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ATTORNEY GENERAL OF TEXAS

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OR2020-09588

Dear Mr. Tidwell:

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# 818282.

The Fannin County Sheriff's Office (the "sheriff's office"), which you represent, received six requests from the same requestor for information pertaining to six named former employees. You state the sheriff's office has released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.117, and 552.130 of the Government Code.¹ We have considered your arguments and reviewed the submitted representative sample of information.²

Initially, the sheriff's office claims the instant request was not a proper request for information under the Act. In the alternative, the sheriff's office claims it does not have information responsive to the request. This office has held a written communication that reasonably can be judged to be a request for public information constitutes a request for information under the Act. *See* Open Records Decision Nos. 497 at 3 (1988), 44 at 2 (1974). In this regard, we note a request for information need not refer to the Act or be addressed to the officer for public information. ORDs 497 at 3, 44 at 2. In this case, the request was

¹ Although you do not raise sections 552.117 or 552.130 of the Government Code in your brief, we understand you to raise these exceptions based on your markings in the documents.

² We assume that 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 that those records contain substantially different types of information than that submitted to this office.

submitted to and received by the sheriff's office and seeks information in the custody of the sheriff's office. Thus, we find the instant request to be a valid information request. We note the Act does not require a governmental body to answer general questions, perform legal research, or create new information in response to a request for information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990). However, the Act does require a governmental body to make a good-faith effort to relate a request for information to information the governmental body holds or to which it has access. See Open Records Decision Nos. 563, 561 at 8-9 (1990), 555 at 1-2, 534 at 2-3 (1989). In this instance, you have submitted information for our review. Therefore, we assume the sheriff's office has made a good-faith effort to locate any information responsive to the request at issue, and we will address your claimed exceptions for the submitted information.

Next, we note some of the information at issue may have been subject to previous requests for information, in response to which this office issued Open Records Letter Nos. 2019-18698 (2019), 2019-29207A (2019), 2019-31031 (2019), and 2019-34649 (2019). In these four rulings, we determined, in part, the sheriff's office must release the information at issue. Thus, some of the information at issue in the instant request may have been previously ordered released pursuant to Open Record Letter Nos. 2019-18698, 2019-29207A, 2019-31031, and 2019-34649. The sheriff's office raises section 552.103 of the Government Code for the submitted information. 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 by 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). Section 552.103 does 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. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Thus, to the extent the information at issue was previously ordered released in Open Record Letter Nos. 2019-18698, 2019-29207A, 2019-31031, or 2019-34649, the sheriff's office may not now withhold such information under section 552.103. However, as sections 552.101, 552.102, 552.117, and 552.130 of the Government Code can make information confidential, we will consider your arguments under these exceptions for any information that was previously ordered released. In addition, we will address your argument under section 552.103 for the information not previously ordered released.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(12) final opinions, including concurring and dissenting opinions, and orders issued in the adjudication of cases; [and]

...

(17) information that is also contained in a court record[.]

Gov't Code § 552.022(a)(1), (12), (17). The submitted information includes information from a completed investigation and completed reports and evaluations that are subject to section 552.022(a)(1), a final order subject to section 552.022(a)(12), and court-filed documents subject to section 552.022(a)(17). The sheriff's office must release the information subject to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. *Id.* § 552.022(a)(1). The final order and court-filed documents must be released unless the information is made confidential under the Act or other law. *Id.* § 552.022(a)(12), (17). You seek to withhold the information subject to section 552.022 under sections 552.101, 552.102, 552.103, and 552.117 of the Government Code. As previously noted, section 552.103 is a discretionary exception to disclosure and does not make information confidential under the Act. *See Dallas Morning News*, 4 S.W.3d at 475-76; ORDs 665 at 2 n.5, 663 at 5. Therefore, none of the information subject to section 552.022(a)(1), section 552.022(a)(12), or section 552.022(a)(17) may be withheld under section 552.103. Further, although we understand you seek to withhold portions of the court-filed documents under section 552.101 of the Government Code in conjunction with common-law privacy, we note common-law privacy is not applicable to information contained in public records. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (action for invasion of privacy cannot be maintained where information is in public domain); *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57 (Tex. 1992) (law cannot recall information once in public domain). Therefore, the court-filed documents we have marked may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. However, we will consider your other arguments under section 552.101 to withhold the information subject to section 552.022, as well as your arguments to withhold the information at issue under sections 552.102, 552.117, and 552.130 of the Government Code. *See* Gov't Code § 552.022(a)(1), (12), (17). Additionally, we will consider your argument under section 552.103 for the information at issue not subject to section 552.022.

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.

Id. § 552.103(a), (c). A 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 (1) litigation was 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state a lawsuit styled *Atchley v. Fannin County Sheriff and Fannin County*, Cause No. CV-19-44430, was pending against a sheriff's office employee in his official capacity in the 336th Judicial District Court of Fannin County, Texas, when the sheriff's office received the instant request for information. You state the information at issue is related to the pending lawsuit. Based on your representations and our review of the information at issue, we find litigation was pending when the sheriff's office received this request for information, and the information at issue is related to the pending litigation for the purposes of section 552.103. Therefore, to the extent the information at issue was not previously ordered released in Open Records Letter Nos. 2019-18698, 2019-29207A, 2019-31031, or 2019-34649, with the exception of the information subject to section 552.022 of the Government Code, the sheriff's office may withhold the submitted information under section 552.103(a) of the Government Code.³

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that

³ As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

has either been obtained from or provided to the opposing parties in the litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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. This section encompasses information protected by other statutes, such as section 1701.454 of the Occupations Code. Section 1701.454 governs the public availability of information submitted to the Texas Commission on Law Enforcement (“TCOLE”) under subchapter J of chapter 1701 of the Occupations Code. Section 1701.454 provides as follows:

- (a) All information submitted to [TCOLE] 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 [TCOLE] member or other person may not release information submitted under this subchapter.

Occ. Code § 1701.454. You seek to withhold the information subject to section 552.022(a)(12), which consists of a final order in a TCOLE case, under section 1701.454. We note section 1701.454 is applicable only to information submitted to TCOLE under subchapter J of chapter 1701 of the Occupations Code. *See id.* § 1701.454(a). The only report or statement found in subchapter J is a Form F-5. *See id.* § 5 1701.452. We therefore conclude the sheriff’s office may not withhold the information you marked under section 552.101 on this basis. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection).

Section 552.101 of the Government Code also encompasses section 560.003 of the Government Code, which provides, “[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act].” Gov’t Code § 560.003; *see id.* § 560.001(1) (“biometric identifier” means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry). There is no indication the requestor has a right of access to the biometric identifiers under section 560.002. *See id.* § 560.002(1)(A) (governmental body may not sell, lease, or otherwise disclose individual’s biometric identifier to another person unless the individual consents to disclosure). Accordingly, the sheriff’s office must withhold the biometric identifier we marked under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code.

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 found personal financial information not relating to a financial transaction between an individual and a governmental body is generally private. *See* Open Records Decision Nos. 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history), 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 455 at 9 (1987) (employment applicant's salary information not private), 423 at 2 (1984) (scope of public employee privacy is narrow). We also note the public generally has a legitimate interest in information that relates to public employment and public employees. *See* Open Records Decisions 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), 542 (1990), 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees). 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.). Upon review, we find some of the information subject to section 552.022(a)(1) 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.⁴ However, the sheriff's office has failed to demonstrate any of the remaining information is highly intimate or embarrassing and not of legitimate concern to the public. Therefore, the sheriff's office may not withhold any of the remaining information under section 552.101 in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses the doctrine of constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently, and (2) an individual's interest in avoiding disclosure of personal matters. ORD 455 at 4. The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). After review of the remaining information, we find you have failed to demonstrate how any portion of the information at issue falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the sheriff's office may not

⁴ As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

withhold any of the remaining information under section 552.101 on the basis of constitutional 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.” 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 v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). Upon review, we find no portion of the remaining information is subject to section 552.102(a) of the Government Code, and the sheriff’s office may not withhold any of the remaining information 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.

In summary, with the exception of information that was previously ordered released in Open Records Letter Nos. 2019-18698, 2019-29207A, 2019-31031, or 2019-34649, and with the exception of the information subject to section 552.022 of the Government Code, the sheriff’s office may withhold the submitted information under section 552.103(a) of the Government Code. In releasing the information subject to section 552.022 of the Government Code, the sheriff’s office must withhold (1) the biometric identifier we marked under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code; (2) the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy; and (3) the motor vehicle record information we marked under section 552.130 of the Government Code. The sheriff’s office must release the remaining information.⁵

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

⁵ 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 the necessity of requesting a decision from this office. Gov’t Code § 552.147(b).

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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,

Emily Kunst
Assistant Attorney General
Open Records Division

EK/eb

Ref: ID# 818282

Enc. Submitted documents

c: Requestor
(w/o enclosures)