



June 14, 2000

Mr. Francisco J. Martinez
Assistant County Attorney
Cameron County Courthouse
974 East Harrison Street
Brownsville, Texas 78520

OR2000-2326

Dear Mr. Martinez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 136723.

The Cameron County District Attorney's Office (the "DA") received a request for all files and records maintained by the DA pertaining to the arrest, investigation, and prosecution of suspects in the attempted murder of a named individual. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.301 of the Government Code provides that a governmental body must ask the attorney general for a decision as to whether requested documents must be disclosed not later than the tenth business day after the date of receiving the written request. You received the request at issue on October 21, 1999. You did not request a decision from this office until May 1, 2000, more than ten business days after the DA's receipt of the requestor's written request. Therefore, we conclude that the DA failed to meet its ten-day deadline for requesting an opinion from this office.

When a governmental body fails to request a decision within ten business days of receiving a request for information, the information at issue is presumed public. Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App. -- Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston

[1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The governmental body must show a compelling interest to withhold the information to overcome this presumption. Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App. -- Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). Normally, a compelling interest is that some other source of law makes the information confidential or that third party interests are at stake. Accordingly, we will examine the exceptions you raise to determine if a compelling interest exists in order to withhold the documents from public disclosure.

First, you contend that section 552.108 excepts the submitted information from public disclosure under the attorney work product privilege. However, we note that section 552.108 is a discretionary exception. Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding), 549 at 6 (1990) (governmental body may waive informer's privilege), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions therefore do not constitute "other law" that makes information confidential. Consequently, a governmental body waives a discretionary exception by failing timely to invoke it. *See* Open Records Decision Nos. 630 (1994), 586 (1991), 552 (1990). Therefore, because section 552.108 may be waived, we conclude that section 552.108 does not constitute a compelling reason to overcome the presumption that the requested information is public. Accordingly, the DA may not withhold the documents under section 552.108.

Next, you assert that the information responsive to the request is confidential pursuant to section 552.101. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." As noted above, this office has held that a compelling reason exists to withhold information when the information is confidential by another source of law or implicates the privacy interest of a third party. *See* Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests). Accordingly, we will consider the DA's argument for withholding the information at issue pursuant to section 552.101.

Section 552.101 excepts from disclosure information considered to be confidential by statute or by judicial decision. Gov't Code § 552.101. Therefore, we must address your assertion that, in accordance with article 39.14 of the Code of Criminal Procedure and *Wood v. McCown*, 748 S.W.2d 126 (Tex. App.--Austin, 1990, no writ), the submitted information contains documents that are privileged and confidential under the criminal work-product

doctrine. Article 39.14 of the Code of Criminal Procedure governs the discovery of information and the testimony of witnesses in criminal proceedings. The *Wood* court determined that, in the context of discovery, the criminal attorney work-product protection extends beyond the concluded criminal case. *See Wood*, 748 S.W.2d at 129. Article 39.14 of the Code of Criminal Procedure and *Wood* are not exceptions to disclosure under the Public Information Act (the "Act"). Discovery privileges are not covered under section 552.101 of the Government Code; such information is "privileged" only to the extent that a court in a particular case deems it to be so. Open Records Decision No. 575 (1990); *see* Gov't Code §§ 552.005, .006. Thus, we do not believe that the requested information is excepted from disclosure under the Act in conjunction with article 39.14 of the Code of Criminal Procedure or *Wood*.

You assert that the TCIC-NCIC reports contained in the submitted documents are confidential. Criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or the Texas Crime Information Center ("TCIC") is confidential. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations provide that "[n]o agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself." 28 C.F.R. § 20.21(c)(2). The federal regulations further allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in subchapter F of chapter 411 of the Government Code. *See* Gov't Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. Gov't Code §411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. Thus, any CHRI 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 CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with subchapter F of chapter 411 of the Government Code. We have marked the CHRI which must be withheld.

The requested information includes medical records which are subject to section 159.002 of the Occupations Code, known as the Medical Practice Act ("MPA"). The MPA provides in relevant part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter . . . may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

The MPA requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Thus, the MPA governs access to medical records. Open Records Decision No. 598 (1991). Moreover, information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code § 159.002(a), (b), (c); Open Records Decision No. 598 (1991). We have marked the medical records that appear in the submitted documents. The DA may release these records only in accordance with the MPA.

We find that the submitted documents also contain social security numbers. Social security numbers may be withheld in some circumstances under section 552.101 of the Government Code. A social security number or “related record” may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the records here are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained pursuant to any provision of law enacted on or after October 1, 1990.

The submitted information also contains documents that are excepted from disclosure under section 552.101 in conjunction with common law privacy. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). When a governmental body locally compiles or summarizes criminal history information pertaining to a particular individual, the compiled or summarized information takes on a character that implicates the individual’s right of privacy in a manner that the same information in an uncompiled state does not. *See United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). Thus, section 552.101 requires a law enforcement agency to withhold such locally compiled criminal history information

that treats an individual as a suspect, arrestee, or defendant, because the individual's common law right of privacy has been implicated. *Id.*; see also Open Records Decision No. 616 at 2-3 (1993). Accordingly, the DA must withhold, under section 552.101 in conjunction with common law privacy, any criminal history information that it has compiled concerning an individual identified as a suspect, arrestee, or defendant. We have marked the information that must be withheld under section 552.101 in conjunction with common law privacy.

Section 552.101 in conjunction with common law privacy also excepts from disclosure private facts about an individual. Therefore, information must be withheld from the public 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. See *Industrial Found.*, 540 S.W.2d at 685; Open Records Decision No. 611 at 1 (1992). In *Industrial Foundation*, the Texas Supreme Court considered intimate and embarrassing information such as that relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683; see also Open Records Decision Nos. 470 (concluding that fact that a person broke out in hives as a result of severe emotional distress is excepted by common law privacy), 455 (1987) (concluding that kinds of prescription drugs a person is taking are protected by common law privacy), 422 (1984) (concluding that details of self-inflicted injuries are presumed protected by common law privacy), 343 (1982) (concluding that information regarding drug overdoses, acute alcohol intoxication, obstetrical/gynecological illnesses, convulsions /seizures, or emotional/mental distress is protected by common law privacy). Moreover, in Open Records Decision No. 373 (1983), we concluded that personal financial information can generally be considered highly intimate and embarrassing:

In our opinion, 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. . . .

We have marked the types of information that must be withheld under section 552.101 in conjunction with common law privacy.

Finally, the submitted documents contain motor records and vehicle information that is confidential under section 552.130 of the Government Code. Section 552.130 excepts from required public disclosure information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration

issued by an agency of this state. Therefore, under section 552.130, the DA must withhold the copy of the Texas driver's license, the driver's license numbers, the VIN numbers, and the license plate numbers that appear in the submitted documents. We have marked the documents containing this information. You must redact this information prior to the release of the documents. However, we note that the requestor represents Sergio Castillo. You must release Mr. Castillo's section 552.130 information to the requestor. *See Gov't Code § 552.023.*

In summary, the DA must withhold the CHRI, the private information, and the section 552.130 information that appear in the submitted documents, except for the section 552.130 information that pertains to Mr. Castillo. The DA must withhold the medical records and the social security numbers that are contained in the submitted documents only in accordance with the above discussion. The DA must release the remaining documents to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

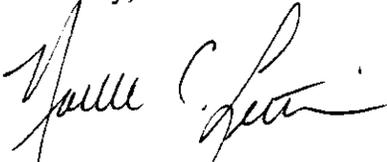
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Noelle C. Letteri". The signature is fluid and cursive, with the first name being the most prominent.

Noelle C. Letteri
Assistant Attorney General
Open Records Division

ncl/nc

Ref: ID# 136723

Encl. Submitted documents

cc: Ms. Helen J. Beardsley
P.O. Box 2482
Austin, Texas 78768
(w/o enclosures)