



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 13, 2005

Ms. Michele Austin  
Assistant City Attorney  
City of Houston  
P.O. Box 1562  
Houston, Texas 77251-1562

OR2005-08333

Dear Ms. Austin:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 232081.

The Houston Police Department (the "department") received a request for information relating to three specified arrests and criminal cause numbers. You have submitted information that you claim is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.130, and 552.147 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

We first note that you failed to submit the information marked as Exhibit 4 within the time prescribed by section 552.301(e) of the Government Code. *See* Gov't Code § 552.301(e)(1)(D). Exhibit 4 is therefore presumed to be public and must be released, unless there is a compelling reason to withhold any of the information from the public. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). The presumption that information is public under section 552.302 can generally be overcome when the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Sections 552.103 and 552.108 of the Government Code are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See* Gov't Code § 552.007; *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 Gov't Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108

subject to waiver). The department's claims under sections 552.103 and 552.108 are not compelling reasons for non-disclosure under section 552.302. In this instance, however, you also have submitted arguments from the Harris County District Attorney's Office (the "district attorney"). As the district attorney's law enforcement interests can provide a compelling reason for non-disclosure under section 552.108, we will consider his arguments. *See* Open Records Decision No. 586 at 2-3 (1991). We also will consider the department's claim with regard to Exhibit 4 under section 552.101 of the Government Code, as the applicability of this exception also can provide a compelling reason for non-disclosure.

We next note that the remaining information, marked as Exhibits 2 and 3, consists of completed police reports. Exhibits 2 and 3 are therefore subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, unless the information is excepted from disclosure under section 552.108 or expressly confidential under other law. Section 552.103 is not other law for purposes of section 552.022. Therefore, the department may not withhold any of the information in Exhibit 2 or Exhibit 3 under section 552.103. However, we will consider whether the department may withhold Exhibits 2 and 3 under section 552.108. We also will consider the applicability of sections 552.101, 552.130, and 552.147 to Exhibits 2 and 3.

Section 552.108 of the Government Code excepts from public disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information that the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

The district attorney states that Exhibits 2, 3, and 4 relate to three criminal cases in which the defendant was convicted. The district attorney explains, however, that the defendant has filed post-conviction applications for writs of habeas corpus, attacking the convictions in all three cases. We find, however, that these habeas corpus proceedings do not establish an ongoing criminal prosecution for the purposes of section 552.108(a)(1). Therefore, having considered all of the district attorney's arguments, we conclude that the department may not withhold any of the submitted information under section 552.108 of the Government Code.

Next, we address the department's claims under section 552.101. This section excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information that other statutes make confidential. The department raises section 552.101 in conjunction with section 261.201 of the Family Code. 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 [the Family 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 [chapter 261 of the Family Code] 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 [chapter 261 of the Family Code] or in providing services as a result of an investigation.

Fam. Code § 261.201(a). You assert that Exhibits 2 and 3 are confidential under section 261.201(a). We find, however, that Exhibits 2 and 3 do not consist of files, reports, records, communications, or working papers used or developed in an investigation under chapter 261 of the Family Code. Thus, Exhibits 2 and 3 are not confidential under section 261.201(a). We therefore conclude that the department may not withhold any of the information in Exhibit 2 or Exhibit 3 under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.

Criminal history record information (“CHRI”) obtained from the National Crime Information Center or the Texas Crime Information Center is confidential under federal and state law. CHRI means “information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions.”<sup>1</sup> Gov’t Code § 411.082(2). Federal law governs the dissemination of CHRI obtained from the National Crime Information Center network. Federal regulations prohibit the release to the general public of CHRI maintained in state and local CHRI systems. *See* 28 C.F.R. § 20.21(c)(1) (“Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given”) and (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”). The federal regulations allow each state to follow its own individual law with respect to CHRI that it generates. *See* Open Records Decision No. 565 at 10-12 (1990); *see generally* Gov’t Code ch. 411 subch. F. Sections 411.083(b)(1) and 411.089(a) of the Government Code 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* Gov’t Code § 411.089(b). Therefore, the department must withhold any CHRI contained in

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<sup>1</sup>We note that the statutory definition of CHRI does not encompass driving record information maintained by the Texas Department of Public Safety (the “DPS”) under subchapter C of chapter 521 of the Transportation Code. *See* Gov’t Code § 411.082(2).

the submitted documents under section 552.101 in conjunction with federal law and subchapter F of chapter 411 of the Government Code.

Section 552.101 also encompasses constitutional and common law rights to privacy. Constitutional privacy protects two kinds of interests. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first is the interest in independence in making certain important decisions related to the “zones of privacy,” pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. *See Fado v. Coon*, 633 F.2d 1172 (5<sup>th</sup> Cir. 1981); Open Records Decision No. 455 at 3-7 (1987). The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. *See Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5<sup>th</sup> Cir. 1985); Open Records Decision No. 455 at 6-7 (1987). This aspect of constitutional privacy balances the individual’s privacy interest against the public’s interest in the information. *See* Open Records Decision No. 455 at 7 (1987). Constitutional privacy under section 552.101 is reserved for “the most intimate aspects of human affairs.” *Id.* at 8 (quoting *Ramie v. City of Hedwig Village*, 765 F.2d at 492).

Information must be withheld from the public under section 552.101 in conjunction with common law privacy when the information is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common law privacy protects the types of information that are held to be intimate or embarrassing in *Industrial Foundation*. *See* 540 S.W.2d at 683 (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). A compilation of law enforcement information that relates to a particular individual as a possible criminal suspect, arrested person, or defendant implicates the individual’s common law privacy interests in a manner that the same information in an uncompiled state does not. *See U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); Open Records Decision No. 616 at 2-3 (1993). This office has determined that other types of information also are private under section 552.101. *See generally* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private).

The department must withhold Exhibit 4 from the requestor on privacy grounds under section 552.101. We also have marked private information in Exhibits 2 and 3 that must be withheld under section 552.101. However, if the requestor is an attorney for an individual to whom any of the marked information in Exhibits 2 and 3 pertains, then the requestor would have a right of access to her client’s private information under section 552.023 of the Government Code. *See* Gov’t Code § 552.023(a). Any information to which the requestor would have a right of access under section 552.023 may not be withheld from her on privacy grounds under section 552.101. *See* Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself).

We next note that the remaining information includes Texas driver's license and motor vehicle information. Section 552.130 of the Government Code excepts from public 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. Gov't Code § 552.130(a)(1)-(2). We have marked Texas driver's license and motor vehicle information that must be withheld from the public under section 552.130. This exception also protects personal privacy interests, however. Therefore, if the requestor is an attorney for an individual to whom any of the driver's license or motor vehicle information pertains, then the requestor would also have a right of access to that information under section 552.023.

Lastly, we note that the remaining information also includes social security numbers. Section 552.147 of the Government Code<sup>2</sup> provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act.<sup>3</sup> Therefore, the social security numbers that we have marked must be withheld from the public under section 552.147. However, the requestor would also have a right of access to her client's social security number under section 552.023.

In summary: (1) the department must withhold any CHRI under section 552.101 of the Government Code in conjunction with federal law and subchapter F of chapter 411 of the Government Code; (2) Exhibit 4 and the marked information in Exhibits 2 and 3 must be withheld on privacy grounds under section 552.101; (3) the marked Texas driver's license and motor vehicle information must be withheld under section 552.130; and (4) the marked social security numbers must be withheld under section 552.147. If the requestor is an attorney for an individual to whom any of the marked information in Exhibits 2 and 3 pertains, then she would have a right of access under section 552.023 to any information relating to her client that must be withheld from the public under section 552.101 on privacy grounds or under sections 552.130 or 552.147. The submitted information that is not protected from disclosure under section 552.101, section 552.130, or section 552.147 must be released.

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

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<sup>2</sup>Added by Act of May 23, 2005, 79th Leg., R.S., S.B. 1485, § 1, sec. 552.147(a) (to be codified at Tex. Gov't Code § 552.147).

<sup>3</sup>We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

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).

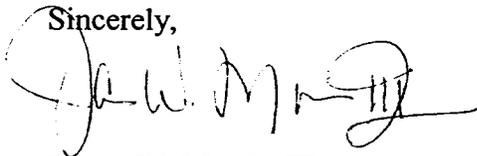
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,

A handwritten signature in black ink, appearing to read "J.W. Morris III", written over the word "Sincerely,".

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/sdk

Ref: ID# 232081

Enc: Submitted documents

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