



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 17, 2014

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

OR2014-04453

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# 516880 (CAO File No. 13PIA0664).

The Harris County Sheriff's Office (the "sheriff's office") received a request for the requestor's personnel file.¹ You claim the submitted information is excepted from disclosure under sections 552.103, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We note the submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2014-00448 (2014). In that ruling, we determined the following: the sheriff's office must withhold: (1) the information we marked under section 552.101 if the Government Code in conjunction with section 1701.454 of the Occupations Code; (2) the L-2 and L-3 forms we marked under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code; (3) the medical records we marked under section 552.101 of the Government Code in conjunction with the MPA; (4) the mental health records we marked under section 552.101 of the Government Code in conjunction with chapter 611 of the Health and Safety Code; (5) the CHRI we marked under section 552.101 of the Government

¹As you have not submitted a copy of the request for information, we take our description from your brief.

Code in conjunction with chapter 411 of the Government Code; (6) the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy; (7) the date of birth we marked under section 552.102(a) of the Government Code; (8) the information we marked under section 552.117(a)(2) of the Government Code if the individuals at issue are currently licensed peace officers as defined by article 2.12 and a governmental body does not pay for the cellular telephone service; (9) the information we marked under section 552.117(a)(1) of the Government Code if the individual at issue timely elected confidentiality under section 552.024 of the Government Code and a governmental body does not pay for the cellular telephone service; (10) the information we marked under section 552.1175 of the Government Code, if the individuals to whom the information pertains elect to restrict access to their information in accordance with subsection 552.1175(b) of the Government Code; however, the individuals' cellular telephone and pager numbers may only be withheld if the cellular telephone and pager service is not paid by a governmental body; (11) the motor vehicle record information we marked under section 552.130 of the Government Code; (12) the insurance policy number we marked under section 552.136 of the Government Code; (13) the personal e-mail address we marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its release; and (14) the photocopy of the officer's identification card we have marked under section 552.139 of the Government Code. We ruled the remaining information must be released. You now seek to withhold the information at issue under sections 552.103, 552.108, and 552.111 of the Government Code.

We note section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the sheriff's office may not now withhold any previously released information unless its release is expressly prohibited by law or the information is confidential under law. Although you raise sections 552.103, 552.108, and 552.111 of the Government Code, these sections do not prohibit the release of information or make information confidential. *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 Gov't Code § 552.103); Open Records Decision Nos. 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver). Thus, to the extent any portion of the submitted information was previously released in accordance with Open Records Letter No. 2014-00448, the sheriff's office may not now withhold such information under sections 552.103, 552.108, and 552.111. Further, we note the requestor, in this instance, has a right of access to some of the previously withheld information. Thus,

the law, facts and circumstances have changed, and the sheriff's office may not rely on Open Records Letter No. 2014-00448 as a previous determination. *See* 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 the same information as was addressed in prior attorney general ruling, ruling addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, we must address the sheriff's office obligations 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), a governmental body must submit to this office within fifteen business days of receiving an open records request a copy of the written request for information. *See* Gov't Code § 552.301(e)(1)(B). You state the sheriff's office received the request for information on December 19, 2013. We understand the sheriff's office was closed on December 24, 2013, December 25, 2013, and January 1, 2014. We note this office does not count the date the request was received or holidays as business days for the purpose of calculating a governmental body's deadlines under the Act. Thus, the sheriff's office's fifteen-business-day deadline to submit a copy of the written request was January 14, 2014. As of the date of this ruling, the sheriff's office has not submitted a copy of the written request. *See id.* § 552.308 (prescribing requirements for timeliness of request for ruling submitted by United States mail). Thus, the sheriff's office failed to comply with the procedural requirements mandated by section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released unless the governmental body overcomes this presumption by demonstrating a compelling reason to withhold the information. *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); Open Records Decision No. 630 (1994). A compelling reason generally exists when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). Although you raise sections 552.103, 552.108, and 552.111 of the Government Code, these sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See* Gov't Code § 552.007; *Dallas Area Rapid Transit* 4 S.W.3d at 475-76; Open Records Decision Nos. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived), 177 at 3, 663 at 5 (1999) (governmental body may waive section 552.111), 470; *see also* ORD No. 665 at 2 n.5. Thus, in failing to comply with section 552.301, the sheriff's office has waived its arguments under sections 552.103, 552.108, and 552.111. Sections 552.101, 552.117, 552.1175, 552.130, and 552.139 of the Government Code can, however, provide compelling reasons to overcome the presumption

of openness.² Accordingly we will address the applicability of these sections to the 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.” Gov’t Code § 552.101. Section 552.101 encompasses section 1701.306 of the Occupations Code, which pertains to an L-2 Declaration of Medical Condition form and an L-3 Declaration of Psychological and Emotional Health form required by the Texas Commission on Law Enforcement Officer Standards and Education (“TCLEOSE”). Former section 1701.306 provides, in part:

(a) [TCLEOSE] may not issue a license to a person as an officer or county jailer unless the person is examined by:

(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.

(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.

Act of May 17, 1999, 76th Leg., R.S., ch. 3888, § 1, 1999 Tex. Gen. Laws 1431, 2219 (current version at Occ. Code §§ 1701.306(a), (b)). Upon review, we find the L-2 and L-3 declaration forms we have marked must be withheld under section 552.101 of the Government Code in conjunction with former section 1701.306 of the Occupations Code.³

²The 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).

³We note the L-2 and L-3 declaration forms at issue were created prior to September 1, 2011. Although section 1701.306 of the Occupations Code was amended in 2011 by the 82nd Legislature, L-2 and L-3 declaration 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.

Section 552.101 of the Government Code also encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. The MPA is applicable to medical records. Section 159.002 of the MPA provides in part:

(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. Upon review, we find the information we have marked constitutes medical records subject to the MPA. Accordingly, the sheriff's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the MPA.

Section 552.101 of the Government Code also encompasses section 611.002 of the Health and Safety Code, which provides in pertinent part:

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b); *see id.* § 611.001 (defining "patient" and "professional"). Upon review, we find the information we have marked consists of confidential mental health records that are subject to chapter 611 of the Health and Safety Code. Accordingly, the information we have marked must be withheld under section 552.101 of the Government Code in conjunction with chapter 611 of the Health and Safety Code.

Section 552.101 of the Government Code also encompasses chapter 411 of the Government Code, which pertains to 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 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 the Texas Department of Public Safety ("DPS") maintains, except 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. Similarly, 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 the information we have marked consists of confidential CHRI, and the sheriff's office must withhold the marked information under section 552.101 in conjunction with chapter 411.

We note some of the remaining information may be excepted under section 552.117 of the Government Code. Section 552.117(a)(2) of the Government Code excepts from public disclosure a peace officer's home address and telephone number, social security number, emergency contact information, and family member information regardless of whether the peace officer made an election under section 552.024 of the Government Code. *Id.* § 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(a)(2) also encompasses a peace officer's cellular telephone number, unless the cellular telephone service is paid for by a governmental body. *See* Open Records Decision No. 506 at 5-7 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). The information at issue consists of the personal information and cellular telephone number of individuals currently or formerly employed by the sheriff's office. In this instance, however, it is unclear whether the individuals at issue are currently licensed peace officers as defined by article 2.12 of the Code of Criminal Procedure. Therefore, if the individuals whose information we have marked are currently licensed peace officers as defined by article 2.12, the sheriff's office must withhold this information under section 552.117(a)(2). However, the sheriff's office must withhold the marked cellular telephone number only if the cellular telephone service is not paid for by a governmental body. If the individuals at issue are no longer licensed peace officers as defined by article 2.12, the sheriff's office may not withhold the information at issue under 552.117(a)(2) of the Government Code.

Section 552.117(a)(1) of the Government Code may apply to the information at issue. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, emergency contact information, 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. Gov't Code § 552.117(a)(1). As noted above, section 552.117 applies to the personal cellular telephone number of a current or former official or employee of a governmental body, provided the cellular telephone service is not paid by a governmental body. *See* ORD 506 at 5-6. 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 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. If the individuals at issue made timely elections under section 552.024, the sheriff's office must withhold the information we have marked under section 552.117(a)(1); however, the marked cellular telephone number may be withheld only if a governmental body does not pay for the cellular telephone service. If the individuals at issue did not make timely elections under section 552.024, this information may not be withheld under section 552.117(a)(1) of the Government Code.

We note some of the remaining information pertains to peace officers not employed by the sheriff's office. Section 552.1175 of the Government Code protects the home address, home telephone number, emergency contact information, social security number, date of birth, and family member information of certain individuals, when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential. *See* Gov't Code § 552.1175. Section 552.1175 applies, in part, to "peace officers as defined by Article 2.12, Code of Criminal Procedure." *Id.* § 552.1175(a)(1). Section 552.1175 is also applicable to personal pager and cellular telephone numbers, provided the cellular telephone service or pager service is not paid for by a governmental body. *See* ORD 506 at 5-6. Accordingly, the sheriff's office must withhold under section 552.1175 of the Government Code the information we have marked if the individuals at issue are peace officers who elect to restrict access to their information in accordance with section 552.1175(b) of the Government Code; however, the peace officers' pager and cellular telephone numbers may only be withheld if the cellular telephone service or pager service is not paid for by a governmental body. If the individuals whose information is at issue are not licensed peace officers or do not elect to restrict access to their information in accordance with section 552.1175(b) of the Government Code, the sheriff's office may not withhold their information under section 552.1175.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's or driver's license or permit, a motor vehicle title or registration, or a personal identification document issued by an agency of Texas or another state or country is excepted

from public release. Gov't Code § 552.130(a). Upon review, we find the sheriff's office must withhold the motor vehicle record information we marked under section 552.130 of the Government Code.⁴

Section 552.139 of the Government code provides, in part, "a photocopy or other copy of an identification badge issued to an official or employee of a governmental body" is confidential. *Id.* § 552.139(b)(3). Therefore, the sheriff's office must withhold the photocopy of the officer's identification card we have marked under section 552.139 of the Government Code.

In summary, the sheriff's office must withhold: (1) the L-2 and L-3 forms we marked under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code; (2) the medical records we marked under section 552.101 of the Government Code in conjunction with the MPA; (3) the mental health records we marked under section 552.101 of the Government Code in conjunction with chapter 611 of the Health and Safety Code; (4) the CHRI we marked under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code; (5) the information we marked under section 552.117(a)(2) of the Government Code if the individuals at issue are currently licensed peace officers as defined by article 2.12 and a governmental body does not pay for the cellular telephone service; (6) the information we marked under section 552.117(a)(1) of the Government Code if the individuals at issue timely elected confidentiality under section 552.024 of the Government Code and a governmental body does not pay for the cellular telephone service; (7) the information we marked under section 552.1175 of the Government Code, if the individuals to whom the information pertains are currently licensed peace officers who elect to restrict access to their information in accordance with subsection 552.1175(b) of the Government Code; however, the individuals' cellular telephone and pager numbers may only be withheld if the cellular telephone and pager service is not paid by a governmental body; (8) the motor vehicle record information we marked under section 552.130 of the Government Code; and (9) the photocopy of the officer's identification card we have marked under section 552.139 of the Government Code. The sheriff's office must release the remaining information.⁵

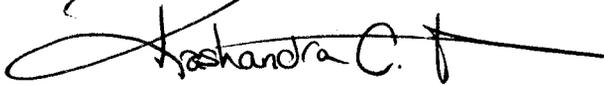
⁴Section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsection 552.130(a) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e).

⁵We note the information being released in this instance includes information that may be confidential with respect to the general public. *See* Gov't Code § 552.023(a) (governmental body may not deny access to person to whom information relates or person's agent on ground that information is considered confidential by privacy principles); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves); Gov't Code § 552.137(b) (personal e-mail address of member of public may be disclosed if owner of address affirmatively consents to its disclosure); Occ. Code § 1701.452 (head of law enforcement agency from which persons resigns or is terminated shall provide copy of report to person). Therefore, if the sheriff's office receives another request for this information from a different requestor, the sheriff's office must again seek a ruling from this office.

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,

A handwritten signature in black ink, appearing to read "Rashandra C. Hayes", with a large, sweeping flourish extending to the right.

Rashandra C. Hayes
Assistant Attorney General
Open Records Division

RCH/dls

Ref: ID# 516880

Enc. Submitted documents

c: Requestor
(w/o enclosures)

