) of the Government Code, which reads as follows:

Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). Section 552.111 of the Government Code is discretionary and does not make information confidential under the Act. *See* Open Records Decision No. 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111 deliberative process); *see also* ORD 522. Therefore, the constable's office may not withhold the information subject to section 552.022, which we have marked, under section 552.111. However, section 552.102 of the Government Code makes information confidential under

the Act. Accordingly, we will consider the applicability of section 552.102 to the information subject to section 552.022. We will also consider your arguments under section 552.108 for this information. *See* Gov't Code § 552.022(a)(1).

The submitted information contains W-4 tax forms of the requestor's client. Section 6103(a) of title 26 of the United States Code renders tax return information confidential. *See* Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Section 6103(b) defines the term "return information" as:

a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Treasury] with respect to a return or with respect to the determination of the existence, or possible existence, of liability . . . for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense[.]

26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service (the "IRS") regarding a taxpayer's liability under title 26 of the United States Code. *See Chamberlain v. Kurtz*, 589 F.2d 827, 840-41 (5th Cir. 1979); *Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *aff'd in part*, 993 F.2d 1111 (4th Cir. 1993). As a federal law, section 6103(a) preempts any conflicting state provisions. *See Equal Employment Opportunity Comm'n v. City of Orange, Tex.*, 905 F. Supp. 381, 382 (E.D.Tex. 1995). Thus, the submitted W-4 tax forms are generally confidential under federal law.

However, subsections (c) and (e) of section 6103 are exceptions to the confidentiality provisions of section 6103(a) and provide for disclosure of tax information to the taxpayer or the taxpayer's designee. *See* 26 U.S.C. § 6103(c), (e)(1)(A)(I) (tax return information may be disclosed to taxpayer), (e)(7) (information may be disclosed to any person authorized by subsection(e) to obtain such information if Secretary of Treasury determines such disclosure would not seriously impair tax administration); *see also Lake v. Rubin*, 162 F.3d 113 (D.C. Cir. 1998) (section 6103 represents exclusive statutory route for taxpayer to gain access to own return information and overrides individual's right of access under the federal Freedom of Information Act). As noted, the W-4 tax forms belong to the requestor's client. Therefore, the constable's office must release the submitted W-4 tax forms, which we have marked, pursuant to section 6103 of title 26 of the United States Code.

The submitted information also contains fingerprints of the requestor's client. Chapter 560 of the Government Code provides a governmental body may not release fingerprint information except in certain limited circumstances. *See* Gov't Code §§ 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). The submitted fingerprint information is confidential under section 560.003. However, the requestor has a special right of access to his client’s fingerprint information. *See id.* § 560.002(1). Although you assert this information is excepted under sections 552.108 and 552.111 of the Government Code, as a general rule, the exceptions to disclosure found in the Act do not apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the constable’s office must release this information, which we have marked, pursuant to section 560.002.

You assert the remaining information is excepted from disclosure under section 552.108 of the Government Code, which 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:

...

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

...

(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:

...

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov’t Code § 552.108(a)(2), (b)(2). A governmental body claiming section 552.108(a)(2) or 552.108(b)(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.* § 552.108(a)(2), (b)(2). You state the information at issue “may . . . reveal law enforcement methods, techniques and strategies” and “this is especially true when the conviction did not result in a conviction as with the case herein.” However, you have not explained how the information at issue pertains to any specific investigation that concluded

in a final result other than a conviction or deferred adjudication. Thus, you have failed to demonstrate the applicability of section 552.108(a)(2) or 552.108(b)(2). Therefore, the constable's office may not withhold any portion of the information at issue under either of those grounds.

You assert some of the information at issue is excepted from disclosure under sections 552.102 and 552.117 of the Government Code. However, these sections protect personal privacy. The requestor has a right of access to his client's private information pursuant to section 552.023 of the Government Code. *Id.* § 552.023(a) (person or person's authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and is protected from public disclosure by laws intended to protect person's privacy interests); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual asks governmental body to provide him with information concerning himself). Thus, the constable's office may not withhold any of the submitted information from the requestor pursuant to section 552.102(a) or 552.117 of the 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."<sup>1</sup> Gov't Code § 552.101. Section 552.101 of the Government Code encompasses federal law, such as the Family Medical Leave Act (the "FMLA"), section 2654 of title 29 of the United States Code. Section 825.500 of chapter V of title 29 of the Code of Federal Regulations identifies the record-keeping requirements for employers that are subject to the FMLA. Section 825.500(g) states the following:

[r]ecords and documents relating to certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if the ADA, as amended, is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements . . . , except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and

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<sup>1</sup>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).

(3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g). Upon review, we find some the submitted information, which we have marked, is confidential under section 825.500 of title 29 of the Code of Federal Regulations. Further, we find the release provisions of the FMLA are not applicable to this information. Accordingly, the constable's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the FMLA.

The submitted information also contains an I-9 form and its attachments. Section 1324a of title 8 of the United States Code provides that an Employment Eligibility Verification Form I-9 "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). The release of the submitted I-9 form and its attachments in response to this request for information would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, the I-9 form and attachments, which we have marked, are excepted from disclosure under section 552.101 of the Government Code in conjunction with federal law and the constable's office may release this information for purposes of compliance with the federal laws and regulations governing the employment verification system.

Section 552.101 of the Government Code also encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code §§ 151.001-168.202. Section 159.002 of the MPA provides in relevant part the following:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
- (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

*Id.* § 159.002(a)-(c). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004. This office

has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. Upon review, we find a portion of the remaining information constitutes medical records of the requestor's client. Accordingly, the constable's office must withhold this information, which we have marked, under section 552.101 in conjunction with the MPA.

You assert the remaining information is excepted from disclosure under section 552.111 of the Government Code, which excepts from disclosure "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]" Gov't Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *see* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

You assert the information not subject to section 552.022 should be protected under section 552.111 because you argue "the records requested clearly show the deliberative process as well as interagency and intra-agency discussion." However, we note the information at issue consists of personnel documents. You have not demonstrated how this information involves policymaking pertaining to personnel matters of a broad scope.

Therefore, the constable's office may not withhold any of the remaining information under section 552.111 of the Government Code.

Section 552.1175(b) of the Government Code provides in part the following:

Information that relates to the home address, home telephone number, emergency contact information, date of birth, 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.

Gov't Code § 552.1175(b). We note section 552.1175 encompasses a personal cellular telephone number, provided a governmental body does not pay for the cellular phone service. *See generally* Open Records Decision No. 506 at 5-6 (1988) (Government Code section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). The submitted documents contain information, including a cellular telephone number, pertaining to peace officers who do not work for the constable's office. Therefore, if these individuals are currently licensed peace officers who elect to restrict access to this information in accordance with section 552.1175(b), then the constable's office must withhold this information, which we have marked, under section 552.1175. However, the constable's office may not withhold this information under section 552.1175 if the individuals either are not currently licensed peace officers or do not elect to restrict access to this information in accordance with section 552.1175(b). In addition, the constable's office may only withhold the personal cellular telephone number we have marked under section 552.1175 if a governmental body did not pay for the cellular telephone service. Section 552.1175 is not applicable to any of the remaining information, and the constable's office may not withhold any of it from release on that ground.

The remaining information contains e-mail addresses of members of the public. 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* Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. The requestor has a right of access to his client's e-mail address pursuant to section 552.137(b) of the Government

Code. *See id.* § 552.137(b). However, the remaining e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). You do not inform us a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, the constable's office must withhold the e-mail addresses we have marked under section 552.137.<sup>2</sup>

To conclude, to the extent the information in the current request is identical to the information previously requested and ruled upon by this office, the constable's office must continue to rely on Open Records Letter No. 2013-16986 as a previous determination and withhold or release the information in accordance with that ruling. The constable's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the FMLA and the MPA. The constable's office may only release the I-9 form and its attachment, which we have marked, in compliance with the federal laws and regulations governing the employment verification system. The constable's office must withhold the information we have marked under section 552.1175 of the Government Code if the information pertains to individuals who are currently licensed peace officers and who elect to restrict access to this information in accordance with section 552.1175(b); however, the constable's office may only withhold the cellular telephone number we have marked under section 552.1175 if the officer at issue paid for the cellular telephone service. The constable's office must withhold the e-mail addresses we have marked under section 552.137 of the Government Code. The constable's office must release the remaining information.<sup>3</sup>

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/>

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<sup>2</sup>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 opinion. Accordingly, if the constable's office receives another request from an individual other than this requestor, the constable's office is authorized to withhold the e-mail address of the requestor's client under section 552.137 without the necessity of requesting an attorney general decision.

<sup>3</sup>Because the requestor has a special right of access to some of the information being released, the constable's office must again seek a decision from this office if it receives another request for the same information from another requestor. We also note the submitted information contains social security numbers of living individuals, other than the requestor's client. 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 under the Act. Gov't Code § 552.147(b).

[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# 508980

Enc. Submitted documents

c: Requestor  
(w/o enclosures)