



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 23, 2008

Ms. Laura Garza Jimenez
County Attorney
Nueces County
901 Leopard, Room 207
Corpus Christi, Texas 78401-3680

OR2008-01069

Dear Ms. Jimenez:

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# 300187.

The Nueces County Sheriff's Department (the "sheriff") received a request for any and all investigation reports, witness statements, and documents in the possession of the sheriff concerning the investigation of the requestor's client beginning September 14, 2007. You state that you have released a portion of the requested information. You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.108, 552.130, 552.140, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the information you have submitted.

Initially, you note that a portion of the requested information is in the constructive possession of the grand jury. This office has concluded that grand juries are not governmental bodies that are subject to chapter 552 of the Government Code, so records that are within the actual or constructive possession of a grand jury are not subject to disclosure under chapter 552. *See* Open Records Decision No. 513 (1988). When an individual or entity acts at the direction of the grand jury as its agent, information prepared or collected by the agent is within the grand jury's constructive possession and is not subject to chapter 552. *Id.* at 3. Information that is not so held or maintained is subject to chapter 552 and may be withheld only if a specific exception to disclosure is applicable. *Id.* You state that a portion of the requested information is in the constructive possession of the grand jury, and thus, you have not provided this information to our office. Based on your argument, we conclude that this

information is in the constructive possession of the grand jury and is, therefore, not subject to disclosure under the Act.

Next, you assert that some of the submitted information does not qualify as “public information” under the Act because it falls under section 552.027. Section 552.027 of the Government Code provides:

(a) A governmental body is not required under this chapter to allow the inspection of or to provide a copy of information *in a commercial book or publication purchased or acquired by the governmental body for research purposes* if the book or publication is commercially available to the public.

(b) Although information in a book or publication may be made available to the public as a resource material, such as a library book, a governmental body is not required to make a copy of the information in response to a request for public information.

(c) A governmental body shall allow the inspection of information in a book or publication that is made part of, incorporated into, or referred to in a rule or policy of a governmental body.

Gov’t Code § 552.027 (emphasis added). This section is designed to alleviate the burden of providing copies of commercially available books, publications, and resource materials maintained by governmental bodies, such as telephone directories, dictionaries, encyclopedias, statutes, and periodicals. Therefore, section 552.027 may exclude commercially available research material from the definition of “public information.” However, if any information in a book or publication is “made part of, incorporated into, or referred to in a rule or policy of” the sheriff, the sheriff must allow inspection of that information. *Id.* § 552.027(c).

You state that a portion of the information in Exhibit 1 is commercially available or available to the public at the law library, and that the information falls outside of the Act pursuant to section 552.027. However, in this instance the requestor seeks information regarding a criminal investigation, and has not requested commercially available publications in particular. Further, you state that the information was used in the criminal investigation. Due to the nature of the request, we do not consider these materials to fall within the scope of section 552.027. Accordingly, we find that all information in Exhibit 1 constitutes “public information” that is subject to the Act. *See id.* § 552.002.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. Section 552.101 encompasses information protected by other statutes. The public availability of fingerprints is governed by chapter 560 of the Government Code. *See id.* §§ 560.001(1) (“biometric identifier” means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry), 560.003 (biometric identifier in possession of

governmental body is exempt from disclosure under Act). Section 560.002 provides, however, that “[a] governmental body that possesses a biometric identifier of an individual . . . may not sell, lease, or otherwise disclose the biometric identifier to another person unless . . . the individual consents to the disclosure[.]” *Id.* § 560.002(1)(A). Therefore, as the authorized representative of the individual whose fingerprints are contained in the submitted documents, the requestor has a right of access to that information under section 560.002(1)(A). *See* Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Therefore, the sheriff must release the submitted fingerprints, which we have marked, under section 560.002 of the Government Code.

Next, you claim that the submitted documents contain information governed by section 1701.454 of the Occupations Code. Section 552.101 also encompasses section 1701.454. Section 1701.454 provides in relevant part that “[a] report or statement submitted to the commission under this subchapter is confidential and is not subject to disclosure under Chapter 552 of the Government Code.” Occ. Code § 1701.454(a). After reviewing the marked information, we do not find it is the form contemplated by section 1701.454 of the Occupations Code. Therefore, the sheriff may not withhold this information, which we have marked for release, under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

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). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. 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.

Generally, only the information that either identifies or tends to identify a victim of sexual assault or other sex-related offense may be withheld under common-law privacy. However, a governmental body is required to withhold an entire report when identifying information is inextricably intertwined with other releasable information or when the requestor knows the identity of the alleged victim. *See* Open Records Decisions Nos. 393 (1983), 339 (1982); *see also* Open Records Decision No. 440 (1986) (detailed descriptions of serious sexual offenses must be withheld). Here the requestor knows the identity of the alleged victim. Thus, withholding only the identifying information from the requestor would not preserve the victim’s common-law right to privacy. We therefore conclude that the sheriff must

withhold case number 07007047 in its entirety pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.¹

You claim that the submitted documents include military discharge records. Section 552.140 of the Government Code provides in part:

(a) This section applies only to a military veteran's Department of Defense Form DD-214 or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003.

Gov't Code § 552.140(a). Section 552.140 provides that a military veteran's DD-214 form or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003 is confidential for a period of seventy-five years and may only be disclosed in accordance with section 552.140 or in accordance with a court order. *See id.* § 552.140(a)-(b). Subsection 552.140(c) states that the veteran who is the subject of the records has a right to inspect or obtain a copy of his or her military discharge records. *See id.* § 552.140(c)(1). We note that in this instance the requestor is the attorney for the veteran who is the subject of the records. Thus, as the authorized representative of the veteran who is the subject of the military discharge records, he has a right to inspect or copy these records. We note, however, that you do not indicate when the sheriff first came into possession of the military discharge records that we have marked. Therefore, if the military discharge records came into the possession of the sheriff on or after September 1, 2003, then this information is subject to section 552.140. In this instance, as the requestor is the authorized representative of the veteran who is the subject of the records, the sheriff must release the military discharge records that we have marked under section 552.140. On the other hand, if this information was received by the sheriff before September 1, 2003, then the information is not subject to section 552.140. In that instance, the sheriff must release the military discharge records because they are not subject to section 552.140, and no other exceptions to disclosure have been raised for this information.

Section 552.108(a)(1) 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, investigation, or prosecution of crime[.]" *Id.* § 552.108(a)(1). Generally, a governmental body claiming section 552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You inform us that the information at issue relates to three pending criminal investigations. Based upon your representation, we find that section 552.108(a)(1) is applicable to the

¹As our ruling is dispositive, we need not address your remaining argument against disclosure for this information.

remaining information you have marked. *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.*, 536 S.W.2d 559 (Tex. 1976) (per curiam) (court delineates law enforcement interests that are present in active cases).

However, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle* and includes, among other things, a detailed description of the offense and the identification and description of the complainant. *See* Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Therefore, with the exception of basic information, the sheriff may withhold the remaining information it has marked under section 552.108(a)(1).

In summary, the requested information that is in the constructive possession of the grand jury is not subject to disclosure under the Act. The sheriff must release the fingerprints under section 560.002 of the Government Code. If the military discharge records were received by the sheriff on or after September 1, 2003, then the submitted military discharge records must be released to the requestor under section 552.140(c) of the Government Code. If the military discharge records were received by the sheriff before September 1, 2003, then this information must be released because it is not subject to section 552.140. The sheriff must withhold case number 07007047 under section 552.101 in conjunction with common-law privacy. With the exception of basic information, the sheriff may withhold the remaining information it has marked under section 552.108(a)(1).² The remaining information must be released.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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).

²As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

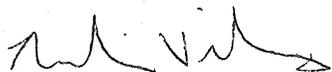
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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 challenge 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,



Melanie J. Villars
Assistant Attorney General
Open Records Division

MJV/jh

Ref: ID# 300187

Enc. Submitted documents

c: Ms. Jo Ellen Hewins
Canales & Simonson, P.C.
P.O. Box 5624
Corpus Christi, Texas 78465-5624
(w/o enclosures)