



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 13, 2014

Ms. Susan Fillion  
Assistant County Attorney  
Harris County Sheriff's Office  
1200 Baker Street  
Houston, Texas 77002-1206

OR2014-10214

Dear Ms. Fillion:

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# 525814.

The Harris County Sheriff's Office (the "sheriff's office") received four requests from different requestors for the pre-employment background check investigation report regarding a named individual. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.152 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from one of the requestors. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

You acknowledge the sheriff's office failed to meet the ten-business-day deadline prescribed by section 552.301(b) of the Government Code in requesting an open records decision from this office following the receipt of the first request. *See id.* § 552.301(b). We note the sheriff's office also failed to comply with its fifteen-business-day deadline under section 552.301(e). *See id.* § 552.301(e). 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 demonstrates a compelling reason to withhold the information to overcome this presumption. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (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); *see also* Open Records Decision No. 319 (1982). This office has held that a compelling reason exists to withhold information when the information is confidential by law or affects third party interests. *See* Open Records Decision No. 150 (1977). You seek to withhold portions of the responsive information under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. The purpose of the common-law informer's privilege is to protect the flow of information to a governmental body, rather than to protect a third person. Thus, the informer's privilege, unlike other claims under section 552.101, may be waived. *See* Open Records Decision No. 549 at 6 (1990). Therefore, the sheriff's office's assertion of the informer's privilege does not provide a compelling reason for non-disclosure under section 552.302, and the sheriff's office may not withhold any portion of the submitted information under section 552.101 on that basis. You also argue portions of the submitted information must be withheld under section 552.101 of the Government Code in conjunction with the common-law physical safety exception and section 552.152 of the Government Code. Because such a claim under section 552.101 and section 552.152 can provide compelling reasons to overcome the presumption of section 552.302, we will address these claims for 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 1703.306 of the Occupations Code, which provides:

(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:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (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 [Polygraph Examiners] Board 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. We have marked information that was acquired from a polygraph examination and is, therefore, within the scope of section 1703.306. However, in this instance, the first requestor is the polygraph examinee. Thus, the sheriff's office has the discretion to release the first requestor's polygraph information to him pursuant to section 1703.306(a)(1). *See* Open Records Decision No. 481 at 9 (1987) (predecessor to section 1703.306 permitted, but did not require, examination results to be disclosed to examinees).

However, it does not appear the remaining requestors fall into any of the categories of individuals who are authorized to receive the polygraph information under section 1703.306(a). Accordingly, the sheriff's office must withhold from the remaining requestors the information 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 laws that make criminal history record information ("CHRI") confidential. CHRI generated by the National Crime Information Center or by the Texas Crime Information Center is confidential under federal and state law. 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 at 7 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* at 10-12. Section 411.083 of the Government Code deems confidential CHRI the 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) of the Government Code authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for criminal justice purposes. *See 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. We note section 411.083 does not apply to information relating to an individual's current involvement with the criminal justice system. *See id.* § 411.081(b) (police department allowed to disclose information pertaining to person's current involvement in the criminal justice system). Further, CHRI does not include driving record information. *Id.* § 411.082(2)(B). Upon review, we find the information we have marked consists of confidential CHRI. Accordingly, the sheriff's office 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.<sup>1</sup>

You raise section 552.101 of the Government Code in conjunction with the common-law physical safety exception. The Texas Supreme Court has recognized, for the first time, a common-law physical safety exception to required disclosure. *Tex. Dep't of Pub. Safety v. Cox Tex. Newspapers, LP. & Hearst Newspapers, LLC*, 343 S.W.3d 112 (Tex. 2011). Pursuant to this common-law physical safety exception, "information may be withheld [from public release] if disclosure would create a substantial threat of physical harm." *Id.* In applying this standard, the court noted "deference must be afforded" law enforcement experts regarding the probability of harm, but further cautioned, "vague assertions of risk will not carry the day." *Id.* at 119.

You generally argue release of the submitted information would jeopardize the investigating officer's safety and may subject him to retaliation. Upon review, however, we conclude you have not demonstrated that release of any of the remaining information would subject any individual to a specific risk of harm. Accordingly, the sheriff's office may not withhold any of the remaining information under section 552.101 in conjunction with the common-law physical safety exception.

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. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). This office has also found that personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from disclosure under common-law privacy. *See* Open Records Decision No. 600 (1992). However, this office has noted the public has a legitimate interest in information relating to those who are involved in law enforcement. *See, e.g.*, Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs but in fact touches on matters of legitimate public concern), 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of law enforcement employees), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest), 329 (1982) (reasons for

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<sup>1</sup>We note an individual can obtain his own CHRI from DPS. *See* Gov't Code § 411.083(b)(3).

employee's resignation ordinarily not private). Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. However, in this instance, the first requestor is the individual whose privacy interests are at issue. Thus, the first requestor has a right of access to information pertaining to himself that would otherwise be confidential under common-law privacy. See Gov't Code § 552.023(a) ("person or a 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 that is protected from public disclosure by laws intended to protect that person's privacy interests"); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Accordingly, the sheriff's office may not withhold the information at issue from the first requestor under section 552.101 in conjunction with common-law privacy. The sheriff's office must withhold the information we have marked from the remaining requestors under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.1175 of the Government Code protects the home address, home telephone number, emergency contact information, date of birth, social security number, 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.<sup>2</sup> Gov't Code § 552.1175. Section 552.1175 applies, in part, to "peace officers as defined by Article 2.12, Code of Criminal Procedure[.]" Gov't Code § 552.1175(a)(1). Some of the remaining information, which we have marked, consists of the personal information of the first requestor who is not employed by the sheriff's office. Because this exception protects personal privacy, the first requestor has a right of access to his own information. See *id.* § 552.023(a); ORD 481 at 4. However, to the extent the first requestor elects to restrict access to his information in accordance with section 552.1175(b), his information must be withheld from the remaining requestors under section 552.1175 of the Government Code. However, if he does not elect to restrict access to the information in accordance with section 552.1175(b), his information may not be withheld under section 552.1175. The sheriff's office must also withhold from all requestors the information we have marked pertaining to a former constable under section 552.1175 if the individual to whom the information pertains is still a licensed peace officer and elects to restrict access to his information in accordance with section 552.1175(b). If this individual is no longer a licensed peace officer or no election is made, the sheriff's office may not withhold this individual's information under section 552.1175.

We note the remaining information contains a personal e-mail address which belongs to the first requestor. 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

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<sup>2</sup>The 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, 480 (1987), 470 (1987).

release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). The e-mail address at issue is not of a type specifically excluded by section 552.137(c). However, because section 552.137 protects personal privacy interests, the first requestor has a special right of access to his own e-mail address under section 552.137(b), and the sheriff's office must release this information to him. *See id.* § 552.137(b). The sheriff's office must withhold the personal e-mail address at issue from the remaining requestors under section 552.137 of the Government Code, unless the first requestor affirmatively consents to its release.

Section 552.152 of the Government Code provides:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from the requirements of Section 552.021 if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

*Id.* § 552.152. Upon review, we find you have failed to demonstrate that release of any of the information at issue would subject any officer to a substantial threat of physical harm. Accordingly, the sheriff's office may not withhold any of the submitted information under section 552.152 of the Government Code.

In summary, with regard to the first requestor, the sheriff's office (1) has the discretion to release the polygraph information we have marked pursuant to section 1703.306(a)(1) of the Occupations Code, (2) 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 (3) must withhold the information we have marked pertaining to a former constable under section 552.1175 of the Government Code if the individual to whom the information pertains is still a licensed peace officer and elects to restrict access to his information in accordance with section 552.1175(b). With regard to the remaining requestors, the sheriff's office must withhold the information we have marked under (1) section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code, (2) section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code, (3) section 552.101 of the Government Code in conjunction with common-law privacy, (4) section 552.1175 of the Government Code if the former constable is still a licensed peace officer and he and the first requestor elect to restrict access to their information in accordance with section 552.1175(b), and (5) section 552.137 of the Government Code unless the first requestor affirmatively consents to the release of his personal e-mail address. 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](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 cursive script that reads "Britni Fabian".

Britni Fabian  
Assistant Attorney General  
Open Records Division

BF/th

Ref: ID# 525814

Enc. Submitted documents

c: Four Requestors  
(w/o enclosures)