



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 3, 2005

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

OR2005-01023

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# 218064.

The Travis County District Attorney's Office (the "district attorney's office") received a request for information concerning two 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 will release some of the requested information to the requestor. You have submitted information relating to Cause Nos. 93-4323 and 3-02-2248 and claim that the information is excepted from disclosure under sections 552.101, 552.103, 552.117, and 552.130 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that some of the submitted information appears 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

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<sup>1</sup>Although you raise sections 552.103 and 552.117 of the Government Code, you did not assert them within 10 business days and 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.

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.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses information protected from disclosure by other statutes. Prior to its repeal by the Seventy-fourth Legislature, section 51.14 of the Family Code provided, in relevant part, as follows:

(a) Except as provided by Subsection (e) of this section, or by Article 15.27, Code of Criminal Procedure, all files and records of a juvenile court, a clerk of court, or a prosecuting attorney relating to a child who is a party to a proceeding under this title are open to inspection only by:

- (1) the judge, probation officers, and professional staff or consultants of the juvenile court;
- (2) an attorney for a party to the proceeding;
- (3) a public or private agency or institution providing supervision of the child by arrangement of the juvenile court, or having custody of the child under juvenile court order; or
- (4) with leave of juvenile court, any other person, agency, or institution having a legitimate interest in the proceeding or in the work of the court.

(b) All files and records of a public or private agency or institution providing supervision of a child by arrangement of the juvenile court or having custody of the child under order of the juvenile court are open to inspection only by:

- (1) the professional staff or consultants of the agency or institution;

(2) the judge, probation officers, and professional staff or consultants of the juvenile court;

(3) an attorney for the child;

(4) with leave of the juvenile court, any other person, agency, or institution having a legitimate interest in the work of the agency or institution; or

(5) the Texas Department of Corrections, the Department of Public Safety, and the Texas Juvenile Probation Commission, for the purpose of maintaining statistical records of recidivism, and for diagnosis and classification.

....

(d) Except as provided by Article 15.27, Code of Criminal Procedure, and except for files and records relating to a charge for which a child is transferred under Section 54.02 of this code to a criminal court for prosecution, the law-enforcement files and records are not open to public inspection nor may their contents be disclosed to the public, but inspection of the files and records is permitted by:

(1) a juvenile court having the child before it in any proceeding;

(2) an attorney for a party to the proceeding; and

(3) law-enforcement officers when necessary for the discharge of their official duties.

Despite the repeal of section 51.14 of the Family Code, law enforcement records pertaining to juvenile conduct that occurred prior to the effective date of the repeal continue to be confidential pursuant to section 51.14.<sup>2</sup> Because the information you have submitted relating to Cause No. 93-4323 pertains to juvenile conduct that occurred prior to January 1, 1996, we conclude that it is governed by section 51.14.<sup>3</sup> However, after reviewing the submitted information, it appears that the juveniles at issue may have been certified, tried, and convicted as adults on the charge of capital murder. If all of the juvenile defendants in the murder case were transferred and tried as adults in accordance with section 54.02 of the

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<sup>2</sup> See Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 106, 1995 Tex. Sess. Law Serv. 2591 (Vernon).

<sup>3</sup> Because section 51.14 is the proper section for this type of information, we do not address your arguments under section 58.007 of the Family Code.

Family Code, none of the submitted information is confidential under section 51.14 and the district attorney's office may not withhold any of the submitted information pursuant to section 552.101 of the Government Code in conjunction with section 51.14 of the Family Code. If any of the juvenile defendants were not transferred and tried as adults, then the district attorney's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 51.14 of the Family Code.

We note, however, that the documents relating to Cause No. 93-4323 include 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 even if the information related to Cause No. 93-4323 is excepted under section 51.14 of the Family Code.

You also claim that some of the information submitted with Cause No. 3-02-2248 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 the Texas Department of Criminal Justice ("TDCJ") or transferred from TDCJ to an appropriate governmental body listed in subsection c. Section 508.313 permits 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.<sup>4</sup>

You claim that a portion of the requested information pertaining to Cause No. 3-02-2248 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 (I) 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.

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<sup>4</sup>You state that the district attorney's office believes that the prosecutor's recommendation 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, you need not provide this information.

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 report 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 contained in the documents for Cause Nos. 93-4323 and 3-02-2248 that is CHRI generated by TCIC and NCIC. We agree that 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). We have marked the criminal history information that must be withheld under section 552.101 in conjunction with common law privacy.

Common law privacy also protects information if (1) the information 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. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (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. 540 S.W.2d at 683. The submitted

documents contain information that is considered highly intimate or embarrassing and is not of legitimate concern to the public. We have marked the information that must be withheld under section 552.101 in conjunction with common law privacy.

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. Please note, however, that the purpose of section 552.130 is to protect the privacy interests of individuals. Some of the submitted motor vehicle information pertains to an individual who is deceased. Since the right of privacy lapses at death, the district attorney's office may not withhold the Texas motor vehicle information 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). If however, the vehicle at issue was co-owned by another living individual, that information must be withheld under section 552.130. We further note, however, that some of the information protected by section 552.130 may belong to one of the inmates who is 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).

In summary, the grand jury records are not subject to the Public Information Act pursuant to section 552.003 of the Government Code. If any of the juvenile defendants involved in Cause No. 93-4323 were not transferred and tried as adults, then the district attorney's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 51.14 of the Family Code. The submitted arrest warrant and arrest warrant affidavit must be released regardless of whether section 51.14 applies. If all of the juvenile defendants in Cause No. 93-4323 were transferred and tried as adults in accordance with section 54.02 of the Family Code, none of the submitted information is confidential under section 51.14 and the district attorney's office may not withhold any of the submitted information pursuant to section 552.101 of the Government Code in

conjunction with section 51.14 of the Family Code. The district attorney's office must withhold (1) the presentence investigation report under section 552.101 of the Government Code in conjunction with article 42.12 of the Code of Criminal Procedure; (2) the marked CHRI under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code; (3) the information we have marked under section 552.101 of the Government Code in conjunction with common law privacy; and (4) the information we have marked under section 552.130 of the Government Code that pertains to living individuals. The remaining information must be released to the requestor.<sup>5</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).

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<sup>5</sup>Some of the information being released contains the requestor's client's social security number that may be excepted from disclosure to the general public under laws and exceptions designed to protect privacy. However, the requestor, as a representative of his client, has a special right of access to that information and it may not be withheld from him. *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).

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,



Debbie K. Lee  
Assistant Attorney General  
Open Records Division

DKL/AEC/sdk

Ref: ID# 218064

Enc. Submitted documents

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(w/o enclosures)