



June 21, 2002

Ms. Donna L. Clarke
Assistant Criminal District Attorney
Lubbock County
P.O. Box 10536
Lubbock, Texas 79408-3536

OR2002-3398

Dear Ms. Clarke:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 164666.

The Lubbock County Criminal District Attorney's Office (the "district attorney") received a request for all information in the district attorney's case files involving a named individual, including information relating to a specified aggravated robbery case and information relating to three specified murder cases. You indicate that some responsive information has been made available to the requestor. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

As a preliminary matter, we note that the submitted information includes court documents. Information filed with a court is generally a matter of public record and may not be withheld from disclosure. Gov't Code § 552.022(a)(17); *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54 (Tex. 1992). The district attorney must release court-filed documents to the requestor.

We next note that the information you have submitted is subject to section 552.022 of the Government Code. Section 552.022 provides in pertinent part 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:

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

Gov't Code § 552.022(a)(1). The submitted information constitutes a completed investigation that the district attorney may withhold only to the extent the information is made confidential by other law or is otherwise protected by section 552.108 of the Government Code.

You contend that the documents submitted as Exhibit C are excepted under sections 552.103 and 552.111 of the Government Code as attorney work product. Sections 552.103 and 552.111 are discretionary exceptions under the Public Information Act and do not constitute "other law" for purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 473 (1987) (governmental body may waive section 552.111). The attorney work product privilege is also found in rule 192.5 of the Texas Rules of Civil Procedure. Recently, the Texas Supreme Court held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). The Texas Rules of Civil Procedure, however, only apply to "actions of a civil nature." Tex. R. Civ. P. 2. Accordingly, the attorney work product privilege found in rule 192.5 does not apply to the criminal matter at issue here. Because sections 552.103 and 552.111 do not apply to this completed investigation, and because we do not find any other law that applies the work product privilege in this instance, we determine that the information in Exhibit C must be released to the requestor.

Next, you claim that the information submitted as Exhibit A is excepted from disclosure under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses the common-law right to privacy. Common-law privacy protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. *See Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). When a law enforcement agency is asked to compile criminal history information regarding a particular individual, the compiled information takes on a character that implicates the individual's right to 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); *see also* Open Records Decision No. 616 at 2-3 (1993).

In part, this request is for unspecified prosecutorial records that pertain to a named individual. That aspect of this request implicates the individual's right to privacy. Therefore, law enforcement records maintained by the district attorney that depict this individual as a suspect, arrestee, or defendant, apart from those that relate to the aggravated robbery case and the three murder cases to which the request for information refers, must be withheld in their entirety under section 552.101 of the Government Code in conjunction with *Reporters Committee*.

We note that Exhibit A contains fingerprint information that is subject to sections 559.001, 559.002, and 559.003 of the Government Code. These provisions of the Government Code 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. Therefore, the district attorney must withhold the fingerprints under section 552.101 in conjunction with section 559.003 of the Government Code.

We next address your argument for the information submitted as Exhibit B. Initially, we note that some of the information in Exhibit B is protected by common-law privacy. Open

Records Decision Nos. 393 (1983), 339 (1982) (information that identifies or tends to identify victim of sexual abuse is protected by common-law privacy); *see also Industrial Found.*, 540 S.W.2d at 685. The district attorney must withhold the information we have marked under section 552.101 in conjunction with common-law privacy.

You contend that the information in Exhibit B is protected from disclosure by the attorney-client privilege as embodied in rule 503 of the Texas Rules of Evidence. Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503. A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh*

Corning Corp. v. Caldwell, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

The district attorney asserts that the documents submitted as Exhibit B include confidential communications made for the purpose of facilitating the rendition of legal services. After careful review, we find that Exhibit B consists of communications among state and federal law enforcement agencies pertaining to a criminal investigation. Exhibit B also contains a victim impact statement, witness affidavits, a Lubbock Police Department internal communication, and district attorney file notes. You have not demonstrated, nor does it appear, that these law enforcement agency documents constitute privileged attorney-client communications. Thus, we determine that the attorney-client privilege under rule 503 does not apply to the material in Exhibit B.

We note, however, that Exhibit B contains a bank account number and a routing number that are subject to section 552.136 of the Government Code. Section 552.136 provides in relevant part:

(a) In this section, “access device” means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov’t Code § 552.136. Accordingly, the district attorney must withhold the account number and routing number that we have marked pursuant to section 552.136 of the Government Code.

We note that the documents in Exhibits A and B contain Texas driver’s license information. Section 552.130 provides for the confidentiality of Texas motor vehicle license and registration information. The district attorney must withhold the information we have marked pursuant to section 552.130.

We also note that the social security numbers in Exhibits A and B may be confidential under federal law. A social security number may be withheld in some circumstances 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 number 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 the social security numbers are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 of the Public Information Act on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information 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 by the district attorney pursuant to any provision of law enacted on or after October 1, 1990.

In summary, with the exception of records pertaining to the robbery and three murders specifically referenced in the request, the district attorney must withhold the named individual's criminal history record information under section 552.101 of the Government Code in conjunction with the common-law right to privacy. Further, we have marked an additional portion of the information that must be withheld under common-law privacy. Fingerprint information must be withheld under section 552.101 in conjunction with section 559.003 of the Government Code. The bank account and routing numbers we have marked must be withheld under section 552.136 of the Government Code. Motor vehicle information must be withheld under section 552.130 of the Government Code. Social security numbers may be confidential under section 552.101 and federal law. You must release the remainder of the submitted information 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).

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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 164666

Enc: Marked documents

c: Ms. Shirley J. Thurston
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(w/o enclosures)