



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 2, 2007

Mr. David E. Cherry
Cherry & Jordan, L.L.P.
P.O. Box 21027
Waco, Texas 76702-1027

OR2007-05117

Dear Mr. Cherry:

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# 277305.

The City of Robinson (the "city"), which you represent, received a request for four categories of information relating to a murder case. You state that some of the requested information has been released. You claim that other responsive information is excepted from disclosure under section 552.108 of the Government Code. We have considered the exception you claim and have reviewed the information you submitted. You also inform us that the city has requested clarification of part 4 of the request, but has not received a response.¹ Accordingly, the city has no further obligation to respond to part 4 of the request at this time. However, should the city receive clarification and seek to withhold any information encompassed by the clarified portion of the request, the city must request another ruling. See Gov't Code §§ 552.301(a), .302.

Section 552.108 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 . . . release of the information would interfere with the detection,

¹See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); Open Records Decision No. 663 at 2-5 (1999) (addressing circumstances under which governmental body's communications with requestor to clarify or narrow request will toll ten-business-day deadline to request decision under section 552.301(b)).

investigation, or prosecution of crime[.]” *Id.* § 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 at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that the submitted information relates to a prosecution that resulted in a conviction. You argue, however, that the prosecution is still pending because the time for filing a motion for new trial has not expired and all appeals have not been exhausted. You have submitted a letter from an assistant criminal district attorney for McLennan County stating that release of the submitted information at this time could compromise the integrity of the case and interfere with the prosecution. Having considered your arguments and those of the assistant criminal district attorney, we find that the possibility that either a motion for a new trial or an appeal will be filed is not sufficient to demonstrate that the release of the submitted information would interfere with the investigation or prosecution of crime. We therefore conclude that the city may not withhold any of the submitted information under section 552.108 of the Government Code.

We note, however, that section 552.101 of the Government Code is applicable to some of the submitted information.² Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision,” and encompasses information that other statutes make confidential. Gov’t Code § 552.101. Section 261.201 of the Family Code provides in part:

(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). We find that some of the submitted information, which we have marked, consists of files, reports, records, communications, or working papers used or developed in an investigation under chapter 261 of the Family Code. Thus, that information

²Unlike other exceptions to disclosure, this office will raise section 552.101 on behalf of a governmental body, because the Act prescribes criminal penalties for the release of confidential information. *See* Gov’t Code §§ 552.007, .352; Open Records Decision No. 325 at 2 (1982).

falls within the scope of section 261.201(a). As you do not indicate that the city has adopted any rule that governs the release of this type of information, we assume that no such rule exists. Given that assumption, we conclude that the city must withhold the marked information under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (addressing predecessor statute).

Section 552.101 also encompasses section 773.091 of the Health and Safety Code, which governs the public availability of information relating to the provision of emergency medical services (“EMS”). Section 773.091 provides in part:

(b) Records of the identity, evaluation or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

(c) Any person who receives information from confidential communications or records as described by this chapter, other than a person listed in Section 773.092 who is acting on the survivor’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was obtained.

Health & Safety Code § 773.091(b)-(c). Section 773.091 further provides, however, that

[t]he privilege of confidentiality under this section does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services.

Id. § 773.091(g). We have marked information that is confidential under section 773.091, except as specified by 773.091(g). We note that this information may be released to “any person who bears a written consent of the patient or other persons authorized to act on the patient’s behalf.” *Id.* § 773.092(e)(4). When the patient is deceased, the patient’s personal representative may consent to the release of the patient’s records. *Id.* § 773.093(a); *see also* Open Records Decision No. 632 (1995) (defining “personal representative” for purposes of Health & Safety Code § 773.093). The consent must be in writing, signed by the patient, authorized representative, or personal representative, and specify (1) the information to be covered by the release, (2) the reasons or purposes for the release, and (3) the person to whom the information is to be released. Health & Safety Code § 773.093(a). Thus, the city must withhold the marked EMS information under section 552.101 of the Government Code in conjunction with section 773.091 of the Health and Safety Code, except as specified by section 773.091(g), unless the deceased individual’s personal representative provides the city

with written consent that meets the requirements of section 773.093(a). *See id.* §§ 773.092, .093; Open Records Decision No. 632.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common law privacy, both elements of the test must be established. *Id.* at 681-82. A compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Furthermore, we find that a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. We have marked criminal history information that the city must withhold under section 552.101 in conjunction with common-law privacy.

Common-law privacy also encompasses the specific 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 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). We have marked medical information that the city also must withhold under section 552.101 in conjunction with common-law privacy. We note that because privacy is a personal right that lapses at death, common-law privacy does not encompass information concerning a deceased individual. *See Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App. – Texarkana 1979, writ ref'd n.r.e.); Open Records Decision No. 272 at 1 (1981) (privacy rights lapse upon death).

We also note that section 552.130 of the Government Code is applicable to some of the submitted information.³ This section excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit or a motor vehicle title or registration issued by an agency of this state. *See* Gov't Code § 552.130(a)(1)-(2). We have marked Texas driver's license and motor vehicle information that the city must withhold under

³Unlike other exceptions to disclosure under the Act, this office will raise section 552.130 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

section 552.130. Because this exception also protects personal privacy, which is a personal right that lapses at death, the murder victim's Texas driver's license information may not be withheld under section 552.130. *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d at 491; Open Records Decision No. 272.

Lastly, section 552.137 of the Government Code also is applicable in this instance.⁴ Section 552.137 states that "[e]xcept as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure. Gov't Code § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We have marked an e-mail address that the city must withhold under section 552.137 unless the owner has consented to its disclosure.

In summary: (1) the information that we have marked under section 261.201 of the Family Code must be withheld under section 552.101 of the Government Code; (2) the EMS information that we have marked under section 773.091 of the Health and Safety Code must be withheld under section 552.101, except as specified by section 773.091(g), unless the city receives consent for release under section 773.093; (3) the marked criminal history and medical information must be withheld under section 552.101 in conjunction with common-law privacy; (4) the marked Texas driver's license and motor vehicle information must be withheld under section 552.130 of the Government Code; and (5) the marked e-mail address must be withheld under section 552.137 of the Government Code unless the owner has consented to its disclosure. The city must release the rest of the submitted information.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

⁴Section 552.137 also is a mandatory exception that may not be waived. Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001).

⁵We note that the submitted information contains social security numbers. 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.

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).

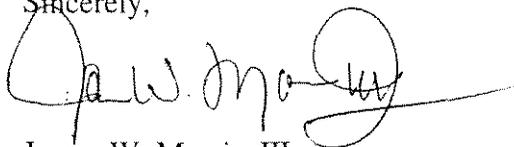
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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 "James W. Morris, III". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

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

JWM/jb

Ref: ID# 277305

Enc: Submitted documents

c: Ms. Heather King
Inside Edition
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