



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

December 5, 2019

Mr. Robert S. Davis  
Counsel for Gregg County  
Flowers & Davis, P.L.C.  
1021 ESE Loop 323, Suite 200  
Tyler, Texas 75701

OR2019-34305

Dear Mr. Davis:

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# 800146.

Gregg County Sheriff's Office (the "sheriff's office"), which you represent, received two requests from the same requestor for information pertaining to the deaths of twenty-one named individuals and the personnel file of a named individual. You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the representative sample of information.<sup>1</sup>

Section 552.103 of the Government Code provides, in relevant part:

(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.

---

<sup>1</sup> We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

...

(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.

*Id.* § 552.103(a), (c). The governmental body claiming section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information, and (2) the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

You state the submitted information relates to two pending civil cases filed against Coryell County. However, we note neither the sheriff's office nor Gregg County is a party to the litigation and, therefore, they do not have a litigation interest in the matter for purposes of section 552.103. *See Gov't Code § 552.103(a); Open Records Decision No. 575 at 2(1990)* (stating that predecessor to section 552.103 only applies when governmental body is party to litigation). In such situation, we require an affirmative representation from a governmental body with the litigation interest that the governmental body wants the information at issue withheld from disclosure under section 552.103. However, you have not provided this office with an affirmative representation from a governmental body with a litigation interest that it seeks to withhold the information at issue pursuant to section 552.103. Thus, we find you have not established the sheriff's office was a party to any litigation which was pending when the sheriff's office received the request for information. Accordingly, none of the information may be withheld under section 552.103.

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."<sup>2</sup> Gov't Code § 552.101. This exception encompasses section 1701.454 of the Occupations Code, which governs the public availability of information submitted to the Texas Commission on Law Enforcement (the "commission") under subchapter J of chapter 1701 of the Occupations Code.<sup>3</sup> Section 1701.454 provides as follows:

---

<sup>2</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).*

<sup>3</sup> The Texas Commission on Law Enforcement Officer Standards and Education was renamed the Texas Commission on Law Enforcement by the 83rd Legislature. *See Act of May 6, 2013, 83rd Leg., R.S., ch. 93, § 1.01, 2013 Tex. Gen. Laws 174, 174.*

(a) All information submitted to the commission under this subchapter is confidential and is not subject to disclosure under Chapter 552, Government Code, unless the person resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses.

(b) Except as provided by this subchapter, a commission member or other person may not release information submitted under this subchapter.

Occ. Code § 1701.454. The submitted information includes F-5 Separation of Licensee forms that were submitted to the commission pursuant to subchapter J of chapter 1701 of the Occupations Code. Furthermore, the submitted F-5 forms do not indicate the named officer resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses. Therefore, the sheriff's office must withhold the submitted F-5 forms we have marked under section 552.101 in conjunction with section 1701.454.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Under the common-law right of privacy, an individual has a right to be free from the publicizing of private affairs in which the public has no legitimate concern. The Third Court of Appeals has concluded public citizens' dates of birth are protected by common-law privacy pursuant to section 552.101. *See Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at \*3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.). However, because “the right of privacy is purely personal[,]” that right “terminates upon the death of the person whose privacy is invaded[.]” *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); *see also Justice v. Belo Broad. Corp.*, 472 F. Supp. 145, 147 (N.D. Tex. 1979) (“action for invasion of privacy can be maintained only by a living individual whose privacy is invaded” (quoting RESTATEMENT (SECOND) OF TORTS § 6521)); Attorney General Opinions JM-229 (1984) (“the right of privacy lapses upon death”), H-917 (1976) (“We are . . . of the opinion that the Texas courts would follow the almost uniform rule of other jurisdictions that the right of privacy lapses upon death.”); Open Records Decision No. 272 (1981) (“the right of privacy is personal and lapses upon death”). Accordingly, information pertaining to a deceased individual may not be withheld on common-law privacy grounds. Thus, the sheriff's office must withhold all living public citizens' dates of birth in the submitted information under section 552.101 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. Gov't Code § 552.1175. Section 552.1175 applies to “peace officers as defined by Article 2.12, Code of Criminal Procedure” and other enumerated individuals. *Id.* § 552.1175(a). We note some of the remaining information is held by the

sheriff's office in a non-employment capacity and relates to deputies of the sheriff's office and other individuals who may be subject to section 552.1175. Accordingly, the sheriff's office must withhold the information we marked that pertains to sheriff's office deputies under section 552.1175 if the deputies to whom the information pertains are still licensed peace officers under article 2.12 and elect to restrict access to their information in accordance with section 552.1175(b). Additionally, if the remaining information we marked under section 552.1175 relates to individuals to whom section 552.1175 applies and the individuals elect to restrict access to the information in accordance with section 552.1175(b), the sheriff's office must withhold the marked information under section 552.1175.

In summary, the sheriff's office must withhold the submitted F-5 forms we marked under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code. The sheriff's office must withhold all living public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy. The sheriff's office must withhold the information we marked that pertains to sheriff's office deputies under section 552.1175 of the Government Code if the deputies to whom the information pertains are still licensed peace officers under article 2.12 of the Code of Criminal Procedure and elect to restrict access to their information in accordance with section 552.1175(b). If the remaining information we marked under section 552.1175 relates to individuals to whom section 552.1175 applies and the individuals elect to restrict access to the information in accordance with section 552.1175(b), the sheriff's office must withhold the marked information under section 552.1175. The remaining information must be released.

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

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

Pearlie Gault  
Attorney  
Open Records Division

PG/eb

Ref: ID# 800146

Enc. Submitted documents

c: Requestor  
(w/o enclosures)