



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

June 26, 1995

Ms. Tamara Armstrong  
Assistant County Attorney  
County of Travis  
P.O. Box 1748  
Austin, Texas 78767

OR95-475

Dear Ms. Armstrong:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 30984.

Travis County (the "county") has received a request for the district attorney's court files in three cases that were closed more than ten years ago. Specifically, the requestor seeks

all files, records and any other documents in the possession of the Travis County District Attorney's Office pertaining to the arrest, investigation and trial of Delbert Lee Burkett for the following cases:

- 1) Forgery, Cause No. 53412 in the 147th Judicial District Court;
- 2) Burglary, Cause No. 54239, in the 167th Judicial District Court, and
- 3) Possession of Marijuana, Cause No. 168-278 in the County Court at Law No. 2 of Travis County.

You have submitted the requested information to us for review (Exhibits A, B, C, and D), to the extent that it exists,<sup>1</sup> and you claim that sections 552.101, 552.108, and 552.111 of the Government Code except it from required public disclosure.

Section 552.101 excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You seek to withhold the checking account numbers of private persons submitted in Exhibit A under common-law privacy. Information may be withheld under common-law privacy if it meets the criteria the Texas Supreme Court articulated for section 552.101 in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Under *Industrial Foundation*, a governmental body must withhold information on common-law privacy grounds only if the information is highly intimate or embarrassing information regarding an individual's private affairs *and* it is of no legitimate concern to the public.

We believe that a person's checking account number is the kind of information that this office previously has concluded falls within the protection of common-law privacy. In Open Records Decision No. 373 (1983) this office addressed the availability of personal financial information submitted to a city by an applicant for a housing rehabilitation grant. The decision concludes as follows:

all financial information relating to an individual—including sources of income, salary, mortgage payments, assets, medical and utility bills, social security and veterans benefits, retirement and state assistance benefits, and credit history—ordinarily satisfies the first requirement of common[-]law privacy, in that it constitutes highly intimate or embarrassing facts about the individual, such that its public disclosure would be highly objectionable to a person of ordinary sensibilities.

Open Records Decision No. 373 (1983) at 3. In Open Records Decision No. 545 (1990) this office applied a similar presumption to determine that, absent "special circumstances," information concerning a public employee's participation in a deferred compensation plan is protected from disclosure by common-law privacy.<sup>2</sup> Open Records

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<sup>1</sup>You indicate the district attorney's office does not have a file responsive to the third listed request regarding cause number 168-278 in the County Court at Law No. 2 of Travis County. The Open Records Act does not require a governmental body to obtain information not in its possession. Open Records Decision No. 558 (1990) at 3.

<sup>2</sup>This office has distinguished between background financial information and information regarding a particular transaction between the individual and a public body. See Open Records Decision Nos. 523 (1989), 373 (1983). This office generally considers information regarding a specific transaction between an individual and a public body to be public information. For example, this office has held that

Decision No. 545 (1990) at 4-5; *see also* Open Records Decision No. 600 (1992) at 9-12. Whether the public has a legitimate interest in such information, however, must be determined on a case-by-case basis. Open Records Decision No. 373 (1983) at 4; *see also* Open Records Decision Nos. 600 (1992), 545 (1990).

Consistent with previous decisions of this office, we believe that the checking account number at issue here is intimate and embarrassing information about an individual's private affairs. *See Industrial Found.*, 540 S.W.2d at 685. Furthermore, we find no legitimate public interest in this checking account number. *See id.* Consequently, we conclude that the checking account number is private under the common law, and the county must withhold it pursuant to section 552.101 of the Government Code.

Next, we address your assertion that section 552.101 of the Government Code in conjunction with state laws protecting criminal history record information ("CHRI") exempts from required public disclosure the information submitted as Exhibit B. Title 28, part 20 of the Code of Federal Regulations prohibits the release of CHRI that a state has obtained from the federal government or other states. Open Records Decision No. 565 (1990). These regulations also allow each state to follow its individual law with respect to CHRI the state generates. *Id.*; *see also* Gov't Code § 411.084 (prohibiting release of CHRI obtained from Department of Public Safety).

We have examined Exhibit B. This exhibit appears to include CHRI generated by the National Crime Information Center, the Texas Crime Information Center, and other sources. Exceptions to confidentiality provided in state and federal law do not appear to apply in this instance. Accordingly, the county must withhold Exhibit B in its entirety under section 552.101 of the Government Code.

You also claim that section 552.108 of the Government Code exempts some of the requested information from required public disclosure. Section 552.108 provides that:

- (a) A record of a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure].

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(Footnote continued)

the amount of a debt to a public hospital, together with the names of debtors and dates of delinquency, is not excepted by common-law privacy. Open Records Decision No. 385 (1983); *see also* Open Records Decision No. 523 (1989) (*determining whether certain information in loan files of Veterans Land Program is protected by right of privacy*). Ordinarily, the public has an interest in knowing who owes money to a governmental body. *See* Open Records Decision Nos. 480 (1987) (names and addresses of students who have received and defaulted on loans administered by Texas Guaranteed Student Loan Corporation not protected by common-law privacy), 443 (1986) (city's utility bill ledgers not confidential under common-law privacy).

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure].

Section 552.108 excepts from required public disclosure the internal records and notations of law-enforcement agencies and prosecutors when the release of such records and notations would unduly interfere with law enforcement and crime prevention. Open Records Decision No. 531 (1989) at 2 (quoting *Ex parte Pruitt*, 551 S.W.2d 706, 710 (Tex. 1977)). When this exception is asserted, the agency claiming it must reasonably explain, if the information does not supply the explanation on its face, how release would unduly interfere with law enforcement. Open Records Decision No. 434 (1986) at 3.

You claim that section 552.108 excepts Exhibit C from required public disclosure. Exhibit C relates to a 1978 investigation for forgery that has long been closed. The records indicate that the requestor-defendant cooperated with the police. You explain as follows:

Although we do not believe that the release of this information to this particular requestor would interfere with law enforcement or crime prevention, the release of such information to this requestor would necessitate the release of the same information to any other requestor . . . . The release of this information to some individuals would unduly interfere with law enforcement and crime prevention in that the defendant himself could be intimidated or harassed in certain situations.

We have examined the information submitted as Exhibit C. We do not believe release of this information would unduly interfere with law enforcement or crime prevention. First, we believe the passing of seventeen years since the close of the forgery investigation probably has rendered moot any fears of retaliation or harassment against the requestor. Second, your argument that a subsequent requestor could discover the identity of the requestor here and the fact that he cooperated with the police is highly speculative. Finally, the documents submitted to us for review that indicate the requestor cooperated with police do not on their face show who suffered as a result of the police cooperation. Moreover, you have not given us any facts sufficient to indicate who, if anyone, would appreciate the effects of the requestor's police cooperation or how anyone might come to resent the requestor's police cooperation. We therefore disagree that releasing the information submitted as Exhibit C might endanger the personal safety of the requestor and might therefore unduly interfere with law enforcement. Accordingly, the county may not withhold Exhibit C under section 552.108 of the Government Code.

Finally, we address your contention that section 552.111 of the Government Code exempts information submitted as Exhibit D from required public disclosure. You assert section 552.111 in conjunction with the work-product doctrine. The work-product doctrine applies only upon a showing of the applicability of section 552.103(a) of the Government Code. See Open Records Decision No. 575 (1990). You have not demonstrated that section 552.103(a) applies in this instance.

We note, however, that the issues you raise with respect to attorney work product are the subject of pending litigation in *Holmes v. Morales*, No. 93-07978 (261st Dist. Ct., Travis County, Tex., Feb. 14, 1994). The plaintiff in this litigation has filed an appeal of the district court ruling to the Third Court of Appeals, *Holmes v. Morales*, No. 03-94-179-CV (Tex. App.--Austin argued Feb. 15, 1995). In light of the pendency of this litigation, it would be inappropriate for this office to rule on the claims you raise regarding attorney work product. At this point, it appears that the outcome of the *Holmes* case may determine the resolution of your claims and may moot any decision this office might reach on those claims. For these reasons, we are declining to rule on the issues you raise regarding attorney work product.<sup>3</sup>

We remind you that the attorney work-product aspect of section 552.103(a) is a discretionary exception under the act. See Gov't Code § 552.007; Open Records Decision No. 542 (1990). Section 552.007 provides as follows:

(a) This chapter does not prohibit a governmental body or its officer for public records from voluntarily making part or all of its records available to the public, unless the disclosure is expressly prohibited by law or the records are confidential under law.

(b) Records made available under Subsection (a) must be made available to any person.

The county therefore may choose to release to the public some or all of the requested records for which it claims protection as attorney work product.<sup>4</sup>

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<sup>3</sup>Because we have declined to rule on your attorney work-product arguments, you may withhold the requested information pending the outcome of the *Holmes* case.

<sup>4</sup>Although a governmental body may choose to waive a discretionary exception such as sections 552.103 and 552.111 for particular records, section 552.007 does not prevent a governmental body from subsequently raising the same exception when faced with a request for different records. On the other hand, once a governmental body has disclosed particular records to a member of the public, it may not ordinarily withhold the same records from public disclosure unless the information is confidential by law. See Gov't Code § 552.007; Open Records Decision Nos. 518 (1989), 454 (1986), 436 (1986), 435 (1986).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



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Open Government Section

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Ref.: ID# 30984

Enclosures: Submitted documents

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(w/o enclosures)