ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 28, 2008

Ms. Myrna S. Reingold
Galveston County Legal Department
722 Moody, 5th Floor
Galveston, Texas 77550-2317

OR2008-04120

Dear Ms. Reingold:

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# 305975.

The Galveston County District Attorney's Office (the "district attorney") received a request for information related to cause number 06CR2756 and a named defendant. You state that you are withholding social security numbers pursuant to section 552.147 of the Government Code.[1] You also inform us that some of the requested information has been released, but claim that some of the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.111, and 552.130 of the Government Code. You also claim that some of the submitted information consists of grand jury records not subject to the Act. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you assert that the requestor "authorize[d the district attorney] to withhold attorney work product privileged information and criminal background information[.]" We note that you have submitted information responsive to these portions of the request. Accordingly, we will consider whether the submitted information is excepted from release pursuant to the Act.

You assert that some of the submitted documents are records of the judiciary, which are not subject to the Act. The Act generally requires the disclosure of information maintained by a "governmental body," but the judiciary is expressly excluded from the requirements of the

[1]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.

Act. *See* Gov't Code § 552.003(1)(B). You state that the documents you have marked are collected, assembled, or maintained for the judiciary. However, you have not explained how these records, which consist of information presented to the grand jury by the district attorney, are collected, assembled, or maintained on behalf of the judiciary. *See id.* § 552.301(e)(1)(A) (providing that it is governmental body's burden to establish applicability of claimed exception or otherwise explain why requested information should not be released). *But see* Open Records Decision No. 646 at 5 (1996) (a community supervision and corrections department holds probationers' records, indicating whether probationers are complying with terms of probation, as an agent of the judiciary). Therefore, you have failed to demonstrate that this information is maintained by the district attorney on behalf of the judiciary and, consequently, we conclude that the information at issue is subject to the Act. *See generally* Open Records Decision No. 513 (1988) (stating that information collected or prepared by district attorney that is submitted to grand jury does not necessarily mean that such information is in grand jury's constructive possession when same information is also held by district attorney for his own purposes).

We note that a portion of the requested information relates to a sex offender who is subject to registration under chapter 62 of the Code of Criminal Procedure. Article 62.051 of the Code of Criminal Procedure requires a sex offender registrant to provide the following information for the Department of Public Safety ("DPS") sex offender registration database: the person's full name; each alias; date of birth; sex; race; height; weight; eye color; hair color; social security number; driver's license number; shoe size; home address; a recent color photograph, or if possible, an electronic image of the person; a complete set of fingerprints; the type of offense the person was convicted of; the age of the victim; the date of conviction; the punishment received; an indication as to whether the person is discharged, paroled, or released on juvenile probation, community supervision, or mandatory supervision; an indication of each license, as defined by article 62.005(g), that is held or sought by the person; an indication as to whether the person is or will be employed, carrying on a vocation, or a student at a particular public or private institution of higher education in this state or another state, and the name and address of that institution; and any other information required by DPS. *See* Crim. Proc. Code art. 62.051(c). This information is public information with the exception of the person's social security number, driver's license number, telephone number, all information required by DPS outside of the enumerated categories of information, and any information that would identify the victim of the offense for which the person is subject to registration. *See id.* art. 62.005(b). We have marked information subject to article 62.005, and the district attorney must withhold or release this information in accordance with article 62.005(b).

Next, we note that the submitted information is subject to section 552.022(a)(1) of the Government Code, which 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 constitutes a completed investigation, which must be released under section 552.022(a)(1) unless the information is excepted from disclosure under section 552.108 or is expressly confidential under other law. The district attorney seeks to withhold the submitted information under sections 552.103, 552.107, and 552.111. We note, however, that these sections are discretionary exceptions to public disclosure that protect the governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 677 at 10 (attorney work product privilege under section 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.103, 552.107, and 552.111 do not qualify as other law that makes information confidential for the purposes of section 552.022. Therefore, the district attorney may not withhold any portion of the submitted information under section 552.103, 552.107, or 552.111. However, because information subject to section 552.022(a)(1) may be withheld under sections 552.101, 552.108, and 552.130 of the Government Code, we will address your arguments under these exceptions for the submitted information.

We note that the attorney-client privilege is also found at rule 503 of the Texas Rules of Evidence, and the attorney work product privilege is found at rule 192.5 of the Texas Rules of Civil Procedure. The Texas Supreme Court held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d 328, 337 (Tex. 2001). Accordingly, we will address your assertions of attorney-client privilege under rule 503. However, the Texas Rules of Civil Procedure apply only to "actions of a civil nature." *See* TEX. R. CIV. P. 2. Thus, because the submitted information relates to a criminal case, the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure does not apply to any of the information at issue.

You contend that the submitted information is excepted from disclosure pursuant to section 552.108 of the Government Code, which provides in pertinent part:

> (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:
>
> . . .
>
> (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:

. . .

(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)(4), (b)(3). 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); Open Records Decision No. 434 at 2-3 (1986).

In *Curry v. Walker*, 873 S.W.2d 379 (Tex. 1994), the Texas Supreme Court held that a request for a district attorney's "entire litigation file" was "too broad" and, quoting *National Union Fire Ins. Co. v. Valdez*, 863 S.W.2d 458 (Tex. 1993, orig. proceeding), held that "the decision as to what to include in [the file], necessarily reveals the attorney's thought processes concerning the prosecution or defense of the case." *Curry*, 873 S.W.2d at 380.

You assert that the request encompasses the district attorney's entire case file and, as such, the responsive information is excepted from disclosure under section 552.108 of the Government Code. However, you indicate that the district attorney has released some of the documents contained in the case file at issue. Therefore, you do not seek to withhold the entire case file. As a result, you may not withhold the submitted information in its entirety under section 552.108 based upon *Curry*.

You also assert that a portion of the submitted information consists of "prosecutor's notes and communications to and from the prosecutor." You state that "[t]he notes and communications were prepared by an attorney representing the state in the course of

preparing for criminal litigation." We agree that this information, which you have marked, is protected by the attorney work-product privilege, and the district attorney may withhold that information under section 552.108.[2]

You assert that the remaining records contain fingerprint information that is excepted from public disclosure under section 552.101 of the Government Code. 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. This section encompasses information protected by other statutes. Chapter 560 of the Government Code provides that a governmental body may not release fingerprint information except in certain limited circumstances. *See id.*§§ 560.001 (defining "biometric identifier" to include fingerprints), 560.002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), 560.003 (biometric identifiers in possession of governmental body exempt from disclosure under the Act). You do not inform us that section 560.002 permits the disclosure of the submitted fingerprint information. Therefore, the district attorney must withhold the marked fingerprint information under section 552.101 in conjunction with section 560.003 of the Government Code.

Criminal history record information ("CHRI") obtained from the National Crime Information Center ("NCIC") or the Texas Crime Information Center ("TCIC") is confidential under federal and state law. Federal law governs the dissemination of CHRI obtained from the NCIC network. Federal regulations prohibit the release to the general public of CHRI that is maintained in state and local CHRI systems. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given.") and (c)(2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."); *see also* Open Records Decision No. 565 at 10-12 (1990). The federal regulations allow each state to follow its own individual law with respect to CHRI that it generates. *See* ORD 565 at 10-12. Sections 411.083(b)(1) and 411.089(a) of the Government Code 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. *See* Gov't Code § 411.089(b). Any CHRI generated by the federal government or another state may be disclosed only in accordance with the federal regulations. Any CHRI obtained from the DPS or another criminal justice agency must be withheld as provided by subchapter F of chapter 411 of the Government Code. However, the definition of CHRI does not include driving record information maintained by DPS under chapter 521 of the Transportation Code. *See id.* § 411.082 (2)(B). Upon review, we agree that some of the information you seek to withhold is CHRI obtained from NCIC or TCIC, and must, therefore, be withheld under section 552.101 in conjunction with chapter 411. We find, however, that the remaining

[2]As we are able to make this determination, we do not address your remaining claims for this information.

information you seek to withhold is not CHRI subject to chapter 411, and it may not be withheld under section 552.101 on that basis. *Id.* Accordingly, we have marked the CHRI that the district attorney must withhold under section 552.101 of the Government Code.

You also seek to withhold some of the remaining records under section 552.101 in conjunction with article 20.02 of the Code of Criminal Procedure, which provides in part that "[t]he proceedings of the grand jury shall be secret." Crim. Proc. Code art. 20.02(a). The information at issue was compiled by the district attorney during the course of a criminal case and presented to a grand jury. We find that the information at issue does not reveal the deliberations of the grand jury merely because it was presented to the grand jury by the district attorney. We therefore conclude that the district attorney may not withhold any of the information at issue under section 552.101 in conjunction with section 20.02(a) of the Code of Criminal Procedure. *Cf.* ORD 513 at 4 (fact that information collected or prepared by another person or entity is submitted to grand jury does not necessarily mean that such information is in grand jury's constructive possession when the same information is also held in other person's or entity's own capacity).

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types 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. In addition, this office has found that an individual's criminal history when compiled by a governmental body may be protected under common-law privacy. *Cf. United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989).

In Open Records Decision No. 169 (1977), this office also recognized that information that would ordinarily be subject to disclosure may be withheld under section 552.101 in conjunction with common-law privacy on a showing of "special circumstances." This office considers such "special circumstances" to refer to a very narrow set of situations in which release of the information at issue would likely cause someone to face "an imminent threat of physical danger." ORD 169 at 6. "Special circumstances" do not include "a generalized and speculative fear of harassment or retribution." *Id.*

Upon review, we find that some of the information is highly intimate or embarrassing and is not of legitimate public concern. Therefore, the district attorney must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The district attorney has failed to demonstrate, however, how the remaining information you have marked under section 552.101 in conjunction with common-law privacy is highly intimate or embarrassing and not of legitimate public interest. *Cf.* Gov't Code § 411.082(2) (definition of criminal history record information does not

include driving record information); Open Records Decision No. 611 at 1 (1992) (family violence is a crime, not a private matter). Furthermore, the district attorney has not established that release of any of the information at issue would cause an individual to face imminent threat of physical danger. Accordingly, you may not withhold the remaining information you have marked under section 552.101 in conjunction with common-law privacy.

Finally, you assert that some of the remaining information is excepted under section 552.130 of the Government Code, which provides that information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1), (2). We agree that the district attorney must withhold the Texas motor vehicle record information you have marked under section 552.130.[3] We have marked some additional information that must be withheld under section 552.130.

In summary, the district attorney must withhold or release the sexual offender registry information in accordance with article 62.005(b) of the Code of Criminal Procedure. The prosecutor's work product may be withheld under section 552.108 of the Government Code. The district attorney must withhold the information we have marked under section 552.101 of the Government Code in conjunction with (1) section 560.002 of the Government Code, (2) chapter 411 of the Government Code, and (3) common-law privacy. Texas motor vehicle record information must be withheld under section 552.130 of the Government Code. The remaining submitted information must be released to the requestor.

Although you request a previous determination regarding Texas motor vehicle record information, we decline to issue one at this time. Accordingly, 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).

---

[3]As our ruling is dispositive, we do not address your other arguments to withhold this information.

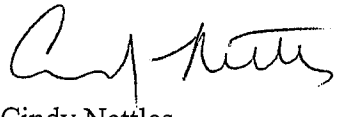
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/mcf

Ref: ID# 305975

Enc. Submitted documents

c: Ms. Jani Maselli
808 Travis Street, 24th Floor
Houston, Texas 77002
(w/o enclosures)