



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

March 13, 1997

Ms. Doreen E. McGookey  
Assistant City Attorney  
Office of the City Attorney  
501 Police & Courts Bldg.  
Dallas, Texas 75201

OR97-0537

Dear Ms. McGookey:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your requests were assigned ID# 104790 and ID# 104826.

The City of Dallas (the "city") received several requests for related information. Two requests were made by an attorney (the "first requestor") on behalf of an individual who was the subject of an evidentiary search warrant.<sup>1</sup> This request was initially for the return of the executed search warrant, the underlying affidavit in support of the search warrant, and copies of or an opportunity to review all items seized during the course of the search. The first requestor made a second request for:

1. [E]very item seized from [an individual's] house on December 31, 1996, by the Dallas Police Department and others working on the Police Department's behalf. Those items include, but are not limited to, items set forth on the Return and Inventory executed by Sergeant Ross Salverino on January 2, 1996 [sic].

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<sup>1</sup>Please note that we will refer collectively to the attorney and the individual whom he represents as "the first requestor."

2. [A]ll scientific and other examinations, analyses, and tests performed on any item seized from [an individual's] house on December 31, 1996, by the City of Dallas Police Department and others working on the Police Department's behalf.
3. [Preservation in a safe and locked location of] any and all reports, interviews, notes and documentation relating to, prepared during or obtained during the recent investigation of [an individual] conducted by the City of Dallas Police Department. Such documentation includes, but is not limited to, any reports of interviews, scientific and other examinations not otherwise provided pursuant to Item 2 above, and any other police reports or notes relating to said investigation.

The second request was made by a law firm (the "second requestor") on behalf of a television station, and was initially for:

1. All witness statements related to a reported incident at the home of [an individual] and allegedly involving [several individuals] on or about December 29, 1996.
2. All physical evidence seized in connection with the execution of a search warrant relating to a reported incident at the home of [an individual] on or about December 29, 1996.
3. All documents showing the results of any tests or analysis of any physical evidence retrieved from or tested from the home of [an individual] relating to an incident occurring on or about December 29, 1996.
4. All audio and video tapes seized from the home of [an individual] in connection with the execution of a search warrant on or about December 31, 1996.
5. All physical evidence seized from [an individual] relating to an incident at the home of [an individual] on or about December 29, 1996.
6. All telephone records of [several individuals] or any other telephone records obtained in connection with an alleged incident at [an individual's] house on or about December 29, 1996.

7. All reports, summaries, and memorandums relating to an incident at the home of [an individual] on or about December 29, 1996.
8. All documents relating to the investigation of an incident at the home of [an individual] on or about December 29, 1996 reported by [an individual].

The second requestor made an additional request for:

1. All correspondence between the Dallas Police Department and [the first requestor] relating to [an individual].
2. All documents reflecting material returned to [the first requestor] relating to a police investigation of [an individual] commencing on or about December 30, 1996.

You state that you have provided the first requestor with a copy of the return of the search warrant and the underlying affidavit in support of the search warrant. In addition, you indicate that you have provided to the first requestor those items seized pursuant to the search warrant, except for a videotape of an alleged criminal offense.<sup>2</sup> You state that you have released to the second requestor all correspondence between the city and the first requestor. You further advise that you have released to the second requestor all "public information," which was released to the first requestor. However, you claim that the remainder of the requested information is excepted from disclosure by sections 552.101, 552.103, and 552.108 of the Government Code. You have identified the documents that are responsive to the requests and submitted a representative sample of copies of those documents to this office for review.<sup>3</sup>

Before considering the exceptions which you claim protect the requested information from public disclosure, we will address your assertion that the tangible, physical items which were released to the first requestor, but have not otherwise been publicly released, do not constitute public information. We agree that the tangible items,

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<sup>2</sup>We note that the city has retained copies of other videotapes, three of which were representative samples submitted to this office for review, in addition to the videotape of the alleged criminal offense.

<sup>3</sup>In 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). 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.

which were seized from the first requestor pursuant to a search warrant and later returned to him, are not public information as that term is defined in section 552.002 of the Government Code, even though some of the items may have been copied or analyzed to produce information. *See, e.g.,* Open Records Decision No. 581 (1990). We, therefore, determine that the items which were released to the first requestor are not the kind of information made public by section 552.021 of the Government Code.

Concluding that the tangible items which were returned to the first requestor are not public information, we now consider whether the city waived its discretionary authority to withhold the requested information under section 552.108 by selective disclosure. We observe that the city copied certain videotapes and other tangible items before returning them to the first requestor. Although we believe that the *copies* of the seized property held by the city constitute public information as defined by section 552.002 of the Government Code, we do not find that the city waived the section 552.108 exception by releasing the tangible items themselves to the first requestor. *Cf. Warden v. Hayden*, 387 U.S. 294 (1967) (true owner may bring appropriate action at law or in equity to reclaim property wrongfully withheld by public officials); Tex. Code Crim. Proc. Ann. art. 18.13 (pertaining to restitution of defendant's property).

We now consider whether section 552.108 excepts the requested information from public disclosure. Section 552.108 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). Because the records at issue come within the purview of section 552.108, we conclude that most of the information at issue may be withheld under this section.

We observe, however, that some of the submitted documents appear to be court documents. If any of the documents have been filed with the court, they have become public record and must be released. *See Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57-58 (Tex. 1992). If, on the other hand, any of these documents have not been filed with the court, the city may withhold them under section 552.108 of the Government Code. We also note that section 552.108 does not protect from public disclosure information that is specifically made public by other law. *See, e.g.,* Open Records Decision Nos. 451 (1986), 391 (1983). Among the documents at issue here is an affidavit for evidentiary search warrant. Article 18.01(b) of the Code of Criminal Procedure specifically provides that executed search warrant affidavits are public information.

We further note that 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). Thus, you must release the type of information that is considered to be front page offense report information, even if this information is not actually located on the front page of the offense report.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses common-law privacy and excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information must be withheld from the public under section 552.101 in conjunction with common-law privacy only when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1. Generally, this office protects from public disclosure information that would identify a victim of sexual assault. *See, e.g.*, Open Records Decision No. 339 (1982). However, the determination of whether such information can be excepted from disclosure must be made on a case-by-case basis. *See, e.g., Industrial Foundation of the South*, 540 S.W.2d at 685 (stating that whether the matter is of legitimate interest to the public can be considered only in the context of each particular case); Open Records Decision No. 611 (1992).

The information at issue here involves an individual who alleged that she had been sexually assaulted, but who is now charged with the offense of perjury involving the same facts upon which the allegations of sexual assault were based. Thus, the alleged victim and the alleged perjurer are the same person. The public concern over the case of the alleged perjury stemming from allegations of sexual assault is inseparable from the public concern over the connection between the facts alleged and the individual involved. *See, e.g., Ross v. Midwest Communications, Inc.*, 870 F.2d 271 (5th Cir. 1989), *cert. denied*, 493 U.S. 935 (1989). Moreover, both the alleged sexual assault case and the alleged perjury case have garnered wide-spread publicity. Under these circumstances, it appears that withholding the identifying information from public disclosure will not preserve this individual's common-law right to privacy. We, therefore, conclude that this individual has no cognizable privacy interest as an alleged victim of sexual assault at this time.

However, we believe that some of the requested information is protected by section 552.101 of the Government Code, in addition to section 552.108. The city submitted for our review a representative sample of copies and photocopies of tangible items that were

seized pursuant to the search warrant. After reviewing the submitted copies of videotapes and photographs of the physical evidence, we conclude that some of these records depict conduct that is highly intimate and embarrassing such that their release would be highly objectionable to a person of ordinary sensibilities, and there is no legitimate public interest in their public disclosure. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). We have marked the type of material that must be withheld from public disclosure based on section 552.101 of the Government Code in conjunction with the common-law right to privacy.

Criminal history information must also be withheld from required public disclosure under common-law privacy if it meets the criteria articulated for section 552.101 of Government Code by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). See also Gov't Code 411.084 (prohibiting release of criminal history information obtained from Department of Public Safety). The privacy interest in criminal history record information has been recognized by federal regulations that limit access to criminal history record information which 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 the 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).<sup>4</sup> As noted above, federal and state case law regarding an individual's common-law right to privacy expressly prohibits the release of such information. Accordingly, we conclude that if there is any criminal history information compiled by the city, it must be withheld from required public disclosure under section 552.101 of the Government Code.

Additionally, we believe that other statutory laws are applicable to some of the requested information. See, e.g., 18 U.S.C.A. § 2702(a) (1993) (pertaining to disclosure of contents of wire or electronic communications); Health & Safety Code (pertaining to disclosure of health care information by a hospital or an agent or employee of a hospital); and V.T.C.S. art. 4495b, § 5.08(b) (pertaining to disclosure of medical records created or maintained by a physician). The city must not release this type of information except as authorized by the applicable statutes.

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<sup>4</sup>The Code of Federal Regulations defines "criminal history information" as "information collected by criminal justice agencies on individuals consisting of identifiable descriptions and notations of arrests, detentions, indictments, informations, or other formal criminal charges, and any disposition arising therefrom, sentencing, correctional supervision, and release." 28 C.F.R. § 20.3(b).

We are resolving this matter with an informal letter ruling rather than with a published open records decision.<sup>5</sup> 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 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Vickie Prehoditch  
Assistant Attorney General  
Open Records Division

VDP/rho

Ref.: ID# 104790, ID# 104826

Enclosures: Marked documents

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<sup>5</sup>Because we are able to make a determination under sections 552.101 and 552.108, we do not address your claim under section 552.103 of the Government Code.

