



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 5, 2005

Ms. Julie Joe
Assistant County Attorney
Travis County
P.O. Box 1748
Austin, Texas 78767

OR2005-00149

Dear Ms. Joe:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 216451.

The Travis County District Attorney's Office (the "district attorney's office") received a request for information concerning three named inmates of the Texas Department of Criminal Justice who are the requestor's clients. You state that the requestor has narrowed his request to exclude information that would be excepted under section 552.108 of the Government Code and that you have released some of the requested information to the requestor. You claim that the remaining information is excepted from disclosure under sections 552.101, 552.103, 552.117, 552.130 and 552.1325 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of the information requested.²

¹Although you raise sections 552.103 and 552.117 of the Government Code, you have submitted no arguments in support of withholding information under those sections. Thus, you have waived those exceptions. See Gov't Code §§ 552.301, .302. We further note that none of the information is subject to section 552.117.

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Initially, we note that some of the submitted documents appear to have been produced in response to grand jury subpoenas. This office has concluded that grand juries are not governmental bodies that are subject to chapter 552 of the Government Code, so that records that are within the actual or constructive possession of a grand jury are not subject to disclosure under chapter 552. *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 chapter 552. *Id.* at 3. Information that is not so held or maintained is subject to chapter 552 and may be withheld only if a specific exception to disclosure is applicable. *Id.* Thus, to the extent that the information at issue is in the custody of the district attorney's office as an agent of the grand jury, it is not subject to disclosure under chapter 552. *Id.* at 4. However, to the extent that this information is not in the custody of the district attorney's office as an agent of the grand jury, it is subject to disclosure under chapter 552. You state that some of the submitted information was created and/or obtained by the district attorney's office at the direction of the grand jury. Therefore, we agree that the marked information is not subject to chapter 552 of the Government Code.

Next, we address your contention that the district attorney's office need not provide some of the requested information under section 552.027 of the Government Code, which provides:

(a) A governmental body is not required under this chapter to allow the inspection of or to provide a copy of information in a commercial book or publication purchased or acquired by the governmental body for research purposes if the book or publication is commercially available to the public.

(b) Although information in a book or publication may be made available to the public as a resource material, such as a library book, a governmental body is not required to make a copy of the information in response to a request for public information.

(c) A governmental body shall allow the inspection of information in a book or publication that is made part of, incorporated into, or referred to in a rule or policy of a governmental body.

Gov't Code § 552.027. This section is designed to alleviate the burden of providing copies of commercially available books, publications, and resource materials maintained by governmental bodies, such as telephone directories, dictionaries, encyclopedias, statutes, and periodicals. You state that the requested records include copies of transcripts of court hearings transcribed by a court reporter and that the district attorney's office "paid for this information, as can the requestor." However, we find you have failed to demonstrate that the information came from the type of commercial book or publication contemplated by section 552.027. *See* Gov't Code § 552.027. Accordingly, we conclude that the submitted information is "public information" and, therefore, subject to the Public Information Act. *See* Gov't Code § 552.002.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 261.201(a) of the Family Code provides as follows:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Because some of the requested information consists of files, reports, records, communications, or working papers used or developed in an investigation under chapter 261, the information is within the scope of section 261.201 of the Family Code. You have not indicated that the district attorney's office has adopted a rule that governs the release of this type of information. Therefore, we assume that no such regulation exists. Given that assumption, some of the requested documents are confidential pursuant to section 261.201 of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute). Accordingly, we have marked the documents that must be withheld under section 552.101 of the Government Code as information made confidential by law.

We note, however, that the submitted child abuse information includes an arrest warrant and arrest warrant affidavit. Article 15.26 states "[t]he arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, is public information." Crim. Proc. Code art. 15.26. Therefore, the district attorney's office must release the submitted arrest warrant and arrest warrant affidavit to the requestor.

You claim that a portion of the requested information is excepted from disclosure pursuant to section 552.101 in conjunction with section 9(j) of article 42.12 of the Code of Criminal Procedure. Section 9(j) of article 42.12 provides in pertinent part:

(j) The judge by order may direct that any information and records that are not privileged and that are relevant to a report required by Subsection (a) or Subsection (k) of this section be released to an officer conducting a presentence investigation under Subsection (l) of this section or a postsentence report under Subsection (k) of this section. The judge may also issue a subpoena to obtain that information. A report and all information obtained in connection with a presentence investigation or postsentence

report are confidential and may be released only: (1) to those persons and under those circumstances authorized under Subsections (d), (e), (f), (h), (k), and (l) of this section; (2) pursuant to Section 614.017, Health and Safety Code; or (3) as directed by the judge for the effective supervision of the defendant.

Crim. Proc. Code art. 42.12, § 9(j). Because none of the release provisions associated with section 9(j) of article 42.12 appear to be applicable in this instance, we conclude that the district attorney's office must withhold the submitted presentence investigation reports pursuant to section 552.101 of the Government Code in conjunction with section 9(j) of article 42.12 of the Code of Criminal Procedure.

Section 552.101 also encompasses confidential criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC"). 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. 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. You have marked information that is CHRI generated by TCIC and NCIC. We agree that some of this information is excepted from required public disclosure by section 552.101 of the Government Code. We have marked those portions of the submitted documents that must be withheld as CHRI information. We note that an individual can obtain his own CHRI from DPS. Gov't Code § 411.083(b)(3).

Some of the information that is not excepted from disclosure under chapter 411 of the Government Code is information that would generally be excepted under section 552.101 of the Government Code in conjunction with 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). In this instance, however, the requestor is an attorney representing the individual whose criminal history has been compiled. Therefore, the requestor has a special right of access to this individual's criminal history compilation contained in the submitted documents. *See* Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself).

We note that the submitted information includes 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 the submitted social security numbers 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 district attorney's office pursuant to any provision of law, enacted on or after October 1, 1990.

We also note that some of the social security numbers belong to the inmates that are represented by the requestor. The requestor therefore has a special right of access to the information in question, and the information may not be withheld from him under section 552.101 in conjunction with federal law. *See* Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). One of the social security numbers in the submitted documents pertains to a deceased individual. The purpose of the federal Social Security Act is to protect the privacy interests of individuals. Since the right of privacy lapses at death, the district attorney's office may not withhold the social security number contained in the submitted documents that pertains to a deceased individual. *See generally Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-47 (N.D. Tex. 1979); Attorney General Opinions JM-229 (1984); H-917 (1976); Open Records Decision No. 272 at 1 (1981) (privacy rights lapse upon death).

You also claim that some of the submitted information is confidential under section 508.313(a) of the Government Code. Section 508.313 provides in part:

(a) All information obtained and maintained, including a victim protest letter or other correspondence, a victim impact statement, a list of inmates eligible for release on parole, and an arrest record of an inmate, is confidential and privileged if the information relates to:

(1) an inmate of the institutional division [of the Texas Department of Criminal Justice] subject to release on parole, release to mandatory supervision, or executive clemency;

(2) a releasee; or

(3) a person directly identified in any proposed plan of release for an inmate.

(b) Statistical and general information relating to the parole and mandatory supervision system, including the names of releasees and data recorded relating to parole and mandatory supervision services, is not confidential or privileged and must be made available for public inspection at any reasonable time.

(c) The [Texas Department of Criminal Justice] may provide information that is confidential and privileged under Subsection (a) to:

(1) the governor;

(2) a member of the [B]oard [of Pardons and Paroles];

(3) the Criminal Justice Policy Council in performing duties of the council under Section 413.017 [of the Government Code]; or

(4) an eligible entity requesting information for a law enforcement, prosecutorial, correctional, clemency, or treatment purpose.

Gov't Code § 508.313(a)-(c). Section 508.313 protects records held by TDCJ or transferred from TDCJ to an appropriate governmental body listed in subsection c. Section 508.313 permits the Texas Department of Criminal Justice ("TDCJ") to transfer information to other governmental entities for consideration in clemency matters; such a transfer does not affect the confidentiality of the information. *See* Gov't Code § 508.313(c). You state that the documents you have marked as excepted from disclosure under section 508.313 were "submitted" or "provided" to TDCJ by the district attorney's office. The documents at issue were not transferred to the district attorney's office by TDCJ. We therefore conclude that none of the submitted information is confidential under section 508.313 of the Government Code.³

The district attorney's office also asserts that the requested juror questionnaires are made confidential under section 62.0132 of the Government Code. This provision was enacted in 1999 and authorized the Office of Court Administration of the Texas Judicial System to create a standardized juror questionnaire form to be used in courts throughout the state. Gov't Code § 62.0312(a). Section 62.0132(f) states that the completed questionnaire is confidential and not subject to Chapter 552. However, the 1995 questionnaires submitted

³Some of the submitted documents contain markings indicating that the district attorney's office believes that some of the information may be excepted from disclosure under section 552.108 of the Government Code. However, the requestor explicitly excluded information that may be excepted under section 552.108 from his request. Therefore, we do not address those markings.

by the district attorney's office in the instant case are not the standardized juror questionnaires addressed in section 62.0132 and were completed prior to that section's enactment by the Legislature. Therefore, we conclude that section 62.0132 is not applicable to the documents at hand.

However, information collected about jurors in the jury selection process is governed by article 35.29 of the Code of Criminal Procedure, which provides:

Information collected by the court or by a prosecuting attorney during the jury selection process about a person who serves as a juror, *including the juror's home address, home telephone number, social security number, driver's license number, and other personal information*, is confidential and may not be disclosed by the court, the prosecuting attorney, the defense counsel, or any court personnel except on application by a party in the trial or on application by a bona fide member of the news media acting in such capacity to the court in which the person is serving or did serve as a juror. On a showing of good cause, the court shall permit disclosure of the information sought. [Emphasis added].

Crim. Proc. Code art. 35.29. Article 35.29 makes confidential certain personal information pertaining to only those individuals who actually served on the petit jury in a criminal trial. In addition to the confidential information listed in article 35.29, "other personal information" which is confidential pursuant to article 35.29 includes the juror's present employer, business telephone number, and spouse's employer. Juror names, however, are not made confidential by article 35.29, and are not "other personal information" that is confidential pursuant to article 35.29. Article 35.29 does not, however, preclude the provision of juror information to trial counsel for the purposes of voir dire. Attorney General Opinion JC-405 (2001). The trial in this case has concluded. The requestor states he is requesting the juror information for the inmates' upcoming review by the Board of Pardons and Paroles. Thus, he is not seeking the information for the purposes of voir dire. Therefore, he does not have a special right of access to this information. We have marked the information that the district attorney's office must withhold under section 552.101 of the Government Code in conjunction with article 35.29 with regard to jurors who served on the petit jury. The district attorney's office must release the remaining information on the juror cards to the requestor, and must release the juror cards of those individuals who did not serve on the petit jury in a criminal trial.

Next, we address the file for cause no. 95-4393 concerning a sexual assault. This file includes an arrest warrant and arrest warrant affidavit. Article 15.26 states "[t]he arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, is public information." Crim. Proc. Code art. 15.26. Therefore, the district attorney's office must release the submitted arrest warrant and arrest warrant affidavit to the requestor. The file also contains court documents. Information filed with a court is generally a matter of public record and may not be withheld from disclosure unless confidential under

other law. Gov't Code § 552.022(a)(17); *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54 (Tex. Because common law privacy is other law that makes information confidential for purposes of section 552.022, we will address your assertion for the court documents and the remainder of file number 95-4393.

Section 552.101 of the Government Code also encompasses common law privacy and excepts from disclosure private facts about an individual. *Indus. Found. v. Tex. 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. *Indus. Found.*, 540 S.W.2d 668.

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 common law privacy; however, because the identifying information was inextricably intertwined with other releasable information, the governmental body was required to withhold the entire report. Open Records Decision No 393 at 2 (1983); *see* Open Records Decision No. 339 (1982); *see also Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information); Open Records Decision No. 440 (1986) (detailed descriptions of serious sexual offenses must be withheld). The requestor in this case knows the identity of the victim. We believe that, in this instance, withholding only identifying information from the requestor would not preserve the victim's common law right to privacy. We conclude, therefore, that the district attorney's office must withhold the information we have marked pursuant to section 552.101 and common law privacy.

We note, however, that the file for cause no. 95-4393 contains court documents that identify the sexual assault victim. In *Star-Telegram, Inc. v. Walker*, the court held that the sexual assault victim's true identity became part of the public record when it was used in the indictment of a public criminal trial, and therefore, the press may disseminate the information. *Id.* at 58. Accordingly, the court documents in the sexual assault case file that contain the sexual assault victim's identity, which we have marked, must be released.

Section 552.130 of the Government Code 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[.]

Therefore, the district attorney's office must withhold the Texas motor vehicle information we have marked under section 552.130. We note, however, that some of the information protected by section 552.130 belongs to the inmates who are represented by the requestor. The requestor therefore has a special right of access to that information and it may not be withheld from him under section 552.130. *See* Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). We also note that the purpose of section 552.130 is to protect the privacy interests of individuals. Since the right of privacy lapses at death, the district attorney's office may not withhold the Texas driver's license number contained in the submitted documents that pertains to a deceased individual. *See generally Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-47 (N.D. Tex. 1979); Attorney General Opinions JM-229 (1984); H-917 (1976); Open Records Decision No. 272 at 1 (1981) (privacy rights lapse upon death).

Lastly, you assert that some of the information is excepted under section 552.1325 of the Government Code. However, you failed to assert section 552.1325 within the ten business day period mandated by section 552.301(a) of the Government Code. Because section 552.1325 was not timely raised, the information subject to this exception is presumed public. Gov't Code § 552.302. In order to overcome this presumption, the district attorney's office must provide compelling reasons why the information should not be disclosed. *Id.*; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see* Open Records Decision No. 630 (1994). This office has held that a compelling reason exists to withhold information when the information is confidential by another source of law or where third party interests are at stake. *See* Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests). Section 552.1325 is considered a compelling reason to withhold information, and therefore we will consider its applicability to the submitted information.

The district attorney's office claims that information contained within the submitted victim impact statement is excepted from disclosure under section 552.1325 of the Government Code, which provides:

(a) In this section:

- (1) "Crime victim" means a person who is a victim as defined by Article 56.32, Code of Criminal Procedure.
- (2) "Victim impact statement" means a victim impact statement under Article 56.03, Code of Criminal Procedure.

(b) The following information that is held by a governmental body or filed with a court and that is contained in a victim impact statement or was submitted for purposes of preparing a victim impact statement is confidential:

- (1) the name, social security number, address, and telephone number of a crime victim; and
- (2) any other information the disclosure of which would identify or tend to identify the crime victim.

Gov't Code § 552.1325. The purpose of section 552.1325 is to protect privacy interests of crime victims. In this instance, the victim to whom the information at issue pertains is deceased. Since the right of privacy lapses at death, the district attorney's office may not withhold the victim's identifying information under section 552.1325. *See generally Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-47 (N.D. Tex. 1979); Attorney General Opinions JM-229 (1984); H-917 (1976); Open Records Decision No. 272 at 1 (1981) (privacy rights lapse upon death).

In summary, the grand jury records are not subject to the Public Information Act pursuant to section 552.003 of the Government Code. The district attorney's office must withhold the information we have marked as confidential under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code; 2) the presentence investigation reports under section 552.101 of the Government Code in conjunction with article 42.12 of the Code of Criminal Procedure; 3) the marked CHRI under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code; 4) the information we have marked under section 552.101 of the Government Code in conjunction with common law privacy; 5) the information we have marked under section 552.101 of the Government Code in conjunction with article 35.29 of the Code of Criminal Procedure; (6) and the information we have marked under section 552.130 of the Government Code. Some of the social security numbers may be excepted from disclosure under section 552.101 of the Government Code in conjunction with federal law. 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,



Amanda Crawford
Assistant Attorney General
Open Records Division

AEC/sdk

Ref: ID# 216451

Enc. Submitted documents

c: Mr. Gary Cohen
The Cohen Law Firm
1307 West Avenue
Austin, Texas 78701
(w/o enclosures)