



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 29, 2009

Ms. Evelyn Njuguna
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2009-01186

Dear Ms. Njuguna:

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# 333463.

The Houston Police Department (the "department") received a request for all information relating to a specified incident. You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.130, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the information you have submitted.

Initially, we address your assertion that Exhibit 4 is not subject to disclosure under the Act. The judiciary is expressly excluded from the requirements of the Act. *See* Gov't Code § 552.003(1)(B). This office has determined that a grand jury, for purposes of the Act, is a part of the judiciary and therefore not subject to the Act. *See* Open Records Decision No. 411 (1984). Further, records kept by another person or entity acting as an agent for a grand jury are considered to be records in the constructive possession of the grand jury and therefore are not subject to the Act. *See* Open Records Decisions Nos. 513 (1988), 411 (1984), 398 (1983). *But see* Open Records Decision No. 513 at 4 (1988) (defining limits of judiciary exclusion). The fact that information collected or prepared by another person or entity is submitted to the grand jury does not necessarily mean that such information is in the grand jury's constructive possession when the same information is also held in the other

person's or entity's own capacity. Information held by another person or entity but not produced at the direction of the grand jury may well be protected under one of the Act's specific exceptions to disclosure, but such information is not excluded from the reach of the Act by the judiciary exclusion. *See* Open Records Decision No. 513 (1988).

You inform us that the information in Exhibit 4 was obtained pursuant to grand jury subpoenas. You also state the department collected this information at the direction of the grand jury, as its agent. Based on your representations, we agree that the information in Exhibit 4 is not subject to the Act.¹ This decision does not address the public availability of such information.

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. Section 552.101 encompasses information protected by other statutes. Chapter 411 of the Government Code deems confidential criminal history record information ("CHRI") generated by the National Crime Information Center or the Texas Crime Information Center. 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." *Id.* § 411.082(2). 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 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. Upon review of Exhibit 3, we find a portion of it contains CHRI that is confidential under chapter 411. Therefore, the department must withhold the information we have marked in Exhibit 3 under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code. The remaining information contained in Exhibit 3, however, does not constitute CHRI generated by either the TCIC or NCIC databases. Therefore, the remaining information in Exhibit 3 is not confidential under section 411.083 and, thus, it may not be withheld under section 552.101 on that basis.

Section 552.101 also 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 public information law, Chapter 552.

¹As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

(b) A person commits an offense if the person knowingly discloses to an unauthorized recipient 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* Crim. Proc. Code art. 38.35(4); *see also* Gov’t Code § 411.141(10) (providing that “forensic analysis” has meaning assigned by Crim. Proc. Code art. 38.35). A “DNA database” means “one or more databases that contain forensic DNA records maintained by the director of the [DPS].” Gov’t Code § 411.141(5); *see id.* § 411.001(3).

The director of the DPS is required to establish certain procedures for DNA laboratories. *See id.* §§ 411.144(a), .142(h) (requiring director to establish standards for DNA analysis). Section 411.144 of the Government Code provides that a DNA laboratory conducting a forensic DNA analysis under subchapter G of chapter 411 shall comply with subchapter G and the rules adopted under subchapter G. *See id.* § 411.144(d); 37 T.A.C § 28.82(a). The director of the DPS has adopted rules that govern the regulation of forensic DNA laboratories in this state. *See* 37 T.A.C. §§ 28.81, .82 (describing minimum standards by which a forensic DNA laboratory must abide); *see also* Gov’t Code § 411.147(b). The director of the DPS may release a DNA record in certain instances, including to a criminal justice agency for criminal justice or law enforcement purposes. *See id.* § 411.147(c).

In this instance, some of the remaining information consists of DNA records relating to DNA analyses of samples collected under subchapter G of chapter 411 of the Government Code. The information in question is contained in the department’s file related to a criminal case. The information we have marked appear to be the result of forensic DNA analyses performed by a DNA laboratory in accordance with DPS regulations. Thus, we conclude the department must withhold the DNA records we have marked under section 552.101 of the Government Code in conjunction with section 411.153 of the Government Code.

Section 552.101 also encompasses common-law privacy. For information to be protected from public disclosure by the common-law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976). In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information

contains highly intimate or embarrassing facts, the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685. This office has found 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) (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. Upon review of the remaining information, we find that portions of it are highly intimate or embarrassing and not of legitimate public concern. Therefore the department must withhold the information we have marked under section 552.101 in conjunction with common-law privacy.

Next, you claim section 552.130 for portions of the remaining information. Section 552.130 of the Government Code 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. Section 552.130 protects privacy interests. Privacy is a purely personal right that lapses at death. *See Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex.App.—Texarkana 1979, writ ref'd n.r.e.); Open Records Decision No. 272 at 1 (1981). Therefore, Texas motor vehicle record information pertaining to a deceased individual may not be withheld under section 552.130. We are uncertain whether a living individual owns an interest in a portion of the vehicle information we have marked. Thus, if a living individual does own an interest in this vehicle information, then it must be withheld under section 552.130. If only the deceased individual owns an interest in this marked vehicle information, it may not be withheld. The department must, however, withhold the remaining Texas motor vehicle record information we have marked under section 552.130 because it pertains to living individuals.

We note the remaining information contains information that may be subject to section 552.136 of the Government Code.² Section 552.136 states "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. An access device number is one that may be used to "(1) obtain money, goods, services, or another thing of value; or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument." *Id.* We note, however, that the purpose

²The 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).

of section 552.136 is to protect the privacy interests of individuals, and because the right of privacy lapses at death, the account numbers of a deceased individual may not be withheld under section 552.136. *Moore*, 589 S.W.2d at 489. We are unable to determine if a living individual has an interest in the account numbers we have marked. Therefore, if the marked credit card numbers pertain solely to the accounts of a deceased individual they are not excepted from disclosure under section 552.136 and must be released. However, if the marked account numbers pertain to accounts in which a living person has an interest, they must be withheld under section 552.136 of the Government Code.

Finally, you claim section 552.147 of the Government Code for portions of the remaining information. Section 552.147 provides that “[t]he social security number of a living person is excepted from” required public disclosure under the Act. We note one of the social security numbers you have marked pertains to a deceased individual. By its terms, section 552.147 is not applicable to the social security number of a deceased individual. Therefore, the department may only withhold social security numbers pertaining to living persons under section 552.147.³

In summary, Exhibit 4 is not subject to the Act and need not be released. The department must withhold the CHRI we have marked under section 552.101 in conjunction with section 411.083 of the Government Code and common-law privacy. The department also must withhold the DNA records we have marked under section 552.101 in conjunction with section 411.153 of the Government Code. If a living individual owns an interest in the Texas vehicle information we have marked, then it, and the remaining Texas motor vehicle record information we have marked, must be withheld under section 552.130. The department must withhold the marked account numbers under section 552.136, if they pertain to accounts in which a living person has an interest. The department may withhold the social security numbers pertaining to living persons under section 552.147. The remaining information must be released.

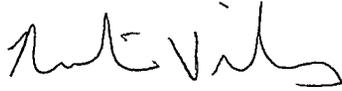
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public

³We note that 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.

information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

A handwritten signature in black ink, appearing to read 'Melanie J. Villars', written in a cursive style.

Melanie J. Villars
Assistant Attorney General
Open Records Division

MJV/eeg

Ref: ID# 333463

Enc. Submitted documents

c: Requestor
(w/o enclosures)