



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 11, 2007

Mr. A. Duane Waddill
Executive Director
Texas Residential Construction Commission
PO Box 13144
Austin, Texas 78711

OR2007-05746

Dear Mr. Waddill:

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# 278324.

The Texas Residential Construction Commission (the "commission") received a request for several categories of information related to several named persons and Middlebury Properties II, Tremont Homes, and Tremont Homes, Inc.¹ You state that some of the requested information does not exist.² You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code.³ We have considered the exceptions you claim and reviewed the submitted information.

¹You state that the requestor agreed to exclude social security numbers, driver's license numbers, bank and charge card account numbers, and e-mail addresses from his request. See Gov't Code § 552.222 (governmental body may communicate with requestor for purpose of clarifying or narrowing request). Accordingly, any such information is not responsive to the request and need not be released to the requestor.

²The Act does not require a governmental body to release information that did not exist when a request for information was received, create information responsive information, or obtain information that is not held by or on behalf of the city. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App. – San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

³We understand you to raise section 552.101, not section 552.110 of the Government Code.

Section 552.111 of the Government Code excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. This exception encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5. A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party’s representative. *Id.*; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that: 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation. *Nat’l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204; ORD 677 at 7.

You state that the Exhibits E through H consist of commission attorneys’ and representative’s handwritten notes and communications made in preparation for contested case proceedings. You also indicate that this information contains the individuals’ mental impressions concerning the commission’s position in the proceedings. You explain that the commission enforces standards of conduct for registered or certified builders under sections 418 and 419 of title 16 of the Property Code. *See* Prop. Code §§ 418.001 (listings grounds for disciplinary action), 419.001 (granting the imposition of administrative penalty to any registered or certified person violating title 16). You further explain that the commission litigates enforcement proceedings as contested cases before the State Office of Administrative Hearings. *See* Open Records Decision No. 588 at 7 (1991) (deciding that contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation for purposes of section 552.103). Based on your representations and our review, we find that the commission has established that most of the

information at issue is attorney work product created in anticipation of litigation. Accordingly, the commission may withhold Exhibits E through H-3 under section 552.111 of the Government Code as attorney work product.⁴ As to Exhibits H-4 through H-6, we find that these documents were filled out by the opposing party as part of a registration process and do not consist of material prepared or mental impressions developed by commission attorney's or representatives. Thus, the commission may not withhold Exhibits H-4 through H-6 under section 552.111 of the Government Code as attorney work product.

You claim that the remaining information consists of criminal background checks. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. The commission argues that the public availability of the submitted information is governed by section 416.002 of the Property Code. Section 416.002 of the Property Code provides, in relevant part, the following:

(d) The commission may, on receipt of an application, conduct a criminal background check of the applicant or any person responsible for the application. The commission may obtain criminal history record information maintained by the Department of Public Safety, the Federal Bureau of Investigation, or any other local, state, or national government entity. *Unless the information is a public record at the time the commission obtains the information under this subsection*, the information is confidential, and the commission may not release or disclose the information to any person except under a court order or with the permission of the applicant.

Property Code § 416.002(d). [Emphasis added]. The commission explains that it contracts with Lexis-Nexis and backgroundcheck.com to provide online access to databases through which background checks are conducted. The commission characterizes the submitted information as "commercial background" information, and states that this information "was public record at the time it was obtained." Based upon this representation and our review, we agree that the criminal history record information within the submitted documents is not confidential under section 416.002(d), and it may not be withheld under section 552.101 on this basis.

However, the commission further states that "[it] interprets Property Code section 416.002(d) to implicitly authorize the release of criminal history information obtained from a public record." We disagree with this interpretation. Rather, we determine that the language italicized above merely limits the confidentiality afforded under the statute to criminal history record information obtained from non-public records. The statute does not by its

⁴Because our ruling is dispositive, we need not address your remaining argument for this information.

terms additionally require that criminal history record information acquired from public records therefore be released to the public. See *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865-66 (Tex. 1999) (stating that a court construes a statute by looking to the plain meaning of the statute's language). Accordingly, because we conclude that the submitted criminal history record information is not expressly public under section 416.002(d), we will address the application of section 552.101 and common-law privacy to that information as well as the remaining submitted information.

Section 552.101 also encompasses the common-law right to 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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be met. *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. U.S. 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. This office has also determined that personal financial information that relates only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. See *Open Records Decision Nos. 545 at 4* (1990) (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities), *523 at 4* (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), *373 at 4* (1983) (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis). Upon review, we determine that a portion of the submitted information is protected under section 552.101 of the Government Code in conjunction with common-law privacy. Accordingly, the commission must withhold the information we have marked on this basis.

We note that the submitted information contains Texas-issue motor vehicle record information.⁵ Section 552.130 of the Government Code, in relevant part, provides:

⁵The Office of the Attorney General will raise a mandatory exception like section 552.130 on behalf of a governmental body, but ordinarily will not raise other exceptions. *Open Records Decision Nos. 481* (1987), *480* (1987), *470* (1987).

(a) Information is excepted from required public disclosure if the information relates to:

(2) a motor vehicle title or registration issued by an agency of this state[.]

Gov't Code § 552.130(a)(2). Therefore, you must withhold the Texas-issued motor vehicle record information we have marked under section 552.130 of the Government Code.

In summary, the commission may withhold Exhibits E through H-3 under section 552.111 of the Government Code. The commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The commission must withhold the Texas-issued motor vehicle record information we have marked under section 552.130 of the Government Code. As you do not raise any other exceptions against disclosure, the remaining information must be released to the requestor.

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*, 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,



Jaclyn N. Thompson
Assistant Attorney General
Open Records Division

JNT/ma

Ref: ID# 278324

Enc. Submitted documents

c: Mr. Steve Hester
15014 Lantern Creek Lane
Houston, Texas 77068
(w/o enclosures)