



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 27, 2007

Ms. Christina O'Neil
Assistant District Attorney
Dallas County
Frank Crowley Courts Building
133 North Industrial Boulevard, LB-19
Dallas, Texas 75207

OR2007-03368

Dear Ms. O'Neil:

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# 274017.

The Dallas County District Attorney's Office (the "district attorney") received a request for information regarding a list of named peace officers. You seek to withhold the requested information under sections 552.101, 552.103, 552.108, 552.111, 552.117, 552.1175, and 552.130 of the Government Code and Texas Rule of Civil Procedure 192.5. We have considered your arguments and reviewed the submitted information.

Initially, we note that the submitted information contains court-filed documents. A document that has been filed with a court is expressly public under section 552.022 of the Government Code and may not be withheld unless confidential under other law. *See Gov't Code § 552.022(a)(17)*. Although, you assert that these documents are excepted under sections 552.103, 552.108, and 552.111 of the Government Code; these sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived by the governmental body. *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 Nos. 663 (1999) (governmental body may waive section 552.111), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived), 177 (1977) (governmental body may waive statutory predecessor to

section 552.108). Therefore, these sections do not constitute other law for purposes of section 552.022(a)(17). Accordingly, the district attorney may not withhold the court-filed documents under section 552.103, 552.108, or 552.111. However, the other exceptions to disclosure that you claim under sections 552.101, 552.117, 552.1175, and 552.130 and rule 192.5 are "other law" for purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your arguments regarding these sections for the information subject to section 552.022.

You state that the district attorney obtained some of the submitted information under the interagency transfer doctrine from civil service cities. The interagency transfer doctrine provides that information may be transferred between governmental bodies without violating its confidential character on the basis of a recognized need to maintain an unrestricted flow of information between governmental bodies. *See* Attorney General Opinion No. GA-0055 (2003); Open Records Decision Nos. 680 at 7 (2003), 667 at 3-4 (2000). *But see* Attorney General Opinions DM-353 at 4 n. 6 (1995) (interagency transfer prohibited where confidentiality statute enumerates specific entities to which release of confidential information is authorized and where receiving agency is not among statute's enumerated entities), JM-590 (1986) (same); Open Records Decision No. 655 (1997) (same), 650 (1996) (transfer of confidential information to federal agency impermissible unless federal law requires its disclosure).

You claim that portions of the submitted information that were received by the district attorney under the transfer doctrine are excepted from disclosure pursuant to section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section encompasses information protected by other statutes, such as section 143.089(g) of the Local Government Code. This section applies to cities that are civil service cities under chapter 143 of the Local Government Code. Section 143.089 contemplates two different types of personnel files: a file that must be maintained by a city's civil service director or the director's designee, and another file that may be maintained by a city's police department for its own use. Local Gov't Code § 143.089(a), (g). In cases in which a police department investigates a police officer's misconduct and takes disciplinary action against the police officer, section 143.089(a)(2) requires the department to place all investigatory records relating to the investigation and disciplinary action, including background documents such as complaints, witness statements, and documents of like nature from individuals who were not in a supervisory capacity, in the police officer's civil service file maintained under section 143.089(a). *Abbott v. City of Corpus Christi*, 109 S.W.3d 113, 122 (Tex. App.—Austin 2003, no pet.). All investigatory materials in a case resulting in disciplinary action are "from the employing department" when they are held by or in possession of a department because of its investigation into a police officer's misconduct, and the department must forward them to the civil service commission for placement in the civil service personnel file. *Id.* Such records are subject to release under chapter 552 of the Government Code. *See* Local Gov't Code § 143.089(f); Open Records

Decision No. 562 at 6 (1990). However, information maintained in a police department's personnel file pursuant to section 43.089(g) is confidential and must not be released. *City of San Antonio v. Tex. Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You state that some of the submitted information “appear[s] to be maintained in the agencies['] personnel and internal affairs files.” Hence, your representation shows you are not certain where the civil service cities maintain the information. Furthermore, you have not demonstrated that the information is maintained by the police departments of these civil service cities in their own departmental personnel files. Lastly, section 143.089(g) expressly forbids the release of “any information contained in the department file to any agency or person requesting information relating to a . . . police officer.” Local Gov't Code § 143.089(g). Accordingly, this office concluded another law enforcement agency has no special right of access to subsection (g) information under this provision or a provision of the Act. *See* Open Records Decision No. 650 at 3 (1996) (the confidentiality provision of section 143.089(g) contains no exceptions). Therefore, none of the submitted information may be withheld under section 552.101 on this basis.

Section 552.101 also encompasses chapter 560 of the Government Code, which provides that a governmental body may not release fingerprint information except in certain limited circumstances. *See* Gov't Code §§ 560.001 (defining “biometric identifier” to include fingerprints), 560.002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), 560.003 (biometric identifiers in possession of governmental body exempt from disclosure under the Act). You do not inform us, and the submitted information does not indicate, that section 560.002 permits the disclosure of the submitted fingerprint information. Therefore, the district attorney must withhold this information in the court-filed documents, which we have marked, under section 552.101 in conjunction with section 560.003 of the Government Code.

Section 552.101 also encompasses the common-law right of privacy. The common-law right to privacy protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy encompasses the specific types of information that are held to be intimate or embarrassing in *Industrial Foundation*. *See id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). 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). Upon review, however, we find that the information that is subject to section 552.022 is not excepted under common-law privacy because it is not highly intimate or embarrassing. Therefore, no portion of the court-filed documents may be withheld under section 552.101 on this basis.

Section 552.101 also encompasses the doctrine of 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; *see Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985). After review of the submitted information, we find that it does not contain information that is confidential under constitutional privacy; therefore, the district attorney may not withhold it under section 552.101 on that ground.

You also assert that portions of the information subject to section 552.022 are exempted from disclosure under section 552.1175 of the Government Code. This exception provides in relevant part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure;

(2) county jailers as defined by section 1701.001, Occupations Code;
[and]

...

(4) commissioned security officers as defined by section 1701.002, Occupations Code[.]

...

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(a)(1)-(2), (a)(4), (b). Thus, pursuant to section 552.1175, the district attorney must the information we have marked under section 552.1175 if the individuals at issue elect to restrict access to the information in accordance with section 552.1175(b). To the extent the individuals at issue do not elect to keep this information confidential, it may not be withheld on this basis.

We note that the remaining court-filed documents include a bank account number. Section 552.136 of the Government Code provides 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.”¹ *Id.* § 552.136. As such, the account number, which we have marked, must be withheld pursuant to section 552.136 of the Government Code.

Next, we note that the remaining information subject to section 552.022 includes 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.² *Id.* § 552.147. Therefore, the district attorney must withhold the social security numbers of living individuals under section 552.147.

You also assert that some of the court-filed documents may be subject to the attorney work produce privilege found in rule 192.5 of the Texas Rules of Civil Procedure. The Texas Supreme Court has held that “[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022.” *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). However, the Texas Rules of Civil Procedure apply only to “actions of a civil nature.” TEX. R. CIV. P. 2. Accordingly, the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure does not apply to any of the information at issue, which relates to criminal cases. Therefore, the district attorney may not withhold any of the information at issue under rule 192.5 of the Texas Rules of Civil Procedure.

¹Unlike other exceptions to disclosure, this office will raise section 552.136 on behalf of a governmental body, as it is a mandatory exception and may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

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.

We next address your arguments for the submitted information that is not subject to section 552.022. Section 552.108 provides in 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.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

(3) the internal record or notation:

(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

(c) This section does not except from [required public disclosure] information that is basic information about an arrested person, an arrest, or a crime.

Gov't Code § 552.108(a)(1), (a)(4), (b)(3). Generally a government body claiming section 552.108 must explain how and why the release of the information would interfere with a criminal investigation or prosecution. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that the submitted information was prepared by a prosecutor representing the state and “exemplif[ies] strategic work done by the [district attorney] in preparation for litigation.” Upon review, we agree that the

remaining information reflects the mental processes or legal reasoning of an attorney representing the state. Therefore, we conclude that the remaining information is subject to section 552.108(b)(3).

In summary, other than documents that have been filed with a court, the district attorney may withhold the submitted information under section 552.108(b)(3) of the Government Code. The fingerprints that we have marked must be withheld under section 552.101 in conjunction with section 560.003 of the Government Code. The district attorney must withhold the home telephone number, home address, social security number, and family member information of any peace officer, county jailer, or commissioned security officer who elects confidentiality under section 552.1175 of the Government Code. The district attorney must withhold the bank account number that we have marked under section 552.136 of the Government Code and the social security numbers of living individuals under section 552.147 of the Government Code.³ The remaining information must be released to the requestor.

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

³As our ruling is dispositive, we do not address your remaining arguments except to note that basic information may not be withheld from public disclosure under section 552.103. Open Records Decision No. 597 (1991).

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,



L. Joseph James
Assistant Attorney General
Open Records Division

LJJ/eb

Ref: ID# 274017

Enc. Submitted documents

c: Mr. Rehan Hyder
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(w/o enclosures)