



January 9, 2002

Mr. Royce Poinsett  
Assistant General Counsel  
Office of the Governor  
P.O. Box 12428  
Austin, Texas 78711

OR2002-0148

Dear Mr. Poinsett:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 157113.

The Office of the Governor (the "office") received a request for "any and all records and documents relating to any and all pardons and/or acts of executive clemency granted to any individual since January 1, 1990, in the State of Texas." You claim that some of the requested information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.107(1) of the Government Code excepts information "that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct[.]" While section 552.107(1) appears to apply to information within rule 1.05 of the Texas Disciplinary Rules of Professional Conduct, this office has determined that section 552.107 cannot be applied as broadly as written to information in the possession of an attorney for a governmental body. Open Records Decision No. 574 (1990). Section 552.107(1) was found to protect only the attorney's communication of legal advice or opinion to the client and communications from a client to an attorney where those communications are made in confidence and in furtherance of the attorney rendering professional legal service to the governmental body. *Id.* at 5. Moreover, section 552.107(1) does not except purely factual information from disclosure. *Id.* We determine the applicability of section 552.107(1) on a case-by-case basis. We agree that the information in Exhibit A reflects either client confidences or an attorney's legal advice or opinions. The office may therefore withhold the information in Exhibit A under section 552.107.<sup>1</sup>

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<sup>1</sup> As we are able to make this determination, we need not address your other claimed exceptions.

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 section encompasses information made confidential by other statutes. Section 411.153(a) of the Government Code provides that “[a] DNA record stored in the DNA database is confidential and is not subject to disclosure under the open records law, Chapter 552 [of the Government Code].” Gov’t Code § 411.153(a). “‘DNA database’ means the database that contains forensic DNA records maintained by the [public safety] director.” Gov’t Code § 411.141(2); *see id.* § 411.001(3). Therefore, if the information in Exhibit B is maintained in the public safety director’s DNA database, the office must withhold Exhibit B under section 552.101 in conjunction with section 411.153 of the Government Code. If, on the other hand, the information in Exhibit B is not maintained in the public safety director’s DNA database, such information would not be confidential under section 411.153 of the Government Code.

Section 3 of Article 9031, V.T.C.S. provides that “genetic information is confidential and privileged regardless of the source of information.” “‘Genetic information’ means information derived from the results of a genetic test.” V.T.C.S. art. 9031, § 1(2). “‘Genetic test’ means a laboratory test of an individual’s DNA, RNA proteins, or chromosomes to identify by analysis of the DNA, RNA, proteins, or chromosomes the genetic mutations or alterations in the DNA, RNA, proteins, or chromosomes that are associated with a predisposition for a clinically recognizable disease or disorder.” V.T.C.S. art. 9031 § 1(3). Therefore, if the DNA analysis at issue in Exhibit B was conducted in order to identify genetic mutations or alterations that are associated with a predisposition for a disease or disorder, the office must withhold Exhibit B under section 552.101 in conjunction with section 3 of Article 9031, V.T.C.S. If, on the other hand, the DNA analysis at issue in Exhibit B was not conducted for such purposes, the information in Exhibit B would not be confidential under section 3 Article 9031, V.T.C.S.

The Seventy-seventh Legislature recently added section 552.137 to chapter 552 of the Government Code. This new exception makes certain e-mail addresses confidential.<sup>2</sup> Senate Bill 694, as passed May 14, 2001, signed by the Governor May 26, 2001, and made effective immediately, provides in relevant part:

**Sec. 552.137. CONFIDENTIALITY OF CERTAIN E-MAIL ADDRESSES.**

(a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

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<sup>2</sup>House Bill 2589, which also makes certain e-mail addresses confidential, took effect on September 1, 2001. *See* Act of May 22, 2001, 77th Leg., R.S., H.B. 2589, § 5 (to be codified at Gov’t Code § 552.136). The language of section 552.136, as added by House Bill 2589, is identical to that of section 552.137.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Act of May 14, 2001, 77th Leg., R.S., S.B. 694, § 1 (to be codified at Gov't Code § 552.137). Section 552.137 requires the office to withhold an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body, unless the member of the public has affirmatively consented to its release. As there is no indication that the member of the public has consented to the release of his e-mail address, the office must withhold the e-mail address in Exhibit C, which you have marked, under section 552.137 of the Government Code.

To summarize, we conclude that: (1) the office may withhold the information in Exhibit A under section 552.107; (2) if the information in Exhibit B is maintained in the public safety director's DNA database, the office must withhold Exhibit B under section 552.101 in conjunction with section 411.153 of the Government Code; (3) if the DNA analysis at issue in Exhibit B was conducted in order to identify genetic mutations or alterations that are associated with a predisposition for a disease or disorder, the office must withhold Exhibit B under section 552.101 in conjunction with section 3 of Article 9031, V.T.C.S.; (4) if neither section 411.153 of the Government nor section 3 of Article 9031, V.T.C.S. are applicable to the information in Exhibit B, Exhibit B must be released; and (5) the office must withhold the e-mail address you have marked in Exhibit C under section 552.137.

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).

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 Texas Building and Procurement 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,



Karen A. Eckerle  
Assistant Attorney General  
Open Records Division

KAE/sdk

Ref: ID# 157113

Enc: Submitted documents

c: Ms. Melynn Cross  
4710 Matador Trail  
Amarillo, Texas 79109  
(w/o enclosures)