



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 22, 2004

Ms. Patricia J. Acosta  
Assistant District Attorney  
34th Judicial District  
500 East San Antonio Street, 2nd Floor  
El Paso, Texas 79901-2420

OR2004-3303

Dear Ms. Acosta:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 199994.

The Office of the District Attorney for the Thirty-fourth Judicial District (the "district attorney") received a request for access to and copies of all records relating to a particular arrest, investigation, and trial. You indicate that you have released some responsive information to the requestor. However, you claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the submitted information contains arrest warrants. The 78th Legislature recently amended article 15.26 of the Code of Criminal Procedure to add language providing:

The arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, *is public information*, and beginning immediately when the warrant is executed the magistrate's clerk shall make a copy of the warrant and the affidavit available for public inspection in the clerk's office during normal business hours. A person may request the clerk to provide copies of the warrant and affidavit on payment of the cost of providing the copies.

Crim. Proc. Code art. 15.26 (emphasis added). Thus, the warrants are public under article 15.26. As a general rule, the exceptions to disclosure found in the Act do not apply to information that is made public by other statutes. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989).

We next note that the submitted information consists of a completed investigation, which is made expressly public by section 552.022(a)(1) of the Government Code, which provides:

(a) Without limiting the amount or kind of information that is public information under this chapter, 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). Section 552.103 is a discretionary exception under the Act and, as such, does not constitute "other law" for purposes of section 552.022(a)(1).<sup>1</sup> *See* Open Records Decision No. 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential). Consequently, we do not address your section 552.103 claim with regard to the submitted information. However, since you claim that portions of the submitted information are excepted from disclosure pursuant to sections 552.101, 552.108, and 552.130 of the Government Code, we will address these claims.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. The information you have submitted as Enclosure 3A contains fingerprint information that is subject to sections 560.001, 560.002, and 560.003 of the Government Code. These sections govern the public availability of fingerprint information. These sections provide as follows:

Sec. 560.001. DEFINITIONS. In this chapter:

(1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.

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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. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

(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. 560.002. 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. 560.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

Gov't Code §§ 560.001, 560.002, 560.003.<sup>2</sup> The fingerprint information in Enclosure 3A is confidential under section 560.003. If the requestor is an attorney for the person to whom this fingerprint information pertains, he would have a right of access to his client's fingerprint information. *See id.* § 560.002(1). Otherwise, the district attorney must withhold the fingerprint information in enclosure 3A under section 552.101.

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).

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<sup>2</sup>These sections, formerly codified at chapter 559 of the Government Code as sections 559.001, 559.002, and 559.003, were renumbered by the Regular Session of the Seventy-eighth Legislature, effective September 1, 2003. See Act of May 20, 2003, 78th Leg., R.S., ch. 1275, § 2 (78), 2003 Tex. Sess. Law Serv. 4140, 4144.

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.

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. Therefore, any CHRI obtained from the NCIC or TCIC that is confidential under federal law or subchapter F of chapter 411 of the Government Code must be withheld under section 552.101.

We note that the submitted information contains social security numbers. 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 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.

We now turn to your argument under section 552.108 of the Government Code and begin by noting that the requestor asserts that some of the requested information has previously been provided to the requestor and the attorney for the criminal defendant in this case. You only acknowledge that the defendant’s attorney was allowed to review the state’s case file in compliance with court-ordered discovery. This office has ruled that exchange of information among litigants in informal discovery is not considered a voluntary release of information. *See* Open Records Decision No. 579 (1990). Likewise, when a governmental body discloses information because it reasonably concludes it has a constitutional obligation to do so, it can still invoke the law enforcement exception. *See* Open Records Decision No. 454 (1986); *see*

*also Brady v. Maryland*, 373 U.S. 83 (1963) (prosecution is required to provide defense with all potentially exculpatory evidence). You make no representation as to whether or not this information has been previously released to the requestor. Whether this information has previously been voluntarily released is a fact question that cannot be addressed in the ruling process. *See* Attorney General Opinion JC-0534 at 1 (2002) (this office does not make factual determinations in opinion process). We therefore must rely on a governmental body's representations with regard to such issues. Based on the district attorney's representation, we conclude that the district attorney has not previously released any of the requested information that it now seeks to withhold to a member of the public. *See* Gov't Code §§ 552.007. We will therefore address the district attorney's claim that the submitted information at issue is excepted from disclosure under section 552.108 of the Government Code.

You contend that the information submitted in Enclosure 7 is excepted under subsections 552.108(a)(3)(A) and (a)(3)(B) of the Government Code. Please note that former subsections 552.108(a)(3)(A) and (a)(3)(B) were renumbered as subsections 552.108(a)(4)(A) and (a)(4)(B) by the Seventy-seventh Legislature, effective September 1, 2001. *See* Act of May 17, 2001, 77th Leg., R.S., H.B. 776, § 6. These subsections provide that information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from required public disclosure if:

...

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state [and]

Gov't Code 552.108(a)(4)(A)-(B). You assert that Enclosure 7 was prepared by an attorney representing the state in anticipation of, or in the course of, preparing for criminal litigation. You advise that Enclosure 7 contains notes and memorandum of the prosecutors that reflect their mental impressions and reasoning. After reviewing the submitted information, we conclude that you may withhold the information in Enclosure 7 pursuant to section 552.108(a)(4) of the Government Code.

Portions of the submitted information are confidential under section 552.130 of the Government Code, which excepts from disclosure information that relates to: "(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; (2) a motor vehicle title or registration issued by an agency of this state; or (3) a personal identification document issued by an agency of this state or a local agency authorized to issue an

identification document.” Gov’t Code § 552.130(a)(1)-(3). You must withhold the information that we have marked under section 552.130.

In summary, you must withhold the fingerprint information in Enclosure 3A under section 552.101 of the Government Code. To the extent the submitted information contains CHRI obtained from the NCIC or TCIC that is confidential under federal law or subchapter F of chapter 411 of the Government Code, it must be withheld under section 552.101 of the Government Code. Social security numbers may be confidential under federal law. You may withhold Enclosure 7 under section 552.108 of the Government Code. You must withhold the information that we have marked under section 552.130 of the Government Code. You must release the remaining 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 Dep’t of Pub. 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/JEB/sdk

Ref: ID# 199994

Enc: Submitted documents

c: Mr. James D. Lucas  
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(w/o enclosures)