



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 26, 2006

Ms. Patricia E. Carls
Georgetown City Attorney
Brown & Carls LLP
106 East Sixth Street, Suite 550
Austin, Texas 78701

OR2006-05572

Dear Ms. Carls:

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# 250268.

The City of Georgetown (the "city") received two requests for any and all documents created after January 1, 2002 regarding a named individual. You state that the city is not required to comply with the requests pursuant to section 552.028 of the Government Code. In the alternative, you claim that the information responsive to the first request is excepted from disclosure under sections 552.101, 552.108, 552.130, and 552.147 of the Government Code. In addition to these exceptions to disclosure, you also argue that the information responsive to the second request is excepted under section 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the second requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Section 552.028(a) provides that a governmental body is not required to accept or comply with a request for information from either of the following:

- (1) an individual who is imprisoned or confined in a correctional facility; or
- (2) an agent of that individual, other than that individual's attorney when the attorney is requesting information that is subject to disclosure under this chapter.

Gov't Code § 552.028(a). You state that the first request for information was made by the agent of an individual imprisoned in a correctional facility and that, therefore, the city is not required to respond to the request. After reviewing all of the arguments submitted to this office, we agree, and conclude that the city need not respond to the first request for information pursuant to section 552.028(a)(2) of the Government Code. However, the second requestor informs us that he is the attorney for the named individual. As the second requestor is the incarcerated individual's attorney, the city is required to comply with his request.

Next, we note that the second requestor, in his request for information, excludes "any documents which constitute protected attorney work-product or any documents that were obtained pursuant to a grand jury subpoena." We have marked the information collected pursuant to grand jury subpoenas that is not responsive to the present request. Accordingly, we do not address your arguments for this information and it need not be released.

We also note that the requested information is subject to section 552.022 of the Government Code. This section provides in part that

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). In this instance, the requested information is a completed investigation. This completed investigation must be released under section 552.022(a)(1) unless excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law. You claim that the completed investigation is excepted from disclosure under section 552.103 of the Government Code. We note, however, that section 552.103 is a discretionary exception to public disclosure that protects 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 section 552.103); Open Records Decision Nos. 665 at 2 n.5 (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to section 552.103 subject to waiver). As such, section 552.103 is not "other law" that makes information confidential for the purposes of section 552.022. Therefore, the city may not withhold the completed investigation under section 552.103. However, because the city claims that the completed investigation, or portions thereof, are excepted from disclosure under sections 552.101, 552.108, 552.130, and 552.147, we will address those arguments.

Because the city's claims under section 552.108 of the Government Code are potentially the most broad, we address them first. Section 552.108 of the Government Code provides, in pertinent 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) represents the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a)(1), (4). 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 city states that the submitted information relates to a criminal case in which the defendant was convicted, but explains that the defendant intends to file a writ of habeas corpus. We find, however, that a habeas corpus proceeding does not establish an ongoing criminal prosecution for the purposes of section 552.108(a)(1). Therefore, we conclude that the city may not withhold any of the submitted information under section 552.108(a)(1) of the Government Code.

The city also claims that the case file held by the investigating law enforcement agency is excepted under section 552.108(a)(4) as "the basis for the prosecutor's thought processes or legal reasoning in prosecuting this case." Thus, the city argues that the request implicates *Curry v. Walker*, 873 S.W.2d 379 (Tex. 1994). In *Curry*, the Texas Supreme Court held that a request for a district attorney's "entire litigation file" was "too broad" and, quoting *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458 (Tex. 1993, orig. proceeding), held that "the decision as to what to include in [the file] necessarily reveals the attorney's thought processes concerning the prosecution or defense of the case." *Curry*, 873 S.W.2d at 380. Here, the requestor specifically excludes "any documents which constitute protected attorney work-product or any documents that were obtained pursuant to a grand jury subpoena." Therefore, the present request is not for the entire litigation file and *Curry* is

inapplicable. Further, we find that you have not established that the submitted police investigation file was prepared by an attorney representing the state or that the file represents the mental impressions or legal reasoning of an attorney representing the state. Thus, none of the information may be withheld under section 552.108(a)(4).

You also claim that a portion of the submitted information is subject to chapter 611 of the Health and Safety Code, which provides for the confidentiality of records created or maintained by a mental health professional. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses chapter 611 of the Health and Safety Code. Section 611.002(a) states that "[c]ommunications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential." Health & Safety Code § 611.002(a); *see also* § 611.001 (defining "patient" and "professional"). However, upon review, we find that the submitted information does not contain mental health records. *See* Health & Safety Code § 611.002. Therefore, none of the submitted information is confidential under chapter 611 of the Health and Safety Code, and the city may not withhold it under section 552.101 on that ground.

Section 552.130 of the Government Code excepts from 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. We note, however, that the requestor has a special right of access to the named individual's information pursuant to section 552.023 of the Government Code. As such, the named individual's driver's license number must be released to the requestor. *See* Gov't Code § 552.023(b) (governmental body may not deny access to person to whom information relates, or that person's representative, solely on grounds that information is considered confidential by privacy principles). Further, some of the submitted Texas driver's license information relates to an individual who is deceased. Since the right of privacy lapses at death, Texas driver's license information that pertains to the deceased individual may not be withheld under section 552.130. *See* Attorney General Opinion JM-229 (1984); Open Records Decision No. 272 (1981) (privacy lapses at death). The city must withhold the remaining Texas motor vehicle record information, which we have marked, in accordance with section 552.130.

Finally, the submitted documents also contain 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. We note, however, that the requestor has a right of access to the named individual's social security number pursuant to

section 552.023. The city must withhold the remaining social security numbers under section 552.147.¹

In summary, information collected pursuant to grand jury subpoenas, which we have marked, is not responsive to the present request and need not be released. The city must withhold the Texas motor vehicle record information that we have marked in accordance with section 552.130. The city must withhold the social security numbers we have marked under section 552.147. The remaining information must be released to the requestor.²

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).

¹ 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.

² Because the records being released contain information relating to the named individual that would be excepted from disclosure to the general public in order to protect the named individual's privacy, the department must request another ruling from our office if it receives a future request for this information from an individual other than the named individual or his authorized representative. *See* Gov't Code § 552.023(b).

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. Vela III', with a stylized flourish at the end.

José Vela III
Assistant Attorney General
Open Records Division

JV/vh2

Ref: ID# 250268

Enc. Submitted documents

c: Patricia E. Carls
Georgetown City Attorney
Brown & Carls LLP
106 East Sixth Street, Suite 550
Austin, Texas 78701
(w/o enclosures)