



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 18, 2008

Ms. Jana K. McCown
First Assistant District Attorney
Williamson County, Texas
405 Martin Luther King Street, No. 1
Georgetown, Texas 78626

OR2008-17231

Dear Ms. McCown:

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# 330406.

The Williamson County District Attorney's Office (the "district attorney") received three separate requests for various documents, recordings, and photographs related to a specific criminal investigation. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note section 552.022 of the Government Code is applicable to the information at issue. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[,]" unless

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 information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). In this instance, the information at issue consists of documents, recordings, and photographs that are part of a completed investigation and thus subject to section 552.022(a)(1). Although you claim section 552.103 of the Government Code for this information, section 552.103 is not other law that makes information expressly confidential for the purposes of section 552.022(a)(1). See Gov't Code § 552.007; *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. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the information at issue may not be withheld under section 552.103. However, because section 552.101 is “other law” for the purpose of section 552.022, we will consider the applicability of this exception to the information at issue.

You contend that Exhibit H is confidential pursuant to section 552.101 of the Government Code in conjunction with article 42.12 of the Code of Criminal Procedure. Section 552.101 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. Article 42.12 of the Code of Criminal Procedure provides in relevant part:

(j) The judge by order may direct that any information and records that are not privileged and that are relevant to a report required by Subsection (a) or Subsection (k) of this section be released to an officer conducting a presentence investigation under Subsection (i) of this section or a postsentence report under Subsection (k) of this section. The judge may also issue a subpoena to obtain that information. A report and all information obtained in connection with a presentence investigation or postsentence report are confidential and may be released only:

(1) to those persons and under those circumstances authorized under Subsections (d), (e), (f), (h), (k), and (l) of this section;

(2) pursuant to Section 614.017, Health and Safety Code; or

(3) as directed by the judge for the effective supervision of the defendant.

Crim. Proc. Code art. 42.12 § 9(j). Accordingly, the presentence investigation report in Exhibit H must be withheld under section 552.101 of the Government Code in conjunction with article 42.12 of the Code of Criminal Procedure.

Section 552.101 also encompasses the doctrine of common-law privacy, 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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type 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. In Open Records Decision No. 339 (1982), we concluded that a sexual assault victim has a common-law privacy interest which prevents disclosure of information that would identify the victim. *See also Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information). Generally, only the information that either identifies or tends to identify a victim of sexual assault or other sex-related offense must be withheld under common-law privacy; however, a governmental body is required to withhold an entire report when identifying information is inextricably intertwined with other releasable information or when the requestor knows the identity of the alleged victim. *See* Open Records Decisions Nos. 393 (1983), 339 (1982); *see also* Open Records Decision No. 440 (1986). In this instance, the requestor in the request marked Exhibit B knows the identity of the sexual assault victim. Therefore, withholding only the individual's identity or certain details of the incident from this requestor would not preserve the subject individual's common-law right of privacy. Accordingly, the district attorney must withhold the remaining information in its entirety from the Exhibit B requestor pursuant to section 552.101 in conjunction with common-law privacy. There is no indication that the remaining two requestors know the identity of the victim. Therefore, withholding only the victim's identifying information from the Exhibit A and Exhibit C requestors is sufficient to protect the victim's privacy.

Next, we note the victim utilizes a pseudonym throughout the written report, but is identified in the audio and video recordings at issue. We note the use of a pseudonym sufficiently protects the victim's privacy in the written report. However, we note the written report contains information that reveals the identity of an additional alleged sexual assault victim. Accordingly, the district attorney must withhold from the Exhibit A and Exhibit C requestors the information we have marked pertaining to the additional victim in the written report, as well as the original victim's identifying information contained in the audio and video recordings at issue, pursuant to section 552.101 in conjunction with common-law privacy. We note that the victim's voice in the audio and video recordings is considered identifying information that must be withheld.

Further, we find a compilation of an individual's criminal history is also 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) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that 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. Thus,

the district attorney must also withhold the criminal history record information from within the audio and video recordings under section 552.101 in conjunction with common-law privacy.

However, we find that there is a legitimate public interest in the remaining information. The information at issue relates to the conduct of a police officer. As this office has frequently stated, such information is generally a matter of legitimate public interest. *See, e.g.*, Open Records Decision Nos. 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of governmental employees, particularly those involved in law enforcement), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest). Accordingly, none of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy.

We note that portions of the remaining information may be subject to section 552.1175 of the Government Code.² This section provides in part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure;

...

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(a), (b). We have marked information in the submitted documents that may be subject to section 552.1175. We note that the submitted photographs and video

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

recordings also contain information that may be subject to section 552.1175. To the extent this information pertains to a currently licensed peace officer who elects to restrict access to this information in accordance with section 552.1175(b), it must be withheld.³

We further note that the remaining information contains information subject to section 552.130 of the Government Code. This section excepts from disclosure information relating to a Texas motor vehicle driver's license and registration information. Gov't Code § 552.130. The district attorney must withhold the Texas driver's license and license plate information from the documents, audio and video recordings, and photographs under section 552.130 of the Government Code.

In summary, (1) the district attorney must withhold the presentence report in Exhibit H under section 552.101 of the Government Code in conjunction with article 42.12 of the Code of Criminal Procedure; (2) the district attorney must withhold the remaining information from the Exhibit B requestor pursuant to section 552.101 in conjunction with common-law privacy. With respect to the Exhibit A and Exhibit C requestors, (3) the district attorney must withhold the identifying information we have marked in the submitted documents of an additional alleged sexual assault victim under section 552.101 in conjunction with common-law privacy; (4) the district attorney must withhold the victim's identifying information, including her voice, and the criminal history record information found within the audio and video recordings pursuant to section 552.101 in conjunction with common-law privacy; (5) if the personal information in the submitted documents, photographs, and video recordings belongs to a currently licensed peace officer who makes an election to restrict public access to his personal information, the district attorney must withhold this information under section 552.1175 of the Government Code; and (6) the district attorney must withhold the Texas driver's license and license plate information from the documents, audio and video recordings, and photographs under section 552.130 of the Government Code. The remaining information must be released. We note, however, that if the district attorney lacks the technical capability to redact the information subject to sections 552.101, 552.1175, and 552.130 in the audio and video recordings at issue, the district attorney must withhold the recordings in their entirety. *See* Open Records Decision No. 364 (1983).

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

³This information contains social security numbers. Regardless of the applicability of section 552.1175 of the Government Code, section 552.147(b) 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.

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,



Christopher D. Sterner
Assistant Attorney General
Open Records Division

CDSA/eb

Ref: ID# 330406

Enc. Submitted documents

c: Requestors
(w/o enclosures)