



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 18, 2004

Mr. David Motley  
Kerr County Attorney's Office  
County Courthouse, Suite BA-103  
700 Main Street  
Kerrville, Texas 78028

OR2004-7012

Dear Mr. Motley:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 207329.

The Kerr County Sheriff's Office (the "sheriff") received a request for information pertaining to a specified person and cause number. You claim that the requested information is excepted from disclosure pursuant to section 552.103 of the Government Code. We have considered the exception you claim and have reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that person may submit comments stating why information should or should not be released).

Initially, we note that portions of the submitted information constitute grand jury records that are not subject to the Public Information Act (the "Act"). Article 20.02(a) of the Code of Criminal Procedure provides that "[t]he proceedings of the grand jury shall be secret." Crim. Proc. Code art. 20.02(a). This office has concluded that grand juries are part of the judiciary and are, thus, not subject to the Act. *See* Gov't Code § 552.003 ("governmental body" does not include judiciary). Records that are within the constructive possession of grand juries are not public information that is subject to disclosure under the Act. *See* Open Records Decision No. 513 (1988). When an individual or entity acts at the direction of the grand jury as its agent, information prepared or collected by the agent is within the grand jury's constructive possession and is not subject to the Act. *See id.* Information that is not so held or maintained is subject to the Act and may be withheld only if a specific exception to disclosure is applicable. *See id.* We note that portions of the submitted information, which we have marked, were obtained by the sheriff through the use of a grand jury subpoena at the direction of the grand jury. Thus, we understand that the sheriff is holding these marked records as an agent of the grand jury. Accordingly, we conclude that this particular marked information is in the constructive possession of the grand jury and is, therefore, not subject to disclosure under the Act.

Next, we note that the remaining submitted information includes capiases, arrest warrants, and arrest warrant affidavits. The 78th Legislature 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; *see id.* art. 45.045 (court may order issuance of *capias pro fine* to arrest defendant not in custody when judgment rendered or if defendant fails to satisfy judgment). Thus, these capiases, arrest warrants, and arrest warrant affidavits are made public under article 15.26 of the Code of Criminal Procedure. 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). Accordingly, we conclude that the sheriff must release these capiases, arrest warrants, and arrest warrant affidavits to the requestor pursuant to article 15.26 of the Code of Criminal Procedure.

In addition, we note that the remaining submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in 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 remaining submitted information constitutes information from a completed investigation made of, for, or by the sheriff that is subject to section 552.022(a)(1). Thus, the sheriff must release the remaining submitted information, unless it is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law.<sup>1</sup> Although the sheriff claims that the remaining submitted information is excepted from disclosure pursuant to section 552.103 of the Government Code, we note that section 552.103 is a discretionary exception to disclosure

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<sup>1</sup> We note that the sheriff does not claim that any portion of the remaining submitted information is excepted from disclosure pursuant to section 552.108 of the Government Code.

under the Act that does not constitute "other law" for purposes of section 552.022.<sup>2</sup> Accordingly, we conclude that the sheriff may not withhold any portion of the remaining submitted information under section 552.103 of the Government Code.

Further, we note that portions of the remaining submitted information are excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy.<sup>3</sup> Information is protected from disclosure by the common-law right of privacy when it (1) is highly intimate and embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). 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 injuries to sexual organs. See *id.* at 683. This office has found that the following types of information are also protected from disclosure by the common-law right to privacy: some kinds of medical information or information indicating disabilities or specific illnesses, see Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to a financial transaction between an individual and a governmental body, see Open Records Decision Nos. 600 (1992), 545 (1990), information concerning the intimate relations between individuals and their family members, see Open Records Decision No. 470 (1987), and identities of victims of sexual abuse, see Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

In Open Records Decision No. 393 (1983), this office concluded that, generally, only that information which either identifies or tends to identify a victim of sexual assault or other sex-related offense may be withheld under section 552.101 of the Government Code in conjunction with the common-law right to privacy. See Open Records Decision No. 393 (1983). However, in this instance, the requestor knows the identity of the alleged sexual assault victim in this matter. Thus, we believe that withholding only the alleged victim's

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<sup>2</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)), 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), 522 at 4 (1989) (discretionary exceptions in general), 473 (1987) (governmental body may waive statutory predecessor to section 552.111); see also *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). Discretionary exceptions, therefore, do not generally constitute "other law" for purposes of section 552.022 of the Government Code.

<sup>3</sup> Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. See Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by the common-law right to privacy.

identifying information from the requestor in this instance would not preserve the victim's common-law privacy interests. Accordingly, we conclude that the sheriff must withhold the rest of the submitted information pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy, provided that the requestor is not the authorized representative of the alleged sexual assault victim in this matter. However, in the event that the requestor is the authorized representative of the alleged sexual assault victim in this matter, then the sheriff may not withhold any portion of the remaining submitted information under section 552.101 in conjunction with the common-law right to privacy on the basis of any privacy interests that the alleged sexual assault victim may have in the information. *See* Gov't Code § 552.023(a) (providing that person or person's authorized representative has special right of access to information when only basis for excepting information involves protection of same individual's privacy interest); *see also* Open Records Decision No. 481 at 4 (1987). In the event that the requestor is the authorized representative of the alleged sexual assault victim in this matter, we next address whether any portion of the remaining submitted information must be released to the requestor. In this regard, we first note that we have marked the types of additional information contained within the remaining submitted information that must be withheld pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy.

We also note that portions of the submitted information are excepted from disclosure pursuant to section 552.101 in conjunction with the constitutional right to privacy. Section 552.101 also encompasses information that is protected from disclosure by the constitutional right to privacy. The constitutional right to privacy protects two types of interests. *See* Open Records Decision No. 600 at 4 (1992) (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)). The first is the interest in independence in making certain important decisions related to the "zones of privacy" recognized by the United States Supreme Court. *See* Open Records Decision No. 600 at 4 (1992). The zones of privacy recognized by the United States Supreme Court are matters pertaining to marriage, procreation, contraception, family relationships, and child rearing and education. *See id.*

The second interest is the interest in avoiding disclosure of personal matters. The test for whether information may be publicly disclosed without violating constitutional privacy rights involves a balancing of the individual's privacy interests against the public's need to know information of public concern. *See* Open Records Decision No. 455 at 5-7 (1987) (citing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981)). In Open Records Decision Nos. 428 (1985) and 430 (1985), we concluded that inmate visitor and mail logs which identify inmates and those who choose to visit or correspond with inmates are protected by constitutional law. Based on our review of the submitted information, we have marked the type of visitor log that the sheriff must withhold pursuant to section 552.101 of the Government Code in conjunction with the constitutional right to privacy.

In addition, we note that portions of the remaining submitted information are excepted from disclosure pursuant to section 552.101 in conjunction with section 1701.306 of the

Occupations Code. Section 552.101 also encompasses information that is protected from disclosure by other statutes. Section 1701.306 makes declarations of medical condition and of psychological and emotional health confidential and provides:

(a) The commission may not issue a license to a person as an officer or county jailer unless the person is examined by:

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test.

(b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to the commission. A declaration is not public information.

Occ. Code § 1701.306. Based on our review of the remaining submitted information, we conclude that the sheriff must withhold the information that we have marked pursuant to section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.

We also note that criminal history record information ("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. *See* Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *See 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. *See 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).

Accordingly, to the extent that the requested records contain CHRI, the sheriff must withhold that information pursuant to section 552.101 of the Government Code.

We further note that portions of the remaining submitted information are excepted from disclosure pursuant to section 552.101 in conjunction with section 1701.454 of the Occupations Code. Section 1701.452 requires a law enforcement agency to submit a report to the Commission on Law Enforcement Officer Standards and Education regarding an officer licensed under chapter 1701 who either resigns from the law enforcement agency or whose appointment with the law enforcement agency is terminated. *See* Occ. Code § 1701.452. Section 1701.454 provides, in relevant part:

- (a) A report or statement submitted to the commission under this subchapter is confidential and is not subject to disclosure under Chapter 552 of the Government Code.

Occ. Code § 1701.454(a). Based on our review of the remaining submitted information, we find that portions of this information, which we have marked, are encompassed by section 1701.454. Accordingly, we conclude that the sheriff must withhold this particular marked information pursuant to section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

We also note that portions of the remaining submitted information are excepted from disclosure pursuant to section 552.101 in conjunction with sections 560.001, 560.002, and 560.003 of the Government Code. These sections of chapter 560 govern the public availability of fingerprint information and 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.

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. Based on our review of the remaining submitted information, we have marked the fingerprint information that the sheriff must withhold pursuant to section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code.

Further, we note that portions of the remaining submitted information may be excepted from disclosure pursuant to section 552.1175 of the Government Code. Section 552.1175 provides in part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure[.]

(2) county jailers as defined by Section 1701.001, Occupations Code[.]

(3) current or former employees of the Texas Department of Criminal Justice ["TDCJ"] or of the predecessor in function of the department or any division of the department[.]

(4) commissioned security officers as defined by Section 1702.002, Occupations Code.

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

- (1) chooses to restrict public access to the information; and
- (2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(a)-(b). Accordingly, we conclude that if the types of information that we have marked under section 552.1175 pertain to an individual listed in section 552.1175(a) who elects to restrict access to his or her such information in accordance with section 552.1175(b), then the sheriff must withhold that information pursuant to section 552.1175 of the Government Code.

Nevertheless, some of this particular information may be excepted from disclosure pursuant to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). However, information that is responsive to a request may not be withheld from disclosure under section 552.117(a)(1) if the employee did not request confidentiality for this information in accordance with section 552.024 or if the request for confidentiality under section 552.024 was not made until after the request for information was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request for it is received by the governmental body. *See* Open Records Decision No. 530 at 5 (1989). Accordingly, we conclude that to the extent that the sheriff's employees with whom the marked section 552.117(a)(1) type of information is associated elected confidentiality for this information prior to the date that the sheriff received this request, the sheriff must withhold that information pursuant to section 552.117(a)(1) of the Government Code.

In addition, we note that social security numbers contained within the submitted information may be excepted from disclosure pursuant to section 552.101 in conjunction with federal law. The 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), make confidential social security numbers and related records that were obtained or are 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). The sheriff has cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes it to obtain or maintain social security numbers. Therefore, we have no basis for concluding that these social security numbers are confidential under section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. We caution the sheriff, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing these social security numbers, the sheriff should ensure that they were not obtained and are not maintained by the sheriff pursuant to any provision of law enacted on or after October 1, 1990.

Further, we note that portions of the remaining submitted information are excepted from disclosure pursuant to section 552.130 of the Government Code. Section 552.130 excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. *See Gov't Code § 552.130.* Accordingly, we conclude that the sheriff must withhold the types of Texas motor vehicle information that we have marked pursuant to section 552.130 of the Government Code.

We also note that portions of the remaining submitted information are excepted from disclosure pursuant to section 552.136 of the Government Code. Section 552.136 provides 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.* Based on our review of the remaining submitted information, we have marked the information that the sheriff must withhold pursuant to section 552.136 of the Government Code.

Finally, we note that a small portion of the remaining submitted information is copyrighted. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *See Attorney General Opinion JM-672 (1987).* A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making such copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See Open Records Decision No. 550 (1990).*

In summary, portions of the submitted information, which we have marked, are in the constructive possession of the grand jury and are, therefore, not subject to disclosure under the Act pursuant to section 552.003 of the Government Code. The sheriff must release the capiases, arrest warrants, and arrest warrant affidavits included in the remaining submitted information pursuant to article 15.26 of the Code of Criminal Procedure. The sheriff must withhold the rest of the submitted information pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy, provided that the requestor is not the authorized representative of the alleged sexual assault victim in this matter. To the extent that the requestor is the authorized representative of the alleged sexual assault victim in this matter, then the sheriff must: 1) withhold the types of additional information that we have marked pursuant to section 552.101 in conjunction with the common-law right to privacy; 2) withhold the type of visitor log that we have marked pursuant to section 552.101 in conjunction with the constitutional right to privacy; 3) withhold the information that we have marked pursuant to section 552.101 in conjunction with sections 1701.306 and 1701.454 of the Occupations Code and section 560.003 of the Government Code; 4) withhold the information that we have marked pursuant to sections 552.130 and 552.136 of the Government Code; 5) withhold CHRI, to the extent that it is contained within the requested records, under section 552.101; 6) withhold the types of information that we have marked under section 552.1175, if they pertain to an individual

listed in section 552.1175(a) who elects to restrict access to his or her such information in accordance with section 552.1175(b); 7) withhold the types of information that we have marked under section 552.117(a)(1), if they are associated with an individual who elected confidentiality for such information prior to the date that the sheriff received this request; 8) withhold social security numbers that may be confidential under federal law; and 9) release the remaining submitted information to the requestor in compliance with the applicable copyright law for the portion of the remaining submitted information that is copyrighted.<sup>4</sup>

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

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<sup>4</sup> We note that portions of the submitted information contain 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 to the extent that the alleged sexual assault victim in this matter is the requestor's client. *See* Gov't Code § 552.023. Because some of the information is confidential with respect to the general public, if the sheriff receives a future request for this information from an individual other than the requestor, the sheriff should again seek our decision.

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,



Ronald J. Bounds  
Assistant Attorney General  
Open Records Division

RJB/krl

Ref: ID# 207329

Enc. Marked documents

c: Mr. Mark Anthony Sánchez, Esq.  
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(w/o enclosures)