



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 14, 2008

Mr. John Couch
Assistant District Attorney
33rd & 424th Judicial District
P.O. Box 725
Llano, Texas 78643

OR2008-04924

Dear Mr. Couch:

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# 307351.

The 33rd and 424th Judicial District Attorney's Office (the "district attorney") received a request for the entire prosecution file pertaining to a named individual.¹ You claim that the submitted prosecution file is excepted from disclosure under section 552.222 of the Government Code. We note, however, that section 552.222 does not constitute an exception to disclosure, and is procedural in nature. *See* Gov't Code § 552.301(a) (noting that exceptions to disclosure under the Act are found at subchapter C of chapter 552 of the Government Code). Alternatively, you claim the submitted information is excepted from disclosure under sections 552.101, 552.111, 552.130, and 552.132 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that a portion of the submitted prosecution file documents were obtained pursuant to a grand jury subpoena. The judiciary is expressly excluded from the requirements of the Act. *See id.* § 552.003(1)(B). This office has determined that a grand jury, for purposes of the Act, is a part of the judiciary and is therefore not subject to the Act. *See* Open Records Decision No. 411 (1984). Further, records kept by another person or entity acting as an agent for a grand jury are considered to be records in the constructive

¹As you have not submitted a copy of the request, we take our description from your brief.

possession of the grand jury and therefore are not subject to the Act. *See* Open Records Decisions Nos. 513 (1988), 398 (1983). *But see* ORD 513 at 4 (defining limits of judiciary exclusion). The fact that information collected or prepared by another person or entity is submitted to the grand jury does not necessarily mean that such information is in the grand jury's constructive possession when the same information is also held in the other person's or entity's own capacity. Information held by another person or entity but not produced at the direction of the grand jury may well be protected under one of the Act's specific exceptions to disclosure, but such information is not excluded from the reach of the Act by the judiciary exclusion. *See* ORD 513. Thus, the submitted medical records that were obtained pursuant to a grand jury subpoena are in the grand jury's constructive possession and are not subject to the Act. This decision does not address the public availability of such information. The remaining submitted information, however, is subject to the Act, and must be released unless it falls within an exception to public disclosure.

Next, we must address the district attorney's procedural obligations under the Act. Pursuant to section 552.301(e) of the Government Code, the governmental body is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See* Gov't Code § 552.301(e). The district attorney states it received the request for information on January 24, 2008. However, as of the date of this ruling, the district attorney has not submitted a copy of the written request for information. Furthermore, you have not submitted any comments explaining how the claimed exceptions apply to the submitted prosecution file. We therefore find that the district attorney has failed to comply with the requirements of section 552.301(e).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Normally, a compelling interest is demonstrated when some other source of law makes the information at issue confidential or third-party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). You raise section 552.111 of the Government Code as an exception to disclosure of the submitted information. This exception, however, is discretionary in nature. It serves only to protect a governmental body's interests and may be waived. As such, it does not constitute a compelling reason to withhold information for purposes of section 552.302. *See* Open Records Decision Nos. 677 at 10 (2002) (attorney

work-product privilege under section 552.111 is not compelling reason to withhold information under section 552.302), 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (governmental body may waive section 552.111), 470 (1987) (statutory predecessor to section 552.111 is discretionary exception). Accordingly, the district attorney may not withhold any of the submitted prosecution file pursuant to section 552.111. Because sections 552.101, 552.130, and 552.132, however, can provide compelling reasons to withhold information, we will consider whether or not these exceptions are applicable to the submitted information.

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 exception encompasses information that another statute makes confidential. We note that the submitted prosecution file includes accident report forms that appear to have been completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer’s accident report). Section 550.065(b) of the Transportation Code states that except as provided by subsection (c), accident reports are privileged and confidential. Section 550.065(c)(4) provides for the release of accident reports to a person who provides two of the following three items of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *See id.* § 550.065(c)(4). Under this provision, the Texas Department of Transportation or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more of the items of information specified by the statute.² *Id.* In the present request, the requestor has not provided the required information. Accordingly, the district attorney must withhold the submitted accident report forms, which we have marked, pursuant to section 552.101 in conjunction with 550.065(b) of the Transportation Code.

Section 552.101 also encompasses chapter 773 of the Health and Safety Code, which pertains to emergency medical service (“EMS”) records. Access to EMS records is governed by the provisions of section 773.091 of the Health and Safety Code. *See* Open Records Decision No. 598 (1991). Section 773.091 provides in part:

(b) Records of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

...

² Transp. Code § 550.0601 (“department” means Texas Department of Transportation).

(g) The privilege of confidentiality under this section does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services.

Health & Safety Code § 773.091(b), (g). We have marked the documents in the submitted information that constitute confidential EMS records. We note, however, that records that are confidential under section 773.091 may be disclosed to “any person who bears a written consent of the patient or other persons authorized to act on the patient’s behalf for the release of confidential information.” Health & Safety Code §§ 773.092(e)(4), .093. Among the individuals authorized to act on the patient’s behalf in providing written consent is a “personal representative” if the patient is deceased. *Id.* Section 773.093 provides that a consent for release of EMS records must specify: (1) the information or records to be covered by the release; (2) the reasons or purpose for the release; and (3) the person to whom the information is to be released. Thus, the district attorney must withhold the marked EMS records under section 552.101 of the Government Code in conjunction with section 773.091 of the Health and Safety Code, except as specified by section 773.091(g). However, the district attorney must release the EMS records on receipt of proper consent under section 773.093(a). *See id.* §§ 773.092, .093.

Section 552.101 also encompasses section 560.003 of the Government Code, which provides that “[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act].” *Id.* § 560.003; *see id.* § 560.001(1) (“biometric identifier” means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry). We have marked fingerprints in the submitted prosecution documents that are confidential under section 560.003. There is no indication that the requestor has a right of access to the fingerprints under section 560.002. *See id.* § 560.002(1)(A) (governmental body may not sell, lease, or otherwise disclose individual’s biometric identifier to another person unless the individual consents to disclosure). Therefore, the district attorney must withhold the marked fingerprints under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code.

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). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate and embarrassing. *See* Open Records Decision Nos. 545 (1990), 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information). The credit report information we have marked in the remaining information constitutes personal financial information. Further, we find that there is not a

legitimate public interest in the release of this information. Accordingly, the district attorney must withhold the credit report information we have marked under section 552.101 in conjunction with common-law privacy.

You assert that portions of the remaining information are excepted from disclosure under section 552.130 of the Government Code, which excepts from public disclosure information that relates to a driver's license or motor vehicle title or registration issued by an agency of this state. Gov't Code § 552.130. We note, however, that section 552.130 does not apply to out-of-state motor vehicle record information. We have marked Texas motor vehicle record information in the remaining documents. We also note that the submitted audio and video recordings contain Texas license plate numbers. Thus, the district attorney must withhold the Texas motor vehicle record information that we have marked, as well as the Texas license plate numbers contained in the audio and video recordings, under section 552.130 of the Government Code.

Section 552.132 of the Government Code provides:

(a) Except as provided by Subsection (d), in this section, "crime victim or claimant" means a victim or claimant under Subchapter B, Chapter 56, Code of Criminal Procedure, who has filed an application for compensation under that subchapter.

(b) The following information held by the crime victim's compensation division of the attorney general's office is confidential:

(1) the name, social security number, address, or telephone number of a crime victim or claimant; or

(2) any other information the disclosure of which would identify or tend to identify the crime victim or claimant.

(c) If the crime victim or claimant is awarded compensation under Section 56.34, Code of Criminal Procedure, as of the date of the award of compensation, the name of the crime victim or claimant and the amount of compensation awarded to that crime victim or claimant are public information and are not excepted from [required public disclosure].

(d) An employee of a governmental body who is also a victim under Subchapter B, Chapter 56, Code of Criminal Procedure, regardless of whether the employee has filed an application for compensation under that subchapter, may elect whether to allow public access to information held by the attorney general's office or other governmental body that would identify or tend to

identify the victim, including a photograph or other visual representation of the victim.[]

(e) If the employee fails to make an election under Subsection (d), the identifying information is excepted from disclosure until the third anniversary of the date the crime was committed. In case of disability, impairment, or other incapacity of the employee, the election may be made by the guardian of the employee or former employee.

Id. § 552.132. Although you assert that victims' social security numbers in the remaining documents are excepted under section 552.132, you have not submitted any arguments explaining how section 552.132 applies to the submitted information. *Id.* § 552.301(e) (governmental body must provide comments explaining why exceptions raised should apply to information requested). We therefore conclude that the district attorney may not withhold the social security numbers in the remaining information under section 552.132 of the Government Code.

Finally, we note that the remaining information contains credit card numbers, bank account numbers, and an insurance policy number, which we have marked, that are subject to section 552.136 of the Government Code.³ Section 552.136 states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b). We note, however, that the purpose of section 552.136 is to protect the privacy interests of individuals, and because the right of privacy lapses at death, the credit card numbers of a deceased individual may not be withheld under section 552.136. *See Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489, 491 (Tex. App—Texarkana 1979, writ ref'd n.r.e.) (Texas does not recognize relational or derivative right of privacy). Therefore, unless the marked credit card numbers of the deceased individuals relate to accounts in which a living person has an interest, they are not excepted from disclosure under section 552.136. However, the credit card numbers, bank account numbers, and insurance policy number that pertain to a living person that we have marked must be withheld under section 552.136 of the Government Code.

In summary, the district attorney must withhold under section 552.101 of the Government Code: the accident report forms we have marked in conjunction with section 560.065(b) of the Transportation Code; the EMS records we have marked in conjunction with section 773.091 of the Health and Safety Code, except as specified by section 773.091(g); the fingerprint information that we have marked in conjunction with 560.003 of the Government Code; and the credit reports that we have marked in conjunction with common-

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

law privacy. The district attorney must withhold the Texas motor vehicle record information that we have marked in the submitted documents, as well as the Texas license plate numbers contained in the submitted audio and video recordings, under section 552.130 of the Government Code. The district attorney must withhold the credit card numbers, bank account numbers, and insurance policy number that we have marked pursuant to section 552.136 of the Government Code. However, the credit card numbers belonging to the deceased individuals may only be withheld if they relate to accounts in which a living person has an interest. The remaining information must be released.⁴

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).

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

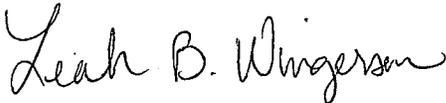
⁴We note that the remaining information to be released contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. *See* Gov't Code § 552.147(b).

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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/eb

Ref: ID# 307351

Enc. Submitted documents

c: Ms. Linda Casnovsky, Adjuster
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