



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

October 12, 2016

Ms. Ann York  
Records Coordinator  
Cherokee County  
272 Underwood Street  
Rusk, Texas 75785

OR2016-22947

Dear Ms. York:

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# 629945.

The Cherokee County Sheriff's Office (the "sheriff's office") received a request for the personnel file of a former sheriff's office employee. You indicate the sheriff's office released some information. We understand the sheriff's office will withhold social security numbers pursuant to section 552.147(b) of the Government Code.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.117, 552.122, 552.130, 552.136, and 552.138 of the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted information.

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<sup>1</sup>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 requesting a decision from this office under the Act. Gov't Code § 552.147(b).

<sup>2</sup>Although you do not explicitly raise section 552.108 of the Government Code, we understand you to raise this exception based on the substance of your argument. Further, although you also raise section 552.1175 of the Government Code, 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. *See* Gov't Code §§ 552.117, .1175. Although you do not raise section 552.122 of the Government Code in your brief, we understand you to claim this exception based on your markings and arguments in the submitted responsive information.

Initially, we note the submitted information contains a peace officer's Texas Commission on Law Enforcement ("TCOLE") identification number. Section 552.002(a) of the Government Code 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:

- (1) by a governmental body;
- (2) for a governmental body and the governmental body:
  - (A) owns the information;
  - (B) has a right of access to the information; or
  - (C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or
- (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.

Gov't Code § 552.002(a). In Open Records Decision No. 581 (1990), this office determined certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. We understand an officer's TCOLE identification number is a unique computer-generated number assigned to peace officers for identification in TCOLE's electronic database and may be used as an access device number on the TCOLE website. Accordingly, we find the officer's TCOLE identification number in the submitted information does not constitute public information under section 552.002 of the Government Code. Therefore, the TCOLE identification number is not subject to the Act and need not be released to the requestor.<sup>3</sup>

Next, we must address the obligations of the sheriff's office under section 552.301 of the Government Code, which prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. *See* Gov't Code § 552.301. Section 552.301(e-1) provides the following:

A governmental body that submits written comments to the attorney general under Subsection (e)(1)(A) shall send a copy of those comments to the person

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<sup>3</sup>As we are able to make this determination, we need not address your argument against disclosure of this information.

who requested the information from the governmental body not later than the 15th business day after the date of receiving the written request. If the written comments disclose or contain the substance of the information requested, the copy of the comments provided to the person must be a redacted copy.

*See id.* § 552.301(e-1). Upon review, we find the sheriff's office has submitted a copy of its correspondence sent to the requestor in which it did not provide arguments for section 552.122 of the Government Code. Further, although the sheriff's office copied the requestor on the brief to our office, we note the sheriff's office provided a handwritten argument for section 552.122 on the submitted responsive documents, which were not sent to the requestor. Based on our review of the information at issue, we find the sheriff's office did not provide the requestor with a copy of its argument for section 552.122. Accordingly, we conclude the sheriff's office failed to comply with the procedural requirements of section 552.301(e-1) of the Government Code with respect to section 552.122.

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 requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *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); *see also* Open Records Decision No. 630 (1994). Generally, a governmental body may demonstrate a compelling reason to withhold information by showing that the information is made confidential by another source of law or affects third-party interests. *See* ORD 630. Section 552.122 of the Government Code is a discretionary exception to disclosure that protects a governmental body's interest and may be waived. As such, it does not constitute a compelling reason to withhold information. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Accordingly, no portion of the submitted information may be withheld under section 552.122 of the Government Code. We will also consider the remaining arguments for which the sheriff's office satisfied the procedural requirements of section 552.301(e-1).

Next, we note the sheriff's office states it will redact information subject to section 552.138 of the Government Code. A governmental body may not withhold information from the public without asking this office for a decision under section 552.301 of the Government Code unless a provision of the Act or a previous determination specifically authorizes the governmental body to do so. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 (2001). The sheriff's office does not assert, nor does our review of the records indicate, the sheriff's office has been authorized to withhold information subject to section 552.138 without seeking a ruling from this office. Accordingly, we will address the argument of the sheriff's office under section 552.138 for the submitted information.

Section 552.138 of the Government Code provides in relevant part:

(a) In this section:

(1) “Family violence shelter center” has the meaning assigned by Section 51.002, Human Resources Code.

(2) “Sexual assault program” has the meaning assigned by Section 420.003 [of the Government Code].

(3) “Victims of trafficking shelter center” means:

(A) a program that:

(i) is operated by a public or private nonprofit organization; and

(ii) provides comprehensive residential and nonresidential services to persons who are victims of trafficking under Section 20A.02, Penal Code; or

(B) a child-placing agency, as defined by Section 42.002, Human Resources Code, that provides services to persons who are victims of trafficking under Section 20A.02, Penal Code.

(b) Information maintained by a family violence shelter center, victims of trafficking shelter center, or sexual assault program is excepted from [required public disclosure] if it is information that relates to:

...

(3) the name, home address, home telephone number, or numeric identifier of a current or former client of a family violence shelter center, victims of trafficking shelter center, or sexual assault program; [or]

(4) the provision of services, including counseling and sheltering, to a current or former client of a family violence shelter center, victims of trafficking shelter center, or sexual assault program[.]

Gov’t Code § 552.138(a), (b)(3)-(4). Section 552.138 applies only to information maintained by a family violence shelter center, victims of trafficking shelter center, or sexual assault

program. *See id.* § 552.138. Therefore, because the information at issue is maintained by the sheriff's office, and not by a family violence shelter center, victims of trafficking shelter center, or sexual assault program, the sheriff's office may not withhold any of the information at issue under section 552.138 of the Government Code.

Section 552.108(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” *Id.* § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must explain how and why the release of the requested information would interfere with law enforcement. *See id.* § 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). In this instance, the submitted information consists of personnel file information of the former sheriff's office employee. Section 552.108 is generally not applicable to purely administrative records that do 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.) (section 552.108 generally not applicable to law enforcement agency's personnel records); *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. 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 do not inform us the submitted personnel file relates to a specific ongoing criminal investigation by the sheriff's office or prosecution, nor have you explained how its release would interfere with the detection, investigation, or prosecution of crime. You state the information at issue has been referred to the Cherokee County District Attorney's Office (the “district attorney's office”) for prosecution and has not gone to trial yet. However, you have not provided our office with a representation from the district attorney's office, which is the entity with the pertinent law enforcement interest, objecting to the release of the information at issue. *See* Open Records Decision Nos. 586 (1991), 474 (1987). Thus, the sheriff's office may not withhold any portion of the submitted information under section 552.108(a)(1) 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.” Gov't Code § 552.101. The sheriff's office raises section 552.101 in conjunction with the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) for the submitted information. At the direction of Congress, the Secretary of Health and Human Services (“HHS”) promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* HIPAA, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 (“Privacy Rule”); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected

health information, except as provided by parts 160 and 164 of the Code of Federal Regulations. *Id.* § 164.502(a).

This office has addressed the interplay of the Privacy Rule and the Act. *See* Open Records Decision No. 681 (2004). In that decision, we noted section 164.512 of title 45 of the Code of Federal Regulations provides a covered entity may use or disclose protected health information to the extent such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted the Act “is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public.” *See* ORD 681 at 8; *see also* Gov’t Code §§ 552.002, .003, .021. We, therefore, held the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. *See Abbott v Tex. Dep’t of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App.—Austin 2006, no pet.); ORD 681 at 9; *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the sheriff’s office may not withhold any portion of the submitted information on that basis.

Section 552.101 of the Government Code encompasses 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 demonstrated. *See 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). Upon review, we find the information we marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the sheriff’s office must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy.

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.”<sup>4</sup> 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*

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<sup>4</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

*v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). Having carefully reviewed the information at issue, we have marked information that must be withheld under section 552.102(a) of the Government Code.<sup>5</sup>

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home addresses, home telephone numbers, emergency contact information, social security number, and family member information of a peace officer, as defined by article 2.12 of the Code of Criminal Procedure, regardless of whether the peace officer complies with section 552.024 of the Government Code or section 552.1175 of the Government Code. Gov't Code § 552.117(a)(2). We note a post office box number is not a "home address" for purposes of section 552.117(a). *See* Open Records Decision No. 622 at 4 (1994) (legislative history makes clear that purpose of Gov't Code § 552.117 is to protect public employees from being harassed at home). Section 552.117 also 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* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone or pager numbers paid for by governmental body and intended for official use). We note some of the remaining information pertains to a former sheriff's office employee and it is unclear whether this individual is currently a licensed peace officer as defined by article 2.12 of the Code of Criminal Procedure. Thus, if the individual at issue is currently a licensed peace officer as defined by article 2.12, the sheriff's office must withhold the information we marked under section 552.117(a)(2) of the Government Code; however, the sheriff's office may only withhold the marked cellular telephone number if the cellular telephone service is not paid for by a governmental body. If, however, the individual at issue is not currently a licensed peace officer, his personal information may not be withheld under section 552.117(a)(2) of the Government Code. However, we find the remaining information the sheriff's office marked is not subject to section 552.117(a)(2), and the sheriff's office may not withhold it on that basis.

In the event the individual at issue is no longer a licensed peace officer, then some of the information at issue may be subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). As previously noted, a post office box number is not a "home address" for purposes of section 552.117(a). *See* ORD 622 at 4. Further, section 552.117 also 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 piece of information is

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<sup>5</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, a governmental body must withhold information under section 552.117(a)(1) on behalf of current or former officials or employees only if these individuals made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. To the extent the former employee at issue timely elected to keep such information confidential under section 552.024, the sheriff's office must withhold the information we marked under section 552.117(a)(1) of the Government Code; however, the sheriff's office may only withhold the marked cellular telephone number if the cellular telephone service is not paid for by a governmental body. If the employee did not make a timely election under section 552.024, the sheriff's office may not withhold the information we marked under section 552.117(a)(1) of the Government Code. However, we find the remaining information the sheriff's office marked is not subject to section 552.117(a)(1), and the sheriff's office may not withhold it on that basis.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release. *See* Gov't Code § 552.130. Accordingly, the sheriff's office must withhold the motor vehicle record information we marked under section 552.130 of the Government Code. However, we find none of the remaining information consists of motor vehicle record information subject to section 552.130. Accordingly, none of the remaining information may be withheld under section 552.130 of the Government Code.

In summary, the TCOLE identification number in the submitted information is not subject to the Act and need not be released to the requestor. The sheriff's office must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy and the information we marked under section 552.102(a) of the Government Code. If the individual at issue is currently a licensed peace officer as defined by article 2.12 of the Code of Criminal Procedure, the sheriff's office must withhold the information we marked under section 552.117(a)(2) of the Government Code; however, the sheriff's office may only withhold the marked cellular telephone number if the cellular telephone service is not paid for by a governmental body. If the individual at issue is not currently a licensed peace officer, to the extent the former employee at issue timely elected to keep such information confidential under section 552.024 of the Government Code, the sheriff's office must withhold the information we marked under section 552.117(a)(1) of the Government Code; however, the sheriff's office may only withhold the marked cellular telephone number if the cellular telephone service is not paid for by a governmental body. The sheriff's office must withhold the motor vehicle record information we marked under section 552.130 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](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 "Paige Thompson", written in a cursive style.

Paige Thompson  
Assistant Attorney General  
Open Records Division

PT/eb

Ref: ID# 629945

Enc. Submitted documents

c: Requestor  
(w/o enclosures)