



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 23, 2007

Mr. Paul F. Wieneskie
Attorney at Law
204 South Mesquite
Arlington, Texas 76010

OR2007-13804

Dear Mr. Wieneskie:

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# 292775.

The Euless Police Department (the "department"), which you represent, received a request for the background investigation related to the requestor's application for employment with the department. You state that you have released most of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, you indicate that some of the submitted information is excepted from disclosure because it was provided to the department with the expectation that it would be kept confidential or it is subject to a non-disclosure agreement. We note that information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through a contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987).

¹We note that the requestor agreed to the redaction of any Texas driver's license numbers, Texas license plate numbers, vehicle identification numbers, and personal financial identification numbers. Therefore, the department need not release such information and this ruling does not address the public availability of this information.

Consequently, unless the requested information falls within an exception to disclosure, it must be released, notwithstanding any agreement between the department and any third party specifying otherwise.

Next, we note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides 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). The submitted information contained in Exhibits C and E includes completed evaluations and a completed report made for the department. A completed evaluation or report must be released under section 552.022(a)(1), unless the information is excepted from disclosure under section 552.108 or expressly confidential under other law. Although you claim that Exhibit C is excepted from disclosure under section 552.111 of the Government Code, this exception to disclosure is a discretionary exception under the Act that does not constitute "other law" for purposes of section 552.022.² Accordingly, no portion of Exhibit C may be withheld on the basis of this exception.

However, since section 552.022(a)(1) of the Government Code provides that information made public under that section may be excepted from disclosure under section 552.108 of the Government Code, we will address the department's section 552.108 claim as it pertains to Exhibit E. Furthermore, because section 552.101 of the Government Code constitutes "other law" for purposes of section 552.022 of the Government Code, we will also consider this exception.

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, including criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or

²Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or which implicates the interests of third parties. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally); 663 (1999) (governmental body may waive section 552.111). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Texas Department of Public Safety (“DPS”) maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov’t Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. You claim that Exhibit D consists of CHRI. After reviewing the information at issue, we have marked CHRI that is excepted from required public disclosure by section 552.101 in conjunction with section 411.083 of the Government Code.³ None of the remaining information in Exhibit D may be withheld under section 552.101 on this basis.

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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has found that the following types of information are excepted from required public disclosure under common law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); and personal financial information not relating to the financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 545 (1990), 523 (1989) (individual’s mortgage payments, assets, bills, and credit history). But this office has found that the public has a legitimate interest in information relating to employees of governmental bodies and their employment qualifications and job performance. *See* Open Records Decision Nos. 562 at 10 (1990), 542 at 5 (1990); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). The department must withhold the information we have marked under section 552.101 in conjunction with common law privacy. We find, however, that the remaining information is either not intimate or embarrassing or is of a legitimate public interest. Therefore, none of the remaining information is confidential under

³We note that the requestor can obtain her own CHRI from DPS. Gov’t Code § 411.083(b)(3).

the doctrine of common law privacy, and it may not be withheld under section 552.101 on that basis.

You state that Exhibit B should be withheld under section 552.101 in conjunction with the informer's privilege. The Texas courts have long recognized the informer's privilege. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). It protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988).

Although you raise the informer's privilege, you have not identified an informer or any alleged violation of a criminal or civil statute. Furthermore, our review of Exhibit B does not reveal any apparent violations of any criminal or civil statutes. Thus, the department has failed to demonstrate the applicability of the informer's privilege to any portion of Exhibit B, and it may not be withheld under section 552.101 on this basis.

We next address your arguments that Exhibits B and E are excepted from disclosure under 552.108 of the Government Code. Section 552.108 provides in relevant part the following:

(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;

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication;

(3) it is information relating to a threat against a peace officer or detention officer collected or disseminated under Section 411.048; or

(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) reflects 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:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or

(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) reflects the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a)-(b). Section 552.108 protects certain specific types of law enforcement information. Section 552.108(a)(1) is applicable if the release of the information would interfere with a pending criminal investigation or prosecution. *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). Section 552.108(b)(1) protects internal records of a law enforcement agency, the release of which would interfere with law enforcement and crime prevention. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.) (Gov't Code § 552.108(b)(1) protects information that, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws). Sections 552.108(a)(2) and 552.108(b)(2) are applicable only if the information at issue relates to a concluded case that did not result in a conviction or a deferred adjudication. Section 552.108(a)(3) is applicable to information collected or disseminated under section 411.048 of the Government Code. Sections 552.108(a)(4) and 552.108(b)(3) are applicable to information that was prepared by an attorney

representing the state in anticipation of or in the course of preparing for criminal litigation or that reflects the mental impressions or legal reasoning of an attorney representing the state.

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* Gov't Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You contend that release of Exhibit B would jeopardize the department's ability to conduct future investigations and that the release of Exhibit E could interfere with the investigation of crimes. Having reviewed the submitted information, we find that it pertains to the department's investigation into a potential employee in its capacity as a potential employer. The department has not reasonably explained how release of the information at issue would interfere with the department's law enforcement efforts. We therefore find that you have failed to establish that section 552.108 of the Government Code is applicable to any part of the submitted information, and the department may not withhold any information pursuant to this exception.⁴

Next, we note that a portion of the remaining submitted information is subject to section 552.130 of the Government Code.⁵ Section 552.130 excepts from public disclosure information that relates to "a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]" Gov't Code § 552.130(a)(1). We note, however, that section 552.130 protects privacy interests. Thus, the requestor has a right of access to her own Texas motor vehicle record information. *See* Gov't Code § 552.023 (section 552.023 gives a person or the person's authorized representative a special right of access to information that is excepted from public disclosure under laws intended to protect that person's privacy interest as subject of the information); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Furthermore, the submitted information reflects that the requestor is the spouse the individual to whom the remaining section 552.130 information pertains. *See id.* § 552.023. As such, she may have a special right of access to this information as the authorized representative of the individual to whom it pertains. If the requestor is seeking the information on behalf of her spouse, then she has a right of access to the information at issue, and the department may not withhold any of this information we have marked under section 552.130.

⁴We note that this 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. We note, however, that the requestor has a right of access to her own social security number. *See generally* Gov't Code § 552.023(b).

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

In summary, the department must withhold the information that we have marked under section 552.101 in conjunction with section 411.083 of the Government Code and common-law privacy. To the extent the requestor does not have a right of access pursuant to section 552.023, the department must also withhold the information we have marked under section 552.130 of the Government Code. The remaining submitted information must be released.⁶

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

⁶We note that the information being released contains confidential information to which the requestor has a right of access. However, if the department receives another request for this particular information from a different requestor, then the department should again seek a decision from this office.

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 that reads "Paige Savoie". The signature is written in a cursive, flowing style.

Paige Savoie
Assistant Attorney General
Open Records Division

PS/ma

Ref: ID# 292775

Enc. Submitted documents

c: Ms. Kimberly K. Rutigliano
9389 Snowbird Way
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(w/o enclosures)