



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 15, 2006

Mr. Dan P. Bradley
First Assistant District Attorney
Chambers and Liberty Counties
P.O. Box 1409
Anahuac, Texas 77514

OR2006-01509

Dear Mr. Bradley:

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# 242437.

The Chambers County District Attorney's Office (the "district attorney") received a request for information related to a named individual. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note that some of the submitted documents may constitute grand jury records not subject to the Act. The judiciary is expressly excluded from the requirements of the Act. Gov't Code § 552.003(1)(B). This office has determined that a grand jury, for purposes of the Act, is a part of the judiciary, and therefore not subject to the Act. Open Records Decision No. 411 (1984). Further, records kept by a district attorney who is acting as an agent for a grand jury are considered records in the constructive possession of the grand jury, and therefore are also not subject to the Act. Open Records Decisions Nos. 513 (1988), 411 (1984), 398 (1983). *But see* Open Records Decision No. 513 at 4 (1988) (defining limits of

¹We assume that the 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.

judiciary exclusion). Thus, to the extent that the records at issue, which we have marked, are in the custody of the district attorney as agent of the grand jury, they are not subject to disclosure under the Act. To the extent that they are not so maintained, these records are subject to the Act and may be withheld only if an exception under the Act is shown to apply. As we are unable to determine the extent that these records are maintained for or on behalf of the grand jury, we will address the exceptions that you claim for this information.

We further note that the submitted information includes arrest warrants and a *capias*. Article 15.26 of the Code of Criminal Procedure 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. We note that a court may order the issuance of a *capias pro fine* to arrest a defendant who is not in custody. *Id.* art. 45.045. Exceptions to disclosure under the Act generally 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). Therefore, the submitted arrest warrants and *capias* must be released pursuant to article 15.26.

The submitted information also includes fingerprints of the requestor’s client. The public availability of this information is governed by sections 560.001, 560.002, and 560.003 of the Government Code. These sections 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. These sections are intended to protect the privacy of a living individual to whom a fingerprint or other biometric identifier pertains. *See id.* § 560.002(1)(A). In this instance, the requestor identifies himself as an attorney for the individual to whom the submitted fingerprints pertain. Section 552.023 of the Government Code grants a special right of access to a person or a person's authorized representative to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person's privacy interests. *Id.* § 552.023(a). Therefore, the requestor has a special right of access to his client's fingerprint information and it must be released to him.

Next, we note that the remaining submitted information is subject to required public disclosure under section 552.022 of the Government Code, which provides in relevant part:

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[.]

Id. § 552.022(a)(1). In this instance, the remaining information consists of a completed investigation made of, for, or by the district attorney. Therefore, this information must be released to the requestor unless it is expressly confidential under "other law" or excepted from disclosure under section 552.108 of the Government Code. Sections 552.103 and 552.111 of the Government Code are discretionary exceptions to disclosure and, as such, do not constitute "other law" that makes information confidential for purposes of section 552.022. *See 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); Open Records Decision No. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived). Accordingly, we conclude that the district attorney may not withhold any portion of the remaining information pursuant to sections 552.103 and 552.111. However, because information that is subject to section 552.022(a)(1) may be withheld under section 552.108, we will address your arguments under that exception.

Additionally, we will address your claims under section 552.101 of the Government Code, as they are based on "other law" for purposes of section 552.022.

Section 552.108(a)(1) of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime." Gov't Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

This office has determined that where an incident involving alleged criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information that relates to the incident. *See Open Records Decision Nos. 474 (1987), 372 (1983)*. In such a situation, the agency that is acting as proper custodian must demonstrate that the information relates to the pending case and provide this office with a representation from the law enforcement entity that is investigating or prosecuting the incident indicating that it wishes to withhold the information.

In this instance, you state that the remaining information relates "to an ongoing investigation by federal authorities who are basing the investigation partly on [this] information." However, you have not provided this office with a representation from any federal entity stating that it wishes this information be withheld from disclosure under section 552.108(a)(1). Consequently, we find that you have not adequately demonstrated how or why section 552.108(a)(1) is applicable to any of the information at issue, and none of it may be withheld on that basis. *See Gov't Code § 552.301(e)* (governmental body must provide comments explaining why exceptions raised should apply to information requested).

We also understand you to claim that some of the remaining information is excepted from disclosure under section 552.108(a)(4) of the Government Code. Section 552.108(a)(4) provides as follows:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

...

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) represents the mental impressions or legal reasoning of an attorney representing the state.

Id. § 552.108(a)(4). Section 552.108(a)(4) is applicable to information that was prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation or that reflects the mental impressions or legal reasoning of an attorney representing the state. 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. You state the submitted “trial notes, questions for witnesses, and case theories” were created by attorneys representing the state and reflects their mental processes or legal reasoning. Further, we understand you to represent that this information was created in anticipation of or in the course of preparing for criminal litigation. Based on your representations and our review of the information at issue, we conclude that the district attorney may withhold the information we have marked pursuant to section 552.108(a)(4).

Section 552.101 of the Government Code, which exempts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” We note that a portion of the remaining information is confidential under section 261.201(a) of the Family Code, which 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.

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

Section 552.101 of the Government Code also encompasses 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. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety (“DPS”) maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov’t Code § 411.083.

Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. We note, however, that the definition of CHRI does not encompass driving record information maintained by DPS under subchapter C of chapter 521 of the Transportation Code. *See* Gov’t Code § 411.082(2) (defining “criminal history record information”). Therefore, the district attorney must withhold the CHRI that we have marked under section 552.101 in conjunction with federal law and chapter 411 of the Government Code.²

We note that the remaining information includes a credit card number. Section 552.136 of the Government Code states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.”³ Gov’t Code § 552.136. Therefore, the district attorney must withhold the credit card number we have marked pursuant to section 552.136.

The remaining information also includes social security numbers. Section 552.147 of the Government Code provides that “[t]he social security number of a living person is excepted

²We note that a person may obtain his own CHRI from DPS. Gov’t Code § 411.083(b)(3).

³This office will raise mandatory exceptions to disclosure on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

from” required public disclosure under the Act.⁴ Gov’t Code § 552.147. We note, however, that the requestor has a special right of access to his client’s social security number. *See id.* § 552.023(a). The district attorney must withhold the remaining social security numbers pursuant to section 552.147.

In summary, we conclude as follows: (1) to the extent that the marked records are maintained by the district attorney as agent of a grand jury, they are not subject to release under the Act; (2) the arrest warrants and *capias* must be released pursuant to article 15.26 of the Code of Criminal Procedure; (3) the submitted fingerprint information must be released to the requestor; (4) the information we have marked may be withheld under section 552.108(a)(4) of the Government Code; (5) the documents we have marked must be withheld under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code; (6) the marked CHRI must be withheld under section 552.101 of the Government Code in conjunction with federal law and chapter 411 of the Government Code; (7) the marked credit card number must be withheld under section 552.136 of the Government Code; and (8) except for the social security number belonging to the requestor’s client, the submitted social security numbers must be withheld under section 552.147 of the Government Code. The remaining information must be released to the requestor.⁵

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

⁴We 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.

⁵Because some of the information to be released is confidential with respect to the general public, if the district attorney receives a future request for this information from an individual other than the requestor, the requestor’s client, or the client’s authorized representative, the district attorney should again seek our decision.

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,



Caroline E. Cho
Assistant Attorney General
Open Records Division

CEC/sdk

Ref: ID# 242437

Enc. Submitted documents

c: Mr. Gary J. Cohen
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