



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 25, 1996

Ms. Kimberly Kiplin
General Counsel
Texas Lottery Commission
P.O. Box 16630
Austin, Texas 78761

OR96-2206

Dear Ms. Kiplin:

You ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 29337.

The Texas Lottery Commission (the "commission") received a request for information concerning Laissez Les Bon Temps Rouler, Inc. d/b/a Brazos Bingo. You assert that the requested information is excepted from required public disclosure based on sections 552.102, 552.103, and 552.108 of the Government Code. You submitted a representative sample of the requested information.¹

Section 552.108 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," and "[a]n 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. Gov't Code § 552.108; see *Holmes v. Morales*, 924 S.W.2d 920 (Tex. 1996). Information normally found on the front page of an offense report is generally considered public. *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), writ *ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 (1976).

¹In reaching our conclusion here, 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) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). 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.

Section 552.108 applies to a "law enforcement agency," that is, an agency which investigates crimes and enforces criminal laws. *See, e.g.*, Open Records Decision No. 126 (1976) (Attorney General's Organized Crime Task Force). It does not as a general rule apply to an agency whose chief function is regulatory in character. Attorney General Opinion MW-575 (1982) (Department of Agriculture). The commission has statutory authority to maintain a department of security staffed by commissioned peace officers or investigators, Gov't Code § 466.020; and authority to enforce violations of the lottery law, *id.* § 466.019, and the Bingo Enabling Act, V.T.C.S. art. 179d, §§16(a), (e), (i) (control and supervision), 16a (administrative penalties), 36(b) (misdemeanors). We conclude that except for information on the complaints that is the sort of information normally found on the front page of an offense report, *see* Open Records Decision No. 127 (1976), the commission may withhold the requested information from the requestor pursuant to section 552.108. Furthermore, we do not believe that section 552.103, the litigation exception, excepts the front page offense report information, as we assume that the commission informed the potential opposing party of the complaint. *See* Open Records Decision No. 597 (1991).

You raise section 552.102 apparently in regard to criminal history record information obtained in the course of employee background investigations. The representative samples of the requested information do not appear to include samples of this information, making our task of ruling on the public disclosure of such information impossible. Nonetheless, we offer the following general guidelines. *See* Gov't Code § 552.352 (providing penalties for distribution of confidential information).

The test to be applied to information claimed to be protected under section 552.102 is the same test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101. *See Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Section 552.101, which excepts from disclosure information that is confidential by law, incorporates the common-law right to privacy. Information may be withheld under section 552.101 in conjunction with the common-law right to privacy if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. *See Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

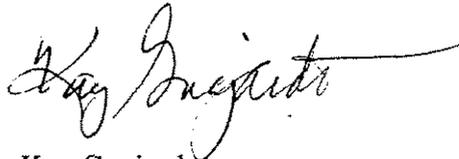
The privacy interest in criminal history record information has been recognized by federal regulations which limit access to criminal history record information that states obtain from the federal government or other states. *See* 28 C.F.R. § 20; *see also United States Dep't of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749 (1989) (finding criminal history information protected from disclosure under Freedom of Information Act, 5 U.S.C. § 552, and Privacy Act of 1974, 5 U.S.C. § 552a). Recognition of this privacy interest has been echoed in open records decisions issued by this office. *See* Open Records Decision Nos. 616 (1993), 565 (1990), 216 (1978), 183 (1978), 144 (1976), 127 (1976).

In *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) ("*Houston Chronicle*"), the court addressed the availability under the Open Records Act of certain broad categories of documents in the possession of a city police department, including offense reports, police blotters, "show-up" sheets, arrest sheets, and "personal history and arrest records." The court held that some of this information was available to the public, including the police blotters, "show-up" sheets, and offense reports. However, the court also held that "personal history and arrest records" were excepted from required public disclosure. These records primarily contained criminal histories, such as information regarding previous arrests and other data relating to suspected crimes, including the offenses, times of arrest, booking numbers, locations, and arresting officers. *Houston Chronicle*, 531 S.W.2d at 179. Such criminal history record is generally referred to as a "rap sheet." The court held that release of these documents would constitute an unwarranted invasion of an arrestee's privacy interests. *Id.* at 188.

If the information was generated by the Texas Crime Information Center ("TCIC") or the National Crime Information Center ("NCIC"), we must consider whether the information is excepted from disclosure under section 552.101 pursuant to statutory law. Title 28, Part 20 of the Code of Federal Regulations governs the release of criminal history information which states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to criminal history information it generates. *Id.* Section 411.083 of the Government Code deems confidential criminal history records that the Department of Public Safety (the "DPS") maintains, except that the DPS may disseminate such records as provided in chapter 411, subchapter F of the Government Code. *See also* Gov't Code § 411.087 (entities authorized to obtain information from DPS are authorized to obtain similar information from any other criminal justice agency; restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain criminal history record information; however, a criminal justice agency may not release the information except to another criminal justice agency for a criminal justice purpose, *id.* § 411.089(b)(1). Other entities specified in Chapter 411 of the Government are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release the information except as provided by Chapter 411. *See generally id.* §§ 411.090 - .127. Thus, any criminal history record information generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). Furthermore, any criminal history record information obtained from DPS or any other criminal justice agency must be withheld under section 552.101

We are resolving this matter with this 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 may not be relied upon as a previous determination regarding any other records.² If you have questions about this ruling, please contact our office.

Yours very truly,



Kay Guajardo
Assistant Attorney General
Open Records Division

KHG/rho

Ref.: ID# 29337

Enclosures: Submitted documents

cc: Ms. Sharon Ives
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(w/o enclosures)

²We do not address in this letter what effect, if any, section 467.104 of the Government Code might have upon the exceptions in chapter 552 of the Government Code. We strongly recommend that you seek legislative guidance on this issue.