



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 19, 2008

Mr. Bob D. Odom  
Assistant District Attorney  
27th Judicial District of Texas  
P.O. Box 540  
Belton, Texas 76513-0540

OR2008-06772

Dear Mr. Odom:

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# 312223.

The District Attorney for the 27th Judicial District (the "district attorney") received two requests for the prosecution file of a named individual. You state that some of the requested information will be released to the requestors, but claim that the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.130, 552.132, and 552.1325 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

Initially, you inform us that some of the submitted information was submitted to the district attorney "under the assurance of confidentiality." We note that information is not confidential under the Act simply because the party submitting the information to a

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<sup>1</sup>You indicate that the requestors have agreed to allow the district attorney to withhold Texas motor vehicle record information and social security numbers.

<sup>2</sup>We assume that the "representative sample" of records submitted to this office is 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.

governmental body anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). Thus, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the requested information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

You assert that some of the submitted information is excepted under section 552.101 of the Government Code, which excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes. The submitted information contains mental health records of a deceased individual. Chapter 611 of the Health and Safety Code provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) states that “[c]ommunications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.” Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. Health & Safety Code § 611.001(b). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). We have marked the information that constitutes mental health records, and that may only be released in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. *See* Health & Safety Code § 611.004(a)(5) (professional may disclose confidential information to patient’s personal representative if patient is deceased). The remaining information does not consist of mental health records that are subject to chapter 611.

The submitted information also contains medical records of a deceased individual, access to which is governed by the Medical Practice Act (“MPA”). Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides in part as follows:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

*Id.* § 159.002(b), (c). Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *Id.* §§ 159.004, 159.005. Medical records pertaining to a deceased patient may only be released upon the signed consent of the deceased's personal representative. *See id.* § 159.005(a)(5). Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). We have marked the portion of the submitted information that constitutes medical records and that may only be released in accordance with the MPA. Open Records Decision No. 598 (1991). The remaining information does not contain medical records that may be withheld under the MPA.

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. CHRI means "information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions." Gov't Code § 411.082(2). Federal law governs the dissemination of CHRI obtained from the National Crime Information Center network. Federal regulations prohibit the release to the general public of CHRI 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."). 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. *See generally* Gov't Code ch. 411 subch. F. 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 id.* § 411.089(b). We also note that, because the laws governing the dissemination of information obtained from the NCIC or TCIC are based on both law enforcement and privacy interests, the CHRI of a deceased individual that is obtained from the DPS or another criminal justice agency may be disseminated only as permitted by subchapter F of chapter 411 of the Government Code. *See* ORD 565 at 10-12.

Exhibit B consists of CHRI that is confidential under the relevant federal and state law. We note, however, that one of the requestors is an Assistant U.S. Attorney with the U.S. Department of Justice (the "DOJ"). Under the applicable federal and state law, a criminal justice agency may obtain CHRI from another criminal justice agency for a criminal justice purpose. *See* 28 C.F.R. §§ 20.21, 20.33; Gov't Code §§ 411.083, 411.087, 411.089. *See generally* Open Records Decision No. 655 (1997) (discussing limitations on release of CHRI). "Criminal justice agency" includes "a federal or state agency that is engaged in the administration of criminal justice under a statute or executive order and that allocates a substantial portion of its annual budget to the administration of criminal justice." Gov't

Code § 411.082(3)(A). “Criminal justice purpose” includes “an activity that is included in the administration of criminal justice.” *Id.* § 411.082(4)(A). “Administration of criminal justice” has the meaning assigned by article 60.01 of the Code of Criminal Procedure. *Id.* § 411.082(1). Article 60.01 defines “administration of criminal justice” as the “performance of any of the following activities: detection, apprehension, detention, pretrial release, post-trial release, prosecution, adjudication, correctional supervision, or rehabilitation of an offender.” Crim. Proc. Code art. 60.01(1). “The term includes criminal identification activities and the collection, storage, and dissemination of criminal history record information.” *Id.* art. 60.01(1).

The DOJ appears to be a criminal justice agency that is engaged in the administration of criminal justice; however, we are unable to determine whether the DOJ seeks access to the CHRI for a criminal justice purpose. Therefore, the district attorney must withhold Exhibit B under section 552.101 of in conjunction with federal law and chapter 411 of the Government Code; however, the district attorney may provide this information to the DOJ if the district attorney determines that the DOJ intends to use this information for a criminal justice purpose.

Exhibit C contains juror questionnaires. Juror questionnaires are made confidential under section 62.0132 of the Government Code. This provision authorizes the Office of Court Administration of the Texas Judicial System to create a standardized juror questionnaire form to be used in courts throughout the state. Gov’t Code § 62.0312(a). Section 62.0132 (f) states that a completed questionnaire is confidential and not subject to the Act. The questionnaires in Exhibit C are standardized juror questionnaires that have been completed. Therefore, Exhibit C must be withheld under section 552.101 in conjunction with section 62.0132 of the Government Code.<sup>3</sup>

You assert that Exhibit E is confidential under article 56.03 of the Code of Criminal Procedure. Article 56.03 provides for the collection of information from a crime victim, the guardian of a victim, or a close relative of a deceased victim and for the use of the information by law enforcement agencies, prosecutors, and other participants in the criminal justice system. *See* Crim. Proc. Code art. 56.03(a)-(b). Article 56.03(f) also provides the following:

The court may not inspect a victim impact statement until after a finding of guilt or until deferred adjudication is ordered and the contents of the statement may not be disclosed to any person unless:

- (1) the defendant pleads guilty or nolo contendere or is convicted of the offense[.]

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<sup>3</sup>As our ruling is dispositive, we do not address your other argument to withhold this information.

*Id.* art. 56.03(f). You inform us that the requested information relates to a case in which the defendant was found guilty; thus, article 56.03(f) would not prohibit the release of the submitted victim information. In addition, after review of your arguments, we find you have not established, and it is not otherwise apparent to this office, how or why article 56.03 would make any of the submitted victim information confidential by law for the purposes of the Act. We therefore conclude that the district attorney may not withhold any of the information in Exhibit E under section 552.101 of the Government Code in conjunction with article 56.03 of the Code of Criminal Procedure.

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. This office has determined that other types of information also are private under section 552.101. *See* Open Records Decision Nos. 659 at 4-5 (1999) (summarizing information attorney general has held to be private), 470 at 4 (1987) (illness from severe emotional job-related stress), 455 at 9 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 343 at 1-2 (1982) (references in emergency medical records to a drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress).

You seek to withhold information relating to the deceased crime victim and his relatives on privacy grounds under section 552.101. Because a person's right to privacy lapses on the person's death, the district attorney may not withhold any of the information at issue on the basis of the decedent's right to privacy. *Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145 (N.D. Tex. 1979); Attorney General Opinions JM-229 (1984); H-917 (1976); Open Records Decision No. 272 (1981). Nevertheless, we have marked information pertaining to other individuals in Exhibit E that the district attorney must withhold under section 552.101 of the Government Code in conjunction with the common-law privacy. The remaining information is not highly intimate or embarrassing; therefore, the remaining information is not confidential under common-law privacy, and the district attorney may not withhold it on that ground.

You claim that Exhibits D and E are excepted from disclosure under section 552.108 of the Government Code. Section 552.108 of the Government Code provides 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 the requirements of Section 552.021 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 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 the requirements of Section 552.021 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 governmental body claiming section 552.108(a)(1) or 552.108(b)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), (b)(1), 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You assert

that Exhibit E is excepted under section 552.108 because “[t]he release of such information would be detrimental to the prosecutor’s efforts to work with and support victims of crime and would interfere with the detection, investigation, and prosecution of crime.” However, you inform us that the submitted information pertains to a prosecution that concluded in conviction, and you have not provided any arguments explaining why the release of Exhibit E would interfere in some way with the detection, investigation, or prosecution of crime. Thus, you have not met your burden under section 552.108(a)(1) or 552.108(b)(1). A governmental body claiming section 552.108(a)(2) or 552.108(b)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. Because the information pertains to a conviction, you have not met your burden under section 552.108(a)(2) or 552.108(b)(2). Section 552.108(a)(3) is also inapplicable as the submitted information does not relate to a threat against a police officer. *See Gov’t Code § 552.108(a)(3)*. You state that Exhibit D “contains a summary of what the prosecutor deemed significant in the testimony of each witness, her notes on the prospective jurors, and her mental impressions of what was or was not significant testimony” and that this information “clearly reflects her mental impressions, as well as her mental reasoning.” Based on these representations and our review of the information at issue, we agree that Exhibit D was prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation or reflects the mental processes or legal reasoning of an attorney representing the state. Accordingly, the district attorney may withhold Exhibit D under section 552.108(a)(4) of the Government Code. However, you have not provided any arguments explaining the applicability of section 552.108(a)(4) to Exhibit E; therefore, the district attorney may not withhold Exhibit E on that ground.

You assert that the remaining information in Exhibit E is excepted under section 552.132 of the Government Code, which provides in relevant part the following:

(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.

...

(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.

Gov't Code § 552.132(b), (d). Exhibit E is held by the district attorney, and not the crime victim's compensation division of this office; therefore, section 552.132(b) is not applicable to this information. Moreover, there is no indication that any of the remaining information involves a victim who is an employee of a governmental body, so as to be subject to section 552.132(d). We therefore conclude that the district attorney may not withhold Exhibit E under section 552.132 of the Government Code.

You also assert that the remaining information in Exhibit E is excepted under section 552.1325 of the Government Code., which provides as follows:

(a) In this section:

(1) "Crime victim" means a person who is a victim as defined by Article 56.32, Code of Criminal Procedure.

(2) "Victim impact statement" means a victim impact statement under Article 56.03, Code of Criminal Procedure.

(b) The following information that is held by a governmental body or filed with a court and that is contained in a victim impact statement or was submitted for purposes of preparing a victim impact statement is confidential:

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

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

Gov't Code § 552.1325. We note that the crime victim to whom this information pertains is deceased. Section 552.1325 protects personal privacy interests, and the victim's right to privacy lapsed at his death. *See Moore*, 589 S.W.2d at 491; *see also Belo Broadcasting Corp.*, 472 F. Supp. at 146-47; ORD 272. We therefore conclude that the district attorney may not withhold the remaining information in Exhibit E under section 552.1325 of the Government Code.

To conclude, the district attorney may only release the marked mental health records in accordance with sections 611.004 and 611.0045 of the Health and Safety Code and the marked medical records in accordance with the MPA. The district attorney must withhold the following under section 552.101 of the Government Code: Exhibit B pursuant to federal law and chapter 411 of the Government Code; Exhibit C pursuant to section 62.0132 of the Government Code; and the information we have marked in Exhibit E under common-law

privacy. However, the district attorney may provide Exhibit B to the DOJ if the district attorney determines that the DOJ intends to use this information for a criminal justice purpose. The district attorney may withhold Exhibit D under section 552.108 of the Government Code. The district attorney must release the remaining information.

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).

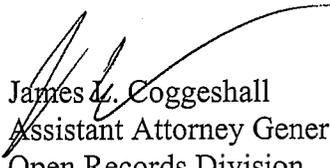
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



James L. Coggeshall  
Assistant Attorney General  
Open Records Division

JLC/jh

Ref: ID# 312223

Enc. Submitted documents

c: Mr. Jeffrey T. Embry  
Hossley Embry  
313 East Charnwood Street  
Tyler, Texas 75701  
(w/o enclosures)

Mr. R. Barry Robinson  
Assistant U.S. Attorney  
U.S. Department of Justice  
816 Congress Avenue, Suite 1000  
Austin, Texas 78701  
(w/o enclosures)