



October 31, 2001

Ms. Larissa T. Roeder  
Assistant District Attorney  
County of Dallas  
Frank Crowley Courts Building, LB 19  
Dallas, Texas 75207-4399

OR2001-4996

Dear Ms. Roeder:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 153488.

The Dallas County District Attorney's Office (the "district attorney") received a request for "any and all files, records, and any other documents" in the possession of the district attorney that pertain to a named defendant in a specified case. You state that much of this information has been made available to the requestor. You claim that other responsive information is excepted from disclosure under sections 552.026, 552.101, 552.111, 552.114, and 552.134 of the Government Code and the federal Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. § 1232g.<sup>1</sup> We have considered your arguments and have reviewed the information you submitted.<sup>2</sup>

We first note that some of the submitted information falls within the scope of section 552.022 of the Government Code. Section 552.022 provides that

*the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:*

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<sup>1</sup>Former section 552.131 of the Government Code, "Exception: Certain Information Relating to Inmate of Department of Criminal Justice," was renumbered as section 552.134 by the Seventy-seventh Legislature effective September 1, 2001. The revision was non-substantive. See Act of May 22, 2001, 77<sup>th</sup> Leg., R.S., H.B. 2812, § 21.001(53) (to be codified at Gov't Code § 552.134).

<sup>2</sup>We note that the district attorney did not raise section 552.111 of the Government Code within ten business days of his receipt of this request for information. Therefore, we do not address section 552.111. See Gov't Code § 552.301(b); Open Records Decision Nos. 630 at 2-3 (1994), 150 (1977).

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

...

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

Gov't Code § 552.022(a)(1), (17) (emphasis added). The district attorney does not raise section 552.108. Thus, the submitted information that is contained in completed reports, evaluations, and investigations and in public court records must be released under section 552.022(a)(1) and (17), unless the information is expressly confidential under other law.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception protects information that another statute makes confidential. Chapter 508 of the Government Code is applicable to the Texas Department of Criminal Justice (the "department"). Section 508.313 provides in part:

(a) All information obtained and maintained, including a victim protest letter or other correspondence, a victim impact statement, a list of inmates eligible for release on parole, and an arrest record of an inmate, is confidential and privileged if the information relates to:

(1) an inmate of the institutional division [of the Department of Criminal Justice] subject to release on parole, release to mandatory supervision, or executive clemency;

(2) a releasee; or

(3) a person directly identified in any proposed plan of release for an inmate.

...

(c) The department may provide information that is confidential and privileged under Subsection (a) to:

...

(4) an eligible entity requesting information for a law enforcement, prosecutorial, correctional, clemency, or treatment purpose.

(d) In this section, "eligible entity" means:

- (1) a government agency, including the office of a prosecuting attorney;
- (2) an organization with which the department contracts or an organization to which the department provides a grant; or
- (3) an organization to which inmates are referred for services by the department.

Gov't Code § 508.313; *see also id.* §§ 508.052, 508.314 (providing for use of information by Texas Board of Pardons and Paroles).

You represent to this office that the district attorney received the information submitted as Exhibit 3 from the Texas Board of Pardons and Paroles (the "board"). You explain that this information relates to an inmate who was eligible for release when these documents were generated and who was in fact paroled based on information identified in the documents. You correctly note that section 508.313 authorizes the department to provide information that is encompassed by this statute to a prosecuting attorney. *See id.* § 508.313(c)(4), (d)(1). You assert that the requestor is not entitled to receive such information under this statute. Based on your representation that the district attorney received the information in Exhibit 3 from the board, we conclude that this information is confidential under section 508.313 of the Government Code and must therefore be withheld from disclosure under section 552.101 of the Government Code.

Section 552.134 of the Government Code relates to inmates of the Texas Department of Criminal Justice. Section 552.134 provides as follows:

(a) Except as provided by Subsection (b) or by Section 552.029, information obtained or maintained by the Texas Department of Criminal Justice is excepted from [required public disclosure] if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

(b) Subsection (a) does not apply to:

- (1) statistical or other aggregated information relating to inmates confined in one or more facilities operated by or under a contract with the department; or
- (2) information about an inmate sentenced to death.

(c) This section does not affect whether information is considered confidential or privileged under Section 508.313 [of the Government Code].

(d) A release of information described by Subsection (a) to an eligible entity, as defined by Section 508.313(d) [of the Government Code], for a purpose related to law enforcement, prosecution, corrections, clemency, or treatment is not considered a release of information to the public for purposes of Section 552.007 [of the Government Code] and does not waive the right to assert in the future that the information is excepted from required disclosure under this section or other law.

Gov't Code § 552.134.

You represent to this office that the district attorney received the information submitted as Exhibit 5 from the department via subpoena. You state that this information relates to an inmate who has been sentenced to death. Section 552.134(b) provides that section 552.134 is not applicable to information relating to an inmate who has been sentenced to death. *See id.* § 552.134(b)(2). Therefore, section 552.134(a) does not protect information relating to such an inmate from disclosure.

We note, however, that some of the information in Exhibit 5 relates to other inmates of the department. You do not inform this office that these other inmates have been sentenced to death. Under section 552.134(d), “[a] release of information described by [section 552.134(a)] to an eligible entity, as defined by Section 508.313(d) [of the Government Code], for a purpose related to law enforcement, prosecution, corrections, clemency, or treatment is not considered a release of information to the public for purposes of Section 552.007 [of the Government Code] and does not waive the right to assert in the future that the information is excepted from required disclosure under this section or other law.” Thus, under section 552.134(d), information that section 552.134(a) excepts from public disclosure may be transferred by the department to a prosecutor for a law enforcement purpose. *Compare* Gov't Code § 508.313(d). Therefore, based on your representation that the district attorney obtained all of the information in Exhibit 5 from the department, we have marked information in Exhibit 5 that you must withhold under section 552.134.

Next, we address your other claims with regard to the information in Exhibit 5 that relates to the inmate who has been sentenced to death. With respect to Exhibit 5a, you raise sections 552.026 and 552.114 of the Government Code and the federal Family Educational Rights and Privacy Act of 1974 (FERPA’), 20 U.S.C. § 1232g. FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student’s education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student’s parent. *See* 20 U.S.C. § 1232g(b)(1); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information).

Section 552.026 of the Government Code incorporates FERPA into chapter 552 of the Government Code. *See* Open Records Decision No. 634 at 6-8 (1995). Section 552.026 provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

Gov't Code § 552.026. "Education records" under FERPA are those records that contain information directly related to a student and that are maintained by an educational agency or institution or by a person acting for such agency or institution. *See* 20 U.S.C. § 1232g(a)(4)(A). Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 at 3 (1982), 206 at 2 (1978).

Section 552.114(a) of the Government Code excepts from disclosure "information in a student record at an educational institution funded wholly or partly by state revenue." This office generally has treated "student record" information under section 552.114(a) as the equivalent of "education record" information that is protected by FERPA. *See* Open Records Decision No. 634 at 5 (1995).

In this instance, the information in Exhibit 5a relates to the Windham School. The Windham School District is established under chapter 19 of the Education Code and receives state funding. *See* Educ. Code §§ 19.002, .007. You inform this office that the district attorney obtained the information relating to the Windham School by subpoena. FERPA does not require the withholding of information that was "furnished . . . pursuant to any lawfully issued subpoena[.]" 20 U.S.C. § 1232(g)(b)(2)(B); *see also* 34 C.F.R. § 99.31(a)(9)(i). Furthermore, as the information in Exhibit 5a is in the district attorney's custody, and not that of the Windham School, section 552.114 does not except this information from disclosure. *See* Open Records Decision No. 390 at 2-3 (1983) (stating that statutory predecessor excepts information only when it is in the custody of an "educational agency").

We note that Exhibit 5 includes medical records relating to the inmate who has been sentenced to death. The disclosure of medical records is governed by the Medical Practice Act (the "MPA"), as codified at subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. Section 159.002 of 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.

*Id.* § 159.002(b), (c). The MPA also includes provisions that govern the disclosure of information that it encompasses. *See* Occ. Code §§ 159.003, .004, .005, .006. This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of chapter 552 of the Government Code. *See* Open Records Decision No. 598 (1991). We have marked the information that is governed by the MPA. This information may be released only if the MPA permits the district attorney to do so.

Exhibit 5 also includes fingerprint information that is subject to sections 559.001, 559.002, and 559.003 of the Government Code. These new statutes were enacted by the Seventy-seventh Legislature and took effect September 1, 2001. *See* Act of May 24, 2001, 77<sup>th</sup> Leg., R.S., H.B. 678, § 2 (to be codified as Gov't Code §§ 559.001, .002, and .003). They provide as follows:

Sec. 559.001. DEFINITIONS. In this chapter:

- (1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.
- (2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 559.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

- (1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:
  - (A) the individual consents to the disclosure;
  - (B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or
  - (C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and
- (2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 559.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

It does not appear to this office that section 559.002 permits the disclosure of the submitted fingerprint information to the requestor. Therefore, the district attorney must withhold this information, which we have marked, under section 559.003 of the Government Code.

Section 552.101 of the Government Code also encompasses the common law right of privacy. Information must be withheld from disclosure under section 552.101 in conjunction with common law privacy when (1) the information is highly intimate or 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. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common law privacy protects the specific types of information that the Texas Supreme Court held to be intimate or embarrassing in *Industrial Foundation*. See 540 S.W.2d at 683 (information 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). This office has since determined that other types of information also are private under section 552.101. See Open Records Decision No. 659 at 4-5 (1999) (summarizing types of information that attorney general has determined to be private). We have marked the information in Exhibit 5 that is protected by common law privacy and must be withheld under section 552.101.

Section 552.101 also encompasses constitutional rights of privacy. Constitutional privacy protects two kinds of interests. See Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987); see also *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). The first is the interest in independence in making certain important decisions related to the "zones of privacy," pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. See Open Records Decision No. 455 at 3-7 (1987); see also *Fadjo v. Coon*, 633 F.2d 1172 (5<sup>th</sup> Cir. 1981). The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. See Open Records Decision No. 455 at 6-7 (1987); see also *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5<sup>th</sup> Cir. 1985), *reh'g denied*, 770 F.2d 1081 (1985), *cert. denied*, 474 U.S. 1062 (1986). Constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." Open Records Decision No. 455 at 8 (1987) (quoting *Ramie v. City of Hedwig Village*, 765 F.2d at 492). We have marked inmate visitor information in Exhibit 5 that is protected by constitutional privacy. The district attorney also must withhold this information under section 552.101. See Open Records Decision No. 430 (1985) (list of inmate's visitors protected by constitutional law); cf. Open Records Decision No. 428 (1985) (list of inmate's correspondents protected by constitutional privacy).

Lastly, we note that a social security number may be confidential under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), *if the social security number was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. See Open Records Decision No. 622 at 2-4 (1994).* It is not apparent to this office that the social security number that appears in Exhibit 5 was obtained or is maintained by the district attorney pursuant to any provision of law enacted on or after October 1, 1990. You have cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes the district attorney to obtain or maintain a social security number. We therefore have no basis for concluding that the social security number in question was obtained or is maintained pursuant to such a law and is therefore confidential under section 405(c)(2)(C)(viii)(I) of the federal law. We caution you, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Therefore, prior to releasing this social security number, the district attorney should ensure that it was not obtained and is not maintained pursuant to any provision of law enacted on or after October 1, 1990.

In summary, Exhibit 3 is confidential in its entirety under section 552.101 of the Government Code in conjunction with section 508.313 of the Government Code. Therefore, the district attorney must not release Exhibit 3. Exhibit 5 contains information relating to inmates of the Department of Criminal Justice that the district attorney must withhold under section 552.134(a) of the Government Code. Other information in Exhibit 5 is confidential under section 552.101 in conjunction with section 559.003 of the Government Code, common law privacy, and constitutional privacy. The medical records in Exhibit 5 may be released only in accordance with the Medical Practice Act. The social security number in Exhibit 5 may be confidential under section 552.101 in conjunction with federal law. With these exceptions, the information in Exhibit 5 must be released.

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).

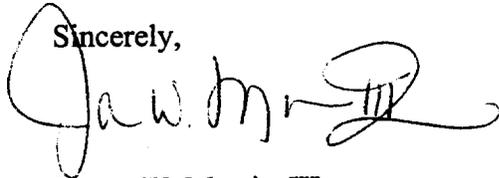
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Dept. of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

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,



James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/sdk

Ref: ID# 153488

Enc: Submitted documents

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