



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 18, 2008

Ms. LeAnn M. Quinn
City Secretary
City of Cedar Park
600 North Bell Boulevard
Cedar Park, Texas 78613

OR2008-09804

Dear Ms. Quinn:

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# 317065.

The City of Cedar Park (the "city") received a request for a copy of three specified PC Affidavits and three specified offense reports. You state that you will release the basic information not excepted from disclosure by section 552.108 of the Government Code. You state that you do not have information responsive to a portion of the request.¹ You seek clarification as to whether the city is required to comply with the request pursuant to section 552.028 of the Government Code.² We have considered your arguments and reviewed the submitted information.

Section 552.028 of the Government Code provides in relevant part:

(a) A governmental body is not required to accept or comply with a request for information from:

¹The Act does not require a governmental body to release information that did not exist when a request for information was received, create responsive information, or obtain information that is not held by or on behalf of the city. *See Econ. Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App. — San Antonio, 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986).

²Although you reference section 552.108 of the Government Code in your brief, you provide no explanation of how this exception is applicable to the submitted information. Therefore, we do not address section 552.108. *See Gov't Code* §§ 552.301, .302.

(1) an individual who is imprisoned or confined in a correctional facility; or

(2) an agent of that individual, other than that individual's attorney when the attorney is requesting information that is subject to disclosure under this chapter.

(b) This section does not prohibit a governmental body from disclosing to an individual described by Subsection (a)(1), or that individual's agent, information held by the governmental body pertaining to that individual.

Gov't Code § 552.028(a)-(b). The requestor indicates that she is the mother of an individual who is currently confined in a correctional facility. The fact that a requestor is related to an imprisoned individual does not in itself establish that the requestor is acting as the agent of the imprisoned individual. Since you have not provided any additional information establishing that the requestor is in fact acting as an agent of an imprisoned individual, we cannot conclude that section 552.028 is applicable in this instance.

Next, we note that the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides in part:

(a) Without limiting the amount or kind of information that is public information under this chapter, 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 consists of a completed investigation that is expressly public under section 552.022(a)(1) unless excepted under section 552.108 of the Government Code or confidential under other law. The city does not claim any exceptions to disclosure in this instance. However, portions of the submitted information are subject to sections 552.101 and 552.130 of the Government Code, which constitute "other law" for the purposes of section 552.022.³ We will therefore consider the aforementioned exceptions as they pertain to the submitted information.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses the doctrine of common-law privacy,

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

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. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both elements of this test must be established. *See id.* at 681-82. A compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (recognizing distinction between scattered public records found in courthouse files and local police stations and compiled summary of information; noting individual has significant privacy interest in compilation of one's criminal history). Furthermore, we find that a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. The submitted information contains compiled law enforcement records of a named individual. Therefore, to the extent the city maintains law enforcement records depicting the named individual as a suspect, arrestee, or criminal defendant, any such information is protected by common-law privacy under section 552.101 of the Government Code, and the city must withhold such information, which we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses 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 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 DPS maintains, except that 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. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. We note that section 411.083 does not apply to active warrant information. *See id.* § 411.081(b) (police department allowed to disclose information pertaining to person's current involvement in the criminal justice system). Therefore, the city must withhold the information we have marked under section 552.101 in conjunction with section 411.083.

Additionally, we note that the submitted information includes DNA analysis information. Section 552.101 encompasses section 411.153 of the Government Code, which provides as follows:

(a) A DNA record stored in the DNA database is confidential and is not subject to disclosure under the open records law, Chapter 552.

(b) A person commits an offense if the person knowingly discloses information in a DNA record or information related to a DNA analysis of a sample collected under this subchapter.

(c) An offense under this section is a state jail felony.

(d) A violation under this section constitutes official misconduct.

Id. § 411.153. A DNA “record” means the results of a forensic DNA analysis performed by a DNA laboratory. *See id.* §§ 411.141(6),(7). “Forensic analysis” is defined as “a medical, chemical, toxicologic, ballistic, or other expert examination or test performed on physical evidence, including DNA evidence, for the purpose of determining the connection of the evidence to a criminal action.” *See* Code Crim. Proc. art. 38.35(4); *see also* Gov’t Code § 411.141(10)(providing “forensic analysis” has meaning assigned by Article 38.35 of the Code of Criminal Procedure). A “DNA database” means “one or more databases that contain forensic DNA records maintained by the director [of public safety of the Department of Public Safety (“DPS”).” Gov’t Code § 411.141(5); *see id.* § 411.001(3).

The DPS director is required to establish certain procedures for DNA laboratories. *See id.* §§ 411.144(a); 411.142(h)(requiring the director to establish standards for DNA analysis). A DNA laboratory conducting a forensic DNA analysis under subchapter G of Chapter 411 shall comply with subchapter G and the rules adopted under this chapter. *See id.* § 411.144(d); 37 T.A.C § 28.82(a). The DPS director has adopted rules that govern the regulation of forensic DNA laboratories in this state. *See* 37 T.A.C. §§ 28.81, 28.82 (describing the minimum standards that a forensic DNA laboratory must abide by); *see also* Gov’t Code § 411.147(b).

In this instance, we note that the DNA information at issue is information from DPS lab reports. We assume that the submitted DNA information concerns DNA records that are the result of a forensic DNA analysis performed by a DNA laboratory in accordance with DPS regulations. Thus, we find that section 411.153(b) of the Government Code applies to portions of the submitted information. To the extent that the submitted DNA information that we have marked is information in a DNA record or information related to a DNA analysis under subchapter G of chapter 411 of the Government Code, the information is confidential under section 411.153(b), and the city must withhold the information under section 552.101.

Finally, we note that portions of the submitted information are subject to section 552.130 of the Government Code. Section 552.130 excepts from disclosure “information [that] relates to . . . a motor vehicle operator’s or driver’s license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state.” Gov’t Code § 552.130. We note, however, that section 552.130 is designed to protect individuals’

privacy and that the right to privacy expires at death. *See Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); *see also Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-47 (N.D. Tex. 1979); Attorney General Opinions JM-229 (1984); H-917 (1976); Open Records Decision No. 272 at 1 (1981). Therefore, Texas driver's license information pertaining to a deceased individual may not be withheld under section 552.130. Accordingly, the city must withhold the Texas motor vehicle record information we have marked pursuant to section 552.130 of the Government Code.

In summary: (1) the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the common-law right to privacy; (2) the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code; (3) to the extent that the submitted DNA information that we have marked is the result of a forensic DNA analysis performed by a DNA laboratory in accordance with DPS regulations, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 411.153(b) of the Government Code; and (4) the city must withhold the Texas motor vehicle record information we have marked pursuant to section 552.130 of the Government Code. The remaining submitted information must be released to the requestor.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). If the governmental body does not file suit over 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

⁴We note that the submitted 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.

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,



Jessica J. Maloney
Assistant Attorney General
Open Records Division

JJM/jh

Ref: ID# 317065

Enc. Submitted documents

c: Ms. Karen Renee Monroe
P.O. Box 224
Spicewood, Texas 78669
(w/o enclosures)