



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

September 15, 2008

Mr. Oscar De La Fuente, Jr.
Attorney Pro Tem
Rio Grande Law Center
501 East Tyler
Harlingen, Texas 78550

OR2008-12653

Dear Mr. De La Fuente:

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# 321679.

The Cameron County Court at Law No. 3 (the "county"), which you represent as Attorney Pro Tem, received a request for all information and documentation maintained by the district attorney's office pertaining to a specific arrest, and any subsequent arrests, of a named individual during a specified time period. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

Initially, we must address the county's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether information is excepted from public disclosure. Pursuant to section 552.301(b) of the Government Code, a governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving

¹We 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.

the request. *See* Gov't Code § 552.301(a), (b). The county received the instant request for information on July 7, 2008. Although you timely raised sections 552.101, 552.103, and 552.111 of the Government Code, you did not raise section 552.108 until July 28, 2008. Violations of section 552.301 result in the waiver of any discretionary exceptions asserted by a governmental body. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Section 552.108 is discretionary in nature and serves only to protect a governmental body's interests. By failing to timely raise section 552.108, the county has waived its claim under this exception. *See* Open Records Decision No. 177 (1977) (statutory predecessor to section 552.108 subject to waiver).

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

(a) 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 contains a completed incident report which is expressly public under section 552.022(a)(1). Although you claim that the submitted information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code, we note that these exceptions to disclosure are discretionary and, therefore, do not make information confidential. *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 No. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived). Accordingly, sections 552.103 and 552.111 are not "other law" for purposes of section 552.022. Thus, the county may not withhold this report under section 552.103 or section 552.111 of the Government Code. However, the attorney work product privilege is also found in 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). However, the Texas Rules of Civil Procedure apply only to "actions of a civil nature." *See* Tex. R. Civ. P. 2. Thus, because the incident report 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 the incident report. You claim, however, that the report is confidential in whole or in part under section 552.101. Therefore, we will address your arguments under this exception.

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 section encompasses information protected by other statutes. Section 261.201(a) of the Family Code provides in relevant part:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). The records at issue relate to an arrest for driving while intoxicated ("DWI"). You do not explain how records pertaining to this DWI investigation are working papers used or developed in an investigation of child abuse or neglect. Accordingly, you have failed to demonstrate that section 261.201 is applicable to the incident report or the other submitted information. Thus the records may not be withheld in their entirety under section 552.101 of the Government Code.

Section 552.101 also encompasses criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC"), which is confidential. 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 the Texas Department of Public Safety ("DPS") maintains, except that the 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. Thus, 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 have marked the information in the incident report that must be withheld under section 552.101 in conjunction with section 411.083 of the Government Code.

Section 552.101 also encompasses the doctrine of common-law privacy. Common-law privacy 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 satisfied. *Id.* at 681-82. 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.

Although you assert that the information in the incident report that identifies the witnesses is private, you provide no arguments explaining how this information is intimate and embarrassing. *See* Gov't Code § 552.301(e). Further, the public has a legitimate interest in knowing the general details of a criminal investigation and how such investigations are conducted. *See generally* *Lowe v. Hearst Communications, Inc.*, 487 F.3d 246, 250 (5th Cir. 2007) (noting a "legitimate public interest in facts tending to support an allegation of criminal activity" (citing *Cinel v. Connick*, 15 F.3d 1338, 1345-46 (1994))). Thus, we conclude that the witness information contained in the incident report is not protected by common-law privacy.

Next, we will address your arguments under section 552.103 for the information that is not subject to section 552.022. Section 552.103 of the Government Code provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The county has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post*

Co., 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, *writ ref'd n.r.e.*); Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See id.*

You state that when the county received this request for information you had been appointed Attorney Pro Tem to investigate and prosecute the individual at issue for DWI. You also state that the submitted investigative documents are related to this criminal litigation. Based on your representations and our review, we find that the investigative documents are related to the pending litigation.

We note, however, that the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that is related to litigation through discovery procedures. *See* ORD 551 at 4-5. If the opposing party has seen or had access to information that is related to pending litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). The documents reflect that the defendant was provided with copies of the citation, the statutory warning, and the notice of suspension temporary driving permit. Because these records have been provided to the defendant, there is no justification in now withholding them pursuant to section 552.103. Therefore, the citation, the statutory warning, and the notice of suspension may not be withheld under section 552.103. It does not appear, however, that the defendant has had access to the remaining records. Accordingly, these records may be withheld under section 552.103 of the Government Code.²

You also argue that the submitted records are attorney work product. Accordingly, we will address whether the citation, the statutory warning, and the notice of suspension may be withheld under section 552.111 of the Government Code. Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. Section 552.111 encompasses the attorney work product privilege found at rule 192.5 of the Texas Rules of Civil Procedure. *See* TEX. R. CIV. P. 192.5; *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines attorney work product as consisting of

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

²The applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5. However, once information has been voluntarily disclosed to a non-privileged party, generally the attorney work product privilege is waived. *See generally* Tex. R. Evid. 511 (stating that a person waives a discovery privilege if he voluntarily discloses the privileged information). As stated above, the citation, the statutory warning, and the notice of suspension have already been provided to the defendant. The county has, therefore, waived its privilege with respect to these documents and they may not be withheld under section 552.111 of the Government Code.

However, the incident report, the citation, the statutory warning, and the notice of suspension contain the defendant's Texas driver's license, license plate number, and vehicle identification number. Section 552.130 of the Government Code excepts from public 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.³ *See id.* § 552.130(a)(1)-(2). The county must withhold the Texas motor vehicle information that we have marked under section 552.130 of the Government Code.

In summary, the county must withhold the information we have marked in the incident report pursuant to section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code. We have marked the motor vehicle information in the incident report, the citation, the statutory warning, and the notice of suspension that must be withheld under section 552.130 of the Government Code. The remaining information in the citation, the statutory warning, and the notice of suspension must be released.⁴ The remaining documents may be withheld under section 552.103 of the Government Code.

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

³The Office of the Attorney General will raise a mandatory exception like section 552.130 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁴We note that the submitted information contains a social security number. Section 552.147(b) of the Government Code authorizes a government 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.

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 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,



Olivia A. Maceo
Assistant Attorney General
Open Records Division

OM/mcf

Ref: ID# 321679

Enc. Submitted documents

c: Mr. Christopher Davis
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(w/o enclosures)