



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 7, 2008

Ms. Donna L. Clarke  
Assistant Criminal District Attorney  
County of Lubbock  
P.O. Box 10536  
Lubbock, Texas 79408-3536

OR2008-15383

Dear Ms. Clarke:

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# 326485.

The Lubbock County District Attorney's Office (the "district attorney") received a request for the offense report, photographs, statements, scientific reports, autopsy report, and expert witness reports related to a specified case. You claim the requested information is excepted from disclosure under sections 552.101, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we acknowledge this office erred in answering the district attorney's question in this matter regarding whether the district attorney could rely on a previous attorney general ruling to withhold the requested information. The district attorney timely complied with section 552.301(b) in requesting a decision from this office. *See* Gov't Code § 552.301(b) (governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request). However, we erroneously told the district attorney it could withhold the information at issue under a previous determination from this office. Based on this answer, the district attorney did not submit the information at issue by the fifteen business day deadline prescribed by section 552.301(e). Because our error resulted in the district attorney not complying with section 552.301(e), we will consider the district attorney's submitted arguments. *See generally* Gov't Code 552.011

(providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of the Act).

Next, we note that the submitted information is subject to section 552.022 of the Government Code, which 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;

*Id.* § 552.022(a)(1). The submitted information pertains to a completed investigation made by the district attorney, which is expressly public under section 552.022(a)(1). While you claim that the submitted information is excepted from disclosure under 552.111 of the Government Code, this section is a discretionary exception to public disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decision No. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived). As such, section 552.111 of the Government Code is not "other law" that makes information confidential for the purposes of section 552.022. Therefore, the district attorney may not withhold any of the submitted information under section 552.111. We note that 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 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. Because information that is subject to section 552.022(a)(1) may be withheld under section 552.108 and mandatory exceptions, we will consider the district attorney's claims under sections 552.101 and 552.108 of the Government Code.

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. Section 552.101 encompasses section 11 of article 49.25 of the Code of Criminal Procedure, which governs the disclosure of autopsy photographs. Section 11 provides as follows:

[t]he medical examiner shall keep full and complete records properly indexed, giving the name if known of every person whose death is investigated, the place where the body was found, the date, the cause and

manner of death, and shall issue a death certificate. The full report and detailed findings of the autopsy, if any, shall be a part of the record. Copies of all records shall promptly be delivered to the proper district, county, or criminal district attorney in any case where further investigation is advisable. The records are subject to required public disclosure in accordance with Chapter 552, Government Code, except that a photograph or x-ray of a body taken during an autopsy is excepted from required public disclosure in accordance with Chapter 552, Government Code, but is subject to disclosure:

(1) under a subpoena or authority of other law; or

(2) if the photograph or x-ray is of the body of a person who died while in the custody of law enforcement.

Code Crim. Proc. art. 49.25, § 11. There is no indication that the exceptions to confidentiality provided in section 11 are applicable in this instance. Therefore, the submitted autopsy photographs are confidential under article 49.25 of the Code of Criminal Procedure and must be withheld under section 552.101 of the Government Code.

You raise section 552.101 of the Government Code in conjunction with common-law privacy, which protects information if it (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. Upon review, we determine that no portion of the remaining information is highly intimate or embarrassing. Therefore, none of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy.

We now address your arguments under 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) represents 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) represents 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 public disclosure under section 552.108 must reasonably explain how and why section 552.108 is applicable to the information. *See id.* § 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*, the Texas Supreme Court held that a district attorney's decision as to what to include in a case file necessarily reveals the attorney's thought processes concerning the prosecution of the case. *See Curry v. Walker*, 873 S.W.2d 379 (Tex. 1994). Accordingly, the court found that the district attorney's entire case file was protected by the attorney work product privilege. *Id.* at 380-81.

You contend that the remaining information is excepted from disclosure under section 552.108 because the information is "contained in the prosecutor's file in question" and "is indeed an internal record relating to prosecution of a crime and was prepared by attorneys representing the State in anticipation of and in the course of preparing for criminal litigation." However, we note that the request is not for the district attorney's entire litigation file. Furthermore, no portion of the remaining information was created by the district attorney. Thus, you have not shown that this information was "prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation." Gov't Code § 552.108(a)(4)(A), (b)(3)(A). Likewise, you have not demonstrated that the information "represents the mental impressions or legal reasoning of an attorney representing the state." *Id.* § 552.108(a)(4)(B), (b)(3)(B). Therefore, as you have not established that the remaining information falls within the scope of either section 552.108(a)(4) or section 552.108(b)(3), we conclude that the district attorney may not withhold any of the remaining information under section 552.108 of the Government Code.

We note that the remaining information contains information subject to section 552.130 of the Government Code.<sup>1</sup> 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. Accordingly, the district attorney must withhold the Texas motor vehicle record information we have marked, as well as the Texas motor vehicle record information contained in the submitted photographs, pursuant to section 552.130 of the Government Code.

In summary, the district attorney must withhold the submitted autopsy photographs pursuant to section 552.101 of the Government Code in conjunction with article 49.25 of the Code of Criminal Procedure. The marked information, as well as the Texas motor vehicle record information contained in the submitted photographs, must be withheld under section 552.130 of the Government Code. The remaining information must be released.<sup>2</sup>

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

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<sup>1</sup>The 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).

<sup>2</sup>We note the remaining information contains a social security number. 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,



Jordan Hale

Assistant Attorney General

Open Records Division

JH/jb

Ref: ID# 326485

Enc. Submitted documents

c: Mr. Gerald E. Bourque  
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(w/o enclosures)