



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 6, 2006

Ms. M. Ann Montgomery
Assistant Ellis County & District Attorney
Ellis County
1201 North Highway 77, Suite 104
Waxahachie, Texas 75165-7832

OR2006-02200

Dear Ms. Montgomery:

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# 242453.

The Ellis County and District Attorney's Office (the "district attorney") received a request for all information held by the district attorney regarding the sexual assault of the requestor's client. The district attorney subsequently received two requests from another requestor for the same information. You state that you have released some of the requested information but claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we address your assertion that pages 1-264 of the submitted information were the subject of a previous ruling issued by this office as Open Records Letter No. 2005-07412 (2005). In that ruling, this office concluded that portions of the submitted information could be withheld under sections 552.101 and 552.108 of the Government Code. We note that Open Records Letter No. 2005-07412 addressed a case involving sexual assault. The requestor in that instance had a special right of access to information tending to identify one of the sexual assault victims in that report. *See Gov't Code § 552.023* (person or person's authorized representative has special right of access to information relating to person and protected from public disclosure by laws intended to protect that person's privacy interests). Neither of the requestors here has a special right of access to that victim's information.

Therefore, as relevant facts have changed since the issuance of Open Records Letter No. 2005-7412, we conclude that the district attorney may not continue to rely on that ruling with respect to the submitted information. Accordingly, we will address the applicability of the exceptions you claim.

We next note that the submitted information includes an arrest warrant and a supporting affidavit. The release of this information is governed by article 15.26 of the Code of Criminal Procedure, which provides:

The arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, is public information, and beginning immediately when the warrant is executed the magistrate's clerk shall make a copy of the warrant and the affidavit available for public inspection in the clerk's office during normal business hours. A person may request the clerk to provide copies of the warrant and affidavit on payment of the cost of providing the copies.

Crim Proc. Code art. 15.26. This provision makes an arrest warrant expressly public. Furthermore, an affidavit presented to a magistrate in support of the issuance of an arrest warrant is also public under this provision. Although you claim section 552.101 excepts the arrest warrant and supporting affidavit from disclosure, information that is specifically made public by statute may not be withheld from the public under any of the exceptions to public disclosure under chapter 552 of the Government Code. *See, e.g.*, Open Records Decision Nos. 544 (1990), 378 (1983), 161 (1977), 146 (1976). Therefore, the submitted arrest warrant must be released pursuant to article 15.26. In addition, to the extent the submitted arrest warrant affidavit was presented to a magistrate in support of the issuance of an arrest warrant, it is also public under article 15.26. To the extent the affidavit was not presented to a magistrate, we will address it together with the other submitted information.

We also note that the submitted information includes a search warrant affidavit. The release of a search warrant affidavit is governed by article 18.01 of the Code of Criminal Procedure, which provides in part:

(b) No search warrant shall issue for any purpose in this state unless sufficient facts are first presented to satisfy the issuing magistrate that probable cause does in fact exist for its issuance. A sworn affidavit setting forth substantial facts establishing probable cause shall be filed in every instance in which a search warrant is requested. The affidavit is public information if executed, and the magistrate's clerk shall make a copy of the affidavit available for public inspection in the clerk's office during normal business hours.

Crim. Proc. Code art. 18.01(b). This provision makes the submitted search warrant affidavit expressly public if the search warrant has been executed. You claim that the submitted search warrant affidavit is excepted from disclosure under section 552.101. However, as noted above, information that is specifically made public by statute may not be withheld from the public under any of the exceptions to public disclosure under chapter 552 of the Government Code. *See, e.g.*, Open Records Decision Nos. 544 (1990), 378 (1983), 161 (1977), 146 (1976). Therefore, because the search warrant has been executed, the submitted search warrant affidavit must be released pursuant to article 18.01(b) of the Code Criminal Procedure.

Furthermore, the 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[.]

Gov't Code § 552.022(a)(1). The submitted information is part of a completed investigation made by the district attorney. Therefore, as prescribed by section 552.022, the district attorney must release the submitted information unless it is excepted from disclosure under section 552.108 or expressly confidential under other law. You claim that this information is excepted by section 552.103 of the Government Code. However, section 552.103 is a discretionary exception to public disclosure that protects the governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 does not qualify as other law that makes information confidential. Thus, the district attorney may not withhold the submitted information under section 552.103 of the Government Code. However, section 552.101 can provide a compelling reason to withhold information. Accordingly, we will address your arguments under sections 552.101 and 552.108.

Section 552.108 provides in relevant part:

- (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:

(1) release of the information would interfere with the detection, investigation or prosecution of crime;

...

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

Gov't Code § 552.108(a)(1), (4). 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* Gov't Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(a); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108(a)(1) excepts from disclosure information the release of which would interfere with detection, investigation, or prosecution of crime. In this instance, we understand you to assert that the portions of the submitted information you have marked are excepted from disclosure under section 552.108(a)(1). However, you have made no arguments to explaining the applicability of this exception. We therefore conclude that you have not demonstrated that release of the marked information would interfere with the detection, investigation, or prosecution of crime. Therefore, the information you have marked may not be withheld under section 552.108(a)(1).

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. You claim that pages 235-264, 786-787, 823-826, 917-923, 1168-1175, 1179, 1227, 1230-1235, 1253-1256, and 1267 consist of information prepared by the district attorney in anticipation of or in the course of preparing for criminal litigation. Based on your representations and our review of this information, we conclude that you may withhold pages 235-264, 786-787, 823-826, 917-923, 1168-1175, 1179, 1227, 1230-1235, 1253-1256, and 1267 under section 552.108(a)(4) of the Government Code.

You also claim that portions of the submitted information are confidential under article 20.02(a) of the Code of Criminal Procedure. Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that is made confidential by another statute. Article 20.02(a) of the Code of Criminal Procedure provides that "[t]he proceedings of the

grand jury shall be secret.” The transcript of the testimony of grand jury witnesses is part of the record of the grand jury proceeding.¹ See *Stern v. State*, 869 S.W. 2d 614 at 621 (Tex. App.—Houston [14th Dist.] 1994, writ denied); see also Open Records Decision No. 398 (1983). Therefore, we agree that the submitted grand jury testimony, which we have marked, is confidential under article 20.02(a) of the Code of Criminal Procedure and must be withheld under section 552.101 of the Government Code. See Open Records Decision No. 513 at 4 (1988) (information must be withheld if its release would reveal grand jury’s deliberations).

Section 552.101 also encompasses information protected by the Medical Privacy Act (the “MPA”), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides in part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b), (c). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. See Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Further, information that is subject to the MPA also includes information that was

¹Release of such information is governed by article 20.02(c) of this code, which provides:

[a] disclosure of a record made under Article 20.012, a disclosure of a typewritten transcription of that record, or a disclosure otherwise prohibited by Subsection (b) or Article 20.16 may be made by the attorney representing the state in performing the attorney’s duties to a grand juror serving on the grand jury before whom the record was made, another grand jury, a law enforcement agency, or a prosecuting attorney, as permitted by the attorney representing the state and determined by the attorney as necessary to assist the attorney in the performance of the attorney’s duties. The attorney representing the state shall warn any person the attorney authorizes to receive information under this subsection of the person’s duty to maintain the secrecy of the information. Any person who receives information under this subsection and discloses the information for purposes other than those permitted by this subsection is subject to punishment for contempt in the same manner as persons who violate Subsection (b).

obtained from medical records. *See* Occ. Code. § 159.002(a), (b), (c); *see also* Open Records Decision No. 598 (1991).

Medical records must be released upon the governmental body's receipt of the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. *See* Open Records Decision No. 565 at 7 (1990). We have marked the submitted information that is confidential under the MPA.

Section 552.101 also encompasses section 164.007 of the Occupations Code, which provides in part:

(c) Each complaint, adverse report, investigation file, other investigation report, and other investigative information in the possession of or received or gathered by the board or its employees or agents relating to a license holder, an application for license, or a criminal investigation or proceeding is privileged and confidential and is not subject to discovery, subpoena, or other means of legal compulsion for release to anyone other than the board or its employees or agents involved in discipline of a license holder. For purposes of this subsection, investigative information includes information relating to the identity of, and a report made by, a physician performing or supervising compliance monitoring for the board.

...

(h) The board shall cooperate with and assist a law enforcement agency conducting a criminal investigation of a license holder by providing information that is relevant to the criminal investigation to the investigating agency. Information disclosed by the board to an investigative agency remains confidential and may not be disclosed by the agency except as necessary to further the investigation.

Occ. Code § 164.007(c), (h). This section applies to complaint and related investigatory records gathered by the Texas Medical Board (the "board") during an investigation of a license holder. This subsection makes confidential all documents that the board compiles in investigating a license holder. We note that some of the submitted records constitute complaint and investigative records gathered by the board of a physician as a license holder. We note that the complaint investigation records were forwarded to the district attorney in accordance with section 164.007(h). In this instance, release of the investigative records would not be in furtherance of the investigation. Therefore, the investigative records that we

have marked are confidential under section 164.007 and must be withheld under section 552.101.

The submitted records also include criminal history record information ("CHRI"). CHRI generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential. Title 28, part 20 of the Code of Federal Regulations, which 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 that driving record information is not made confidential by the confidentiality provisions that govern CHRI. *See id.* § 411.082(2)(B) (definition of CHRI does not include driving record information). Accordingly, the CHRI we have marked is confidential under section 411.083 and must be withheld under section 552.101 of the Government Code.

You also claim that some of the submitted information is confidential under common law privacy. Section 552.101 also encompasses the doctrines of common law. Common law privacy protects information that is 1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and 2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (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. *Id.* at 683.

This office has found that the following types of information are excepted from required public disclosure under common law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps);* personal financial

information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). We have marked the portions of the submitted information that are confidential under common law privacy and must be withheld under section 552.101 of the Government Code.

Section 552.101 also encompasses constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

Having considered your arguments and reviewed the submitted information, we find that you have not shown that any of the remaining information comes within one of the constitutional zones of privacy or involves the most intimate aspects of human affairs. *See* Open Records Decision Nos. 470, 455, 444, 423 at 2. Therefore, none of the remaining information may be withheld under section 552.101 in conjunction with constitutional privacy.

We note that the remaining information includes driver's license numbers. 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[.]

Gov't Code § 552.130(a)(1), (2). We are unable to determine if some of the driver's license numbers that we have marked were issued by the State of Texas. To the extent the driver's license numbers were issued by the State of Texas, they must be withheld under section 552.130. If they were not issued by the State of Texas, they must be released.

Some of the remaining information is subject to section 552.136 of the Government Code. This section 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.” Gov’t Code § 552.136. The district attorney must, therefore, withhold the information that we have marked pursuant to section 552.136 of the Government Code.

Next, we note that the submitted information contains e-mail addresses. Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). The e-mail addresses contained in the submitted information are not the type specifically excluded by section 552.137(c). Therefore, unless the individuals whose e-mail addresses are at issue consented to release of their e-mail addresses, the district attorney must withhold them in accordance with section 552.137 of the Government Code.

We note that the submitted information contains social security numbers. Section 552.147 of the Government Code provides that “[t]he social security number of a living person is excepted from” required public disclosure under the Act. Therefore, the district attorney must withhold the social security numbers that we have marked under section 552.147 of the Government Code.²

We also note that some of the information that is excepted under sections 552.101 in conjunction with common law privacy relates to the client of one of the requestors. Section 552.023 of the Government Code gives a person or the person’s authorized representative a special right of access to information that is excepted from public disclosure under laws intended to protect that person’s privacy interest as subject of the information. *See* Gov’t Code § 552.023. Thus, this requestor has a right of access to the information that relates to her client. In addition, some of the submitted information pertains to the spouse of this requestor’s client. If this requestor is also seeking the submitted information on behalf of her client’s spouse, pursuant to section 552.023, the requestor has a special right of access to information pertaining to the spouse that is otherwise confidential under sections 552.130 and 552.147 of the Government Code. To the extent the requestor has a right of access to the information we have marked, the district attorney must release it to her.

Finally, we note that a portion of the submitted information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987).

²We 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.

A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the district attorney may withhold pages 235-264, 786-787, 1179, 1227, 1230-1235, 1253-1256, and 1267 under section 552.108(a)(4) of the Government Code. The district attorney must withhold under section 552.101 of the Government Code the information we have marked pursuant to article 20.02 of the Code of Criminal Procedure, section 164.007 of the Occupations Code, section 411.083 of the Government Code, and common law privacy. The submitted medical records, which we have marked, may only be released in accordance with the MPA. The district attorney must also withhold the Texas-issued motor vehicle record information that we have marked under section 552.130 of the Government Code. The information that we have marked must be withheld under section 552.136 of the Government Code. The e-mail addresses that we have marked may only be released with the consent of their owner pursuant to section 552.137 of the Government Code. We have also marked social security numbers that must be withheld under section 552.147 of the Government Code. One of the requestors has a right of access to her client's identifying information that would otherwise be confidential under common law privacy. To the extent this requestor also represents her client's husband, she has a right of access to his driver's license and social security numbers. The remaining information must be released. In releasing any portions of the submitted information protected by copyright, the district attorney must comply with copyright law.

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, 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*, 342 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,



L. Joseph James
Assistant Attorney General
Open Records Division

LJJ/segh

Ref: ID# 242453

Enc. Submitted documents

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