



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 15, 2007

Ms. Karen Rabon
Assistant Attorney General
Public Information Coordinator
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2007-07646

Dear Ms. Rabon:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 280079.

The Office of the Attorney General (the "OAG") received a request for ten categories of information pertaining to any investigation by the OAG's Medicaid Fraud Control Unit (the "MFCU") of the El Paso Independent School District and Strategic Governmental Solutions, Inc. The OAG has released information responsive to item 3 but claims the remaining information is excepted from disclosure under sections 552.101, 552.107, and 552.108 of the Government Code.¹ We have considered the OAG's claimed exceptions to disclosure and have reviewed the submitted sample records.²

¹The OAG asserts the information is protected under section 552.101 of the Government Code in conjunction with the attorney-client privilege pursuant to Texas Rule of Evidence 503. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. It does not encompass the discovery privileges found in the Texas Rules of Evidence because they are not constitutional law, statutory law, or judicial decisions. Open Records Decision No. 676 at 1-2 (2002).

²We assume that the sample records submitted to this office are truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

First, we note some of the documents have been filed with a court. Section 552.022(a)(17) makes public “information that is also contained in a public court record” unless such information is expressly confidential under other law. Gov’t Code § 552.022(a)(17). The OAG contends that although the documents have been filed with a court, they are not subject to section 552.022(a) “in the hands of the OAG.” We disagree. Although section 552.022(a)(1) limits the public availability of a completed report, audit, or investigation to one “made of, for, or by a governmental body,” section 552.022(a)(17) has no such limiting language. *Id.* § 552.022(a)(1), (17). Rather, section 552.022(a)(17) makes public any “information that is also contained in a public court record” regardless of which agency possesses or maintains the information. *Id.* § 552.022(a)(17). Section 552.108 is a discretionary exception that does not make information confidential. Open Records Decision No. 177 (1977) (governmental body may waive statutory predecessor to section 552.108). Thus, the OAG may not withhold this information under section 552.108. However, the OAG also asserts such information is protected by section 552.101 in conjunction with common-law privacy. Because section 552.101 is other law that makes information confidential, we will consider whether the information subject to section 552.022(a)(17) is private.

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. Section 552.101 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. *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 satisfied. *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. Here, most of the court-filed documents are criminal history information compiled by the MFCU investigators. Therefore, the OAG must withhold such information under section 552.101 in conjunction with common-law privacy. However, we have marked one court-filed document that is not criminal history information and must be released.

Next, we address the OAG’s arguments for the remaining information. Section 552.108(a) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime.” Gov’t Code § 552.108(a)(1). 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 id* § 552.301(e)(1)(a); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). In this instance, the OAG explains Exhibit B relates to an ongoing criminal investigation being conducted by the MFCU and that release of these records will compromise the investigation of this matter. Based on the OAG's representations and our review of the records, we agree that the OAG may withhold the remaining information under section 552.108(a)(1). *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases).³

In summary, the OAG must release the document we marked pursuant to section 552.022(a)(17). The OAG may withhold the remainder under section 552.108(a)(1).

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).

³Because section 552.108 is dispositive, we do not address the OAG's other arguments.

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,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/sdk

Ref: ID# 280079

Enc: Marked documents

c: Mr. Joseph J. O'Hara
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(w/o enclosures)