



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 1, 2004

Ms. Sheri Bryce Dye
Assistant Criminal District Attorney
Bexar County
300 Dolorosa, Suite 4049
San Antonio, Texas 78205-3030

OR2004-4457

Dear Ms. Dye:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 202912.

The Bexar County District Attorney's Office (the "DA") received a request for the criminal investigation and DA files relating to a prosecution for theft by check. You claim that the 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. Additionally, we have received comments from the requestor. *See* Gov't Code § 552.304 (permitting interested party to submit comments explaining why information should or should not be released).¹

We first note that the submitted information is subject to section 552.022 of the Government Code. Under section 552.022(a)(1), a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it either is excepted under section 552.108 of the Government Code or is expressly confidential under other law. The submitted information consists of a completed investigation made of, for, or by the DA. You

¹In correspondence to this office, the requestor asserts that the DA did not request a decision from this office within the deadlines of section 552.301; however, we note that a governmental body has ten business days after it receives a request for information to ask this office for a decision. Gov't Code §552.301(b). The DA submitted its request within this deadline.

do not assert that the information is excepted under section 552.108, but you do assert that the documents are confidential under sections 552.103 and 552.111 of the Government Code.

Section 552.111, which excepts information within the attorney work product privilege, and section 552.103 are discretionary exceptions under the Public Information Act (the "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 (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); *see also* Open Records Decision No. 522 at 4 (1989) (discretionary exceptions in general). Thus, the DA may not withhold the requested information under these sections. The attorney work product privilege is also found in Rule 192.5 of the Texas Rules of Civil Procedure. The Texas Rules of Civil Procedure are "other law" for purposes of section 552.022(a)(1). *In re Georgetown*, 53 S.W.3d 328 (Tex. 2001). However, the Texas Rules of Civil Procedure 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 information at issue here.

Section 552.101 is considered to be "other law" for purposes of section 552.022(a)(1); therefore, we will address the applicability of section 552.101. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 excepts criminal history record information ("CHRI") made confidential by state or federal law. CHRI generated by the National Crime Information Center or by the Texas Crime Information Center 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.

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.* §§ 411.090-411.127. 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. The information submitted for our review contains CHRI that is excepted from required public disclosure by section 552.101 of the Government Code.

We have marked the information you must withhold under section 552.101 in conjunction with state and federal regulations.

Section 552.101 also encompasses common law privacy. 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). Thus, any criminal history information that is protected by privacy under *Reporters Committee* must be withheld from disclosure under section 552.101 of the Government Code. *See id.*; cf. 28 C.F.R. § 20.21(c)(2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). We note that driving record information is not made confidential either by *Reporters Committee* or by the confidentiality provisions that govern CHRI. *See* Gov't Code § 411.082(2)(B) (definition of CHRI does not include driving record information).

Some information in the submitted documents is also excepted from release under section 552.130 of the Government Code. Section 552.130 provides in relevant part:

(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[.]

You must withhold the marked Texas driver's license numbers under section 552.130.

Some of the submitted information is also excepted from release under section 552.136 of the Government Code. Section 552.136 of the Government Code states that "[n]otwithstanding 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. You must withhold the marked check routing and account numbers under section 552.136.

In summary, (1) none of the information is excepted from release under section 552.103 or the attorney work product privilege of section 552.111 or Texas Rule of Civil Procedure 192.5, (2) the CHRI we have marked is confidential and must be withheld under section 552.101, (3) any information that is confidential under common law privacy must be withheld under section 552.101, (4) the driver's license information we have marked is excepted from release under section 552.130, and (5) the check account information we have

marked is excepted from release under section 552.136. The remaining 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).

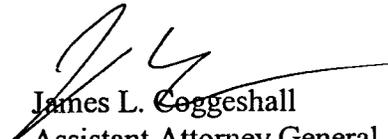
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/seg

Ref: ID# 202912

Enc. Submitted documents

c: Ms. Jennifer Gibbins Durbin
Allen, Stein & Durbin, PC
6243 IH-10 West, 7th Floor
San Antonio, Texas 78201
(w/o enclosures)