



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 19, 2004

Mr. Harold Willard
Police Legal Advisor
City of Lubbock
P.O. Box 2000
Lubbock, Texas 79457

OR2004-4117

Dear Mr. Willard:

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# 201755.

The Lubbock Police Department (the "department") received a request for information related to five individuals, three particular addresses, and a specific timeframe. You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code in conjunction with common law privacy. We have considered the exception you claim and reviewed the submitted information.

We begin by noting that the submitted information includes arrest warrants and arrest warrant affidavits. 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. This provision makes the submitted arrest warrants and supporting affidavits that were presented to the magistrate expressly public. The exceptions found in the Act do not, as a general rule, apply to information that is made public by other statutes. *See* Open Records Decision No. 525 (1989) (statutory predecessor). Therefore, the department must release the arrest warrants to the requestor pursuant to article 15.26. If the accompanying affidavits were presented to a magistrate in support of the issuance of an arrest warrant, they must also be released to the requestor pursuant to article 15.26 of the Code of Criminal Procedure. If they were not so presented, then they must be disposed of in accordance with the remainder of this ruling.

We next address your claimed exception. 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 protected by the common law right of privacy. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). Common law privacy protects information if it (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Id.* 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 in a manner that the same individual records in an uncompiled state do not. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). Thus, when a requestor asks for unspecified information concerning a certain named individual and that individual is a possible suspect, arrestee, or defendant, a law enforcement agency must withhold this information under section 552.101 because that individual's privacy right has been implicated. *See id.* Therefore, to the extent the instant request asks for records involving the named individuals, it seeks a compilation of the individuals' criminal history, and the information at issue must be withheld under section 552.101 in conjunction with the common law privacy concerns expressed in *Reporters Committee*. However, the submitted documents reflect that one of the individuals named in the request is now deceased. Because the privacy rights of an individual lapse upon death, we conclude that the department may not withhold any compiled criminal history information that relates to the deceased individual. *See Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ ref'd n.r.e.); *see also Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-47 (N.D. Tex. 1979) (protection afforded by provision enacted to protect privacy of an individual extinguishes upon individual's death).

You have submitted some records in which none of the named individuals is portrayed as an arrestee, suspect, or defendant. *Cf.* Gov't Code § 411.082(2) (definition of criminal history record information does not include driving record information). Accordingly, we find that such information is not made confidential under the holding in *Reporters Committee* and is

therefore not excepted from disclosure under section 552.101 in conjunction with common law privacy.

We note, however, that the remaining submitted records contain fingerprint information, the public availability of which is governed by sections 560.001, 560.002, and 560.003 of the Government Code.¹ 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.
- (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.

¹Section 552.101 of the Government Code also encompasses information protected by other statutes.

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. There is no indication that the requestor has a right of access to this information under section 560.002. Therefore, the department must withhold the fingerprint information that we have marked under section 552.101 in conjunction with section 560.003 of the Government Code.²

We also note that the remaining submitted information contains social security numbers. The Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), makes 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* Open Records Decision No. 622 (1994). We have no basis for concluding that the social security numbers at issue 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, the department should ensure that no such information was obtained or is maintained pursuant to any provision of law enacted on or after October 1, 1990.

The remaining submitted information also contains information that is excepted from disclosure under section 552.130 of the Government Code. This section provides that "[i]nformation is excepted from [required public disclosure] if the information relates to . . . (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state." Thus, we have marked the information in the submitted documents that the department must withhold pursuant to section 552.130, provided it was issued by an agency of this state.

In summary, arrest warrants must be released to the requestor pursuant to article 15.26 of the Code of Criminal Procedure. Affidavits presented to a magistrate in support of the issuance of an arrest warrant must also be released to the requestor pursuant to article 15.26. To the extent the instant request asks for records involving the named individuals, it seeks a compilation of the individuals' criminal history, and the information at issue must be withheld under section 552.101 in conjunction with the common law privacy concerns expressed in *Reporters Committee*. The department must withhold the fingerprint information that we have marked under section 552.101 in conjunction with section 560.003 of the Government Code. Social security numbers may be confidential under federal law. We have marked the information in the submitted documents that the department must \

²We note that section 560.003 protects privacy interests and is therefore not applicable to the fingerprints of a deceased individual.

withhold pursuant to section 552.130 provided it was issued by an agency of this state. The remaining submitted information must be released 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 201755
Enc. Submitted documents

c: Ms. Roxanne M. Gonzalez
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(w/o enclosures)