



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

December 11, 2002

Mr. Brad Norton  
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P.O. Box 1088  
Austin, Texas 78767-1088

OR2002-7062

Dear Mr. Norton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 173440.

The City of Austin Police Department (the "department") received a request for all information contained within the requestor's application file. You claim that the requested information is excepted from disclosure under sections 552.101, 552.108, 552.111, and 552.122 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You claim that some of the submitted information is excepted from disclosure under the attorney work product privilege, defined at Texas Rule of Civil Procedure 192.5, which is encompassed by section 552.111 of the Government Code. In Open Records Decision No. 647 (1996), this office held that a governmental body may withhold information under section 552.111 if it demonstrates that the material was (1) created for trial or in anticipation of civil litigation, and (2) consists of or tends to reveal an attorney's mental processes, conclusions, and legal theories. *See* Open Records Decision No. 647 (1996). Rather than making information confidential at law, the attorney work product privilege as encompassed by section 552.111 is a discretionary exception that exists to protect the interests of a party preparing for anticipated litigation or for trial, and thus can only be raised by the party

preparing for anticipated litigation or for trial.<sup>1</sup> See Tex. R. Civ. P. 192.5(a)(1), (2) (work product comprises a communication made, material prepared, or mental impressions developed in anticipation of litigation or for trial *by or for a party or a party's representatives*) (emphasis added). Here, however, the department was not a party or a representative of a party to the proceedings for which the submitted documents you claim are excepted under the attorney work product privilege were created. Accordingly, we conclude that you may not withhold any of the submitted information under section 552.111 in conjunction with the attorney work product privilege.

You also assert that some of the submitted information is excepted from release under section 552.108(a)(2) of the Government Code. Section 552.108(a)(2) excepts from disclosure information concerning the detection, investigation, or prosecution of an alleged crime that concluded in a result other than conviction or deferred adjudication. A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. However, you have not shown that the department has any law enforcement interest in the records you claim are excepted under section 552.108. Furthermore, you have provided no representation from the Corpus Christi Police Department or from the United States military requesting that any of the submitted information be withheld. See generally Open Records Decision Nos. 474 (1987), 372 (1983); see also Open Records Decision No. 586 (1991) (need of another governmental body to withhold requested information may provide compelling reason for nondisclosure under section 552.108). Therefore, we find that you may not withhold any of the submitted information under section 552.108.

We now consider your arguments under section 552.101 of the Government Code in conjunction with the doctrine of common-law privacy. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section 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 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). Information is excepted from required public disclosure by a common law right of privacy if the information (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found.*, 540 S.W.2d 668. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and

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<sup>1</sup>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. 522 at 4 (1989) (discretionary exceptions in general); 473 (1987) (governmental body may waive section 552.111).

injuries to sexual organs. 540 S.W.2d at 683. In addition, where an individual's criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual's right to privacy. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). We find that some of the information you assert is excepted from release under section 552.101 in conjunction with common-law privacy does not contain the sort of highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person. On the other hand, we agree that some of the submitted documents do contain some information that is considered highly intimate or embarrassing for the purposes of common-law privacy. However, some of this information relates to the requestor. We note that the requestor has a special right of access pursuant to section 552.023 of the Government Code to information that would otherwise be protected based on his right to privacy. Gov't Code § 552.023 (person has special right of access to information relating to person and protected from public disclosure by laws intended to protect that person's privacy interests). Furthermore, there is a legitimate public interest in some of the information. *See generally* Open Records Decision Nos. 470 (1987) 470 (1987) (public has legitimate interest in job qualifications of public employees), 444 (1986) (concluding that public has obvious interest in having access to information concerning performances of governmental employees, particularly employees who hold positions as sensitive as those held by members of law enforcement), 423 at 2 (1984) (scope of public employee privacy is narrow), 284 (1981) (letters of recommendation not protected by privacy). Accordingly, the department may not withhold any of the submitted information under section 552.101 in conjunction with the common-law right to privacy.

We now address your arguments under section 552.101 in conjunction with section 411.083 of the Government Code. Criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by 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 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 chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083.

Section 411.082 of the Government Code defines CHRI as:

(2) . . . information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions. The term does not include:

(A) identification information, including fingerprint records, to the extent that the identification information does not indicate involvement of the person in the criminal justice system; or

(B) driving record information maintained by the department under Subchapter C, Chapter 521, Transportation Code.

Gov't Code 411.082(2)

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. *Id.* § 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 Government Code chapter 411, subchapter F. Some of the information that you state is excepted from release pursuant to section 552.101 in conjunction with section 411.083 is CHRI generated by TCIC and NCIC. Accordingly, this information, which we have marked, is excepted from required public disclosure by section 552.101 of the Government Code. The remainder of the information that you assert is excepted from release pursuant to section 552.101 in conjunction with section 411.083 is not CHRI and so is not excepted from release under section 552.101 in conjunction with section 411.083. We note that the requestor can obtain his own CHRI from DPS. Gov't Code § 411.083(b)(3).

We now consider your assertion that some of the information, which you have marked, is excepted from release under the informer's privilege. The informer's privilege is well established under Texas case law. *See Aguilar v. State*, 444 S.W.2d 935 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724 (Tex. Crim. App. 1928). The privilege protects the identities of individuals who report violations of statutes to police, other law enforcement agencies, and certain administrative officials. *See Open Records Decision No. 279 (1981)*. For information to come under the protection of the informer's privilege, it must relate to a violation of a criminal or civil statute. *See Open Records Decision Nos. 515 (1988), 391 (1983)*. The information you claim is protected under the informer's privilege was received by the department as background information as a part of the requestor's employment application process. There is no indication that the information you have marked was reported to the department for law enforcement purposes or that the department treated it as such. Rather, the information you claim is excepted from release under the informer's privilege was reported to the Corpus Christi Police Department. As the informer's privilege does not make information confidential by law but rather is a

discretionary exception that exists to protect the interests of the government body who received the information, the department is not the appropriate entity to raise the informer's privilege with regard to this information.<sup>2</sup> Consequently, the informer's privilege is not applicable in this instance.

We now consider your arguments that some of the submitted information is excepted from release under section 552.122. Section 552.122(b) excepts from disclosure test items developed by a licensing agency or governmental body. In Open Records Decision No. 626 (1994), this office determined that the term "test item" in section 552.122 includes any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated, but does not encompass evaluations of an employee's overall job performance or suitability. Whether information falls within the section 552.122 exception must be determined on a case-by-case basis. Open Records Decision No. 626 at 6 (1994). 552.122(b). After reviewing the submitted information, we conclude that the submitted information does not test an individual's or group's knowledge or ability in a particular area. Therefore, the department may not withhold any of the submitted information under section 552.122.

We also note that the submitted information contains 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 and 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 file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 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 department pursuant to any provision of law, enacted on or after October 1, 1990. However, because section 552.023 provides the requestor a special right of access to his social security number, the department must release to the requestor his social security number.

Finally, we note that the requested information contains information subject to section 552.130, which provides in relevant part:

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<sup>2</sup>As previously noted, 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. 549 at 6 (1990) (governmental body may waive informer's privilege); 522 at 4 (1989).

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

Thus, the driver's license number, class, and expiration date found in the submitted information are subject to section 552.130. We note, however, that information protected under section 552.130 is intended to protect a person's privacy. Therefore, under section 552.023 of the Government Code, a person who is the subject of the information or the person's authorized representative has a special right of access to such information. Accordingly, the requestor here has a special right of access to his driver's license information. Therefore, the department must release to the requestor his driver's license number, class, and expiration date.

In summary, you must withhold the information we have marked under section 552.101 in conjunction with section 411.083 of the Government Code. You may need to withhold social security numbers included with the submitted information under section 552.101 in conjunction with the federal Social Security Act with the exception of the requestor's social security number, which you must release pursuant to the requestor's special right of access created by section 552.023. You must release the requestor's driver's license number, class, and expiration date pursuant to the requestor's special right of access created by section 552.023.<sup>3</sup> You must release the remaining information.

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.*

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<sup>3</sup>We note that some of the information that you must release contains or consists of confidential information that is not subject to release to the general public. See Gov't Code § 552.352. However, the requestor in this instance has a special right of access to the information. Gov't Code § 552.023. Because some of the information is confidential with respect to the general public, if the department receives a future request for this information from an individual other than the requestor or his authorized representative, the department should again seek our decision.

§ 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).

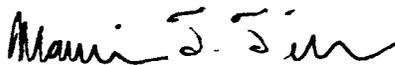
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,



Maverick F. Fisher  
Assistant Attorney General  
Open Records Division

MFF/seg

Ref: ID# 173440

Enc: Submitted documents

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(w/o enclosures)