



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 3, 2019

Ms. Katie Lentz
Open Records
Williamson County Sheriff's Office
508 South Rock Street
Georgetown, Texas 78626

OR2019-18319

Dear Ms. Lentz:

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# 773613.

The Williamson County Sheriff's Office (the "sheriff's office") received a request for any text messages that were gathered and used in a specified personnel action. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.117, 552.130, and 552.152 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 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). In *Morales v. Ellen*, 840 S.W.2d

¹Although 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 held in an employment context.

519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of common-law privacy to information relating to an investigation of alleged sexual harassment in the workplace. This office has also concluded the public has a legitimate interest in information that relates to public employees and their conduct in the workplace. *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 government employees), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest), 392 (1982) (reasons for employee's resignation ordinarily not private).

You seek to withhold the submitted information under common-law privacy and the holding in *Ellen*. We note the information at issue does not pertain to a sexual harassment investigation in an employment context for the purposes of *Ellen*. Therefore, the sheriff's office may not withhold the entirety of the submitted information under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*. Nevertheless, we find portions of the submitted information satisfy 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 552.103 of the Government Code provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must

meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, an attorney for a potential opposing party making a demand for payment and asserting an intent to sue if such payments are not made. Open Records Decision Nos. 555 at 3 (1990), 346 (1982). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party threatened to sue on several occasions and hired an attorney. *See* Open Records Decision No. 288 at 2 (1981). However, an individual publicly threatening to bring suit against a governmental body, but who does not actually take objective steps toward filing suit, is not concrete evidence that litigation is reasonably anticipated. *See* Open Records Decision No. 331 at 1-2 (1982).

You assert the remaining information is excepted under section 552.103 of the Government Code because the sheriff's office reasonably anticipates litigation relating to the conduct of officers involved in the specified personnel action. Upon review, however, we find you have not demonstrated any party had taken any concrete steps toward the initiation of litigation against the sheriff's office when it received the request for information. Consequently, we find you have failed to demonstrate the sheriff's office reasonably anticipated litigation when it received the present request for information. As such, we conclude the sheriff's office may not withhold any of the remaining information under section 552.103 of the Government Code.

Section 552.108(b)(1) of the Government Code excepts from disclosure the internal records and notations of law enforcement agencies and prosecutors when their release would interfere with law enforcement and crime prevention. Gov't Code § 552.108(b)(1); *see also* Open Records Decision No. 531 at 2 (1989) (quoting *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977)). A governmental body claiming section 552.108(b)(1) must explain how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706. Section 552.108(b)(1) is intended to protect "information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State." *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.). This office has concluded section 552.108(b)(1) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (section 552.108 of the Government Code is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). Section 552.108(b)(1) is not applicable, however, to generally known policies and procedures. *See, e.g.*, ORDs 531 at 2-3 (Penal Code

provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

You state the information you marked consists of internal law enforcement records of the sheriff's office. You also state the information at issue, if released, would interfere with law enforcement activities and crime prevention. Based on your representations and our review, we agree the release of the information at issue would interfere with law enforcement. Accordingly, the sheriff's office may withhold the information you marked under section 552.108(b)(1) of the Government Code.²

Section 552.117(a)(2) of the Government Code exempts from public disclosure the home address, home telephone number, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code. *See* Gov't Code § 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. Upon review, we find some of the remaining information may be subject to section 552.117(a)(2). We note the individuals whose information is at issue may be currently licensed peace officers as defined by article 2.12. Accordingly, with the exception of the information we marked for release, to the extent the information you marked pertains to individuals who are currently licensed peace officers as defined by article 2.12, the sheriff's office must withhold the information under section 552.117(a)(2) of the Government Code. Conversely, if the information you marked pertains to individuals who are not currently licensed peace officers as defined by article 2.12, the information at issue may not be withheld under section 552.117(a)(2) of the Government Code. In either instance, we find you failed to demonstrate the applicability of section 552.117(a)(2) to the information we marked for release. Accordingly, the sheriff's office may not withhold the information we marked for release under section 552.117(a)(2) of the Government Code.

With the exception of the information we marked for release, if the information you marked under section 552.117 pertains to individuals who are not currently licensed peace officers, then the information at issue may be subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) exempts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). 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 be withheld under section 552.117(a)(1) only on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the

²As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

date of the governmental body's receipt of the request for the information. Therefore, to the extent the individuals whose information is at issue are not currently licensed peace officers as defined by article 2.12 of the Code of Criminal Procedure, and to the extent these individuals timely requested confidentiality under section 552.024 of the Government Code, the sheriff's office must withhold the information you marked under section 552.117(a)(1) of the Government Code. Conversely, to the extent the individuals at issue are not currently licensed peace officers as defined by article 2.12 and did not timely request confidentiality under section 552.024, the sheriff's office may not withhold the information at issue under section 552.117(a)(1). In either event, we find you failed to demonstrate the applicability of section 552.117(1) to the information we marked for release. Accordingly, the sheriff's office may not withhold any of the information we marked for release under section 552.117(a)(1) of the Government Code.

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 the remaining information the sheriff's office marked does not consist of motor vehicle record information for purposes of section 552.130, and the sheriff's office may not withhold the remaining information it marked on that basis.

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. You inform us the information you marked identifies undercover deputies of the sheriff's office. You assert release of the deputies' identities would place the deputies at risk and subject the deputies to a substantial threat of physical harm. Therefore, we find section 552.152 is applicable to the information at issue. Accordingly, the sheriff's office must withhold the information you marked under section 552.152 of the Government Code.

In summary, the sheriff's office must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The sheriff's office may withhold the information you marked under section 552.108(b)(1) of the Government Code. With the exception of the information we marked for release, to the extent the information you marked pertains to individuals who are currently licensed peace officers as defined by article 2.12, the sheriff's office must withhold the information under section 552.117(a)(2) of the Government Code. With the exception of the information we marked for release, to the extent the individuals whose information is at issue are not currently licensed peace officers as defined by article 2.12, and to the extent these individuals timely requested confidentiality under section 552.024 of the Government Code, the sheriff's

office must withhold the information you marked under section 552.117(a)(1) of the Government Code. 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 withhold the information you marked under section 552.152 of the Government Code. The sheriff's office must release the remaining information.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Michelle Case", with a long horizontal flourish extending to the right.

D. Michelle Case
Assistant Attorney General
Open Records Division

DMC/mo

Ref: ID# 773613

Enc. Submitted documents

c: Requestor
(w/o enclosures)