



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

October 5, 2009

Mr. Rene M. Pena  
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81st Judicial District  
1327 3rd Street  
Floresville, Texas 78114

OR2009-13982

Mr. Rene M. Pena:

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# 355899.

The District Attorney of the 81st Judicial District (the "district attorney") received three requests from the same requestor for written or electronic communications to and from the district attorney's office related to the district attorney's investigation of two named individuals; documents related to the Texas Rangers' 2008 investigation of the Karnes County Treasurer's office; and all e-mails sent and received by the district attorney's office within a specified time period. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.111, 552.117, 552.134, 552.136, 552.137, 552.139, and 552.140 of the Government Code. We have considered your arguments and reviewed the submitted representative sample of information.<sup>1</sup>

You claim that Appendices A, AAAAA, F, G, I, and L are excepted from disclosure under section 552.108(a)(1) of the Government Code.<sup>2</sup> Section 552.108(a)(1) provides in part:

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<sup>1</sup>We assume 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 those records contain substantially different types of information than that submitted to this office.

<sup>2</sup>Although you also claim section 552.108(a) of the Government Code for Appendix D, you have not submitted arguments explaining how this exception applies to the information at issue. Therefore, we presume you no longer assert this exception for Appendix D. *See* Gov't Code §§ 552.301, .302.

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

- (1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]

Gov't Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with that governmental body's law enforcement or prosecutorial interests. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). This office has concluded, however, if the custodian of records does not have a law enforcement or prosecutorial interest in the information, it must provide a representation from the governmental body with the law enforcement interest that release of the information will interfere with that agency's law enforcement interest. *See Open Records Decision Nos. 474 at 4-5 (1987)* (where incident involving allegedly criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information relating to incident). Documents G-1 through G-6 are communications from employees of various district attorney's offices throughout the state concerning bond issues. You do not provide any arguments explaining how release of documents G-1 through G-6 would interfere with any specific case the district attorney is prosecuting or how release would otherwise interfere with the law enforcement or prosecutorial interests of your office. Furthermore, you have not submitted a representation from any other governmental body explaining how release will interfere with that agency's law enforcement or prosecutorial interests. Consequently, you have failed to demonstrate the applicability of section 552.108(a)(1) to documents G-1 through G-6. Accordingly, documents G-1 through G-6 may not be withheld under section 552.108(a)(1).

You assert that Appendix I is related to a military investigation. As we have previously stated, a governmental body asserting section 552.108(a)(1) must either demonstrate that it has a law enforcement or prosecutorial interest in the information it seeks to withhold or must provide a representation from a governmental body with such an interest. You do not assert that the district attorney has a law enforcement or prosecutorial interest in Appendix I. Furthermore you have not submitted a representation from any other law enforcement entity explaining how release of Appendix I will interfere with that agency's detection, investigation, or prosecution of this matter. Consequently, you have failed to demonstrate the applicability of section 552.108(a)(1) to Appendix I. Accordingly, Appendix I may not be withheld under section 552.108(a)(1).

You assert that Appendices A, AAAAA, F, L, and documents G-7 through G-14 relate to cases that are currently indicted or pending indictment and will be prosecuted by the district attorney. Because you have demonstrated that the release of this information would interfere with the district attorney's prosecutorial interests, you have demonstrated the applicability

of section 552.108(a)(1) to this information. See *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), writ ref'd n.r.e., 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases).

However, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle*. Thus, with the exception of basic information in Appendix L, the district attorney may withhold Appendices A, AAAAA, F, L, and documents G-7 through G-14 under section 552.108(a)(1).<sup>3</sup>

You claim that Appendix D and documents G-1 through G-6 are excepted under section 552.108(b)(1).<sup>4</sup> Section 552.108(b)(1) excepts from required public disclosure an internal record of a law enforcement agency maintained for internal use in matters relating to law enforcement or prosecution if “release of the internal record or notation would interfere with law enforcement or prosecution.” Gov't Code § 552.108(b)(1). A governmental body that seeks to withhold information under section 552.108(b)(1) must sufficiently explain how and why the release of the information would interfere with law enforcement and crime prevention. See *id.* § 552.301(e)(1)(A); *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.) (section 552.108(b)(1) protects information that, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws); Open Records Decision Nos. 562 at 10 (1990), 531 at 2 (1989). Documents G-1 through G-6 are communications between employees of other district attorney's offices throughout the state regarding general bond issues. None of the communications reveal any information particular to your office. You have not explained how the release of information about other offices would interfere with the district attorney's law enforcement or prosecutorial interests. Consequently, you have failed to demonstrate the applicability of section 552.108(b)(1) to documents G-1 through G-6. Accordingly, this information may not be withheld under section 552.108(b)(1).

You also assert that Appendix D relates to drug interdiction procedure followed by the district attorney's drug interdiction officer and that release of this information would hinder the ability of the district attorney to investigate and prosecute drug crimes. A small portion of Appendix D is substantive information relating to the drug interdiction procedure. This

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of the information in Appendices A, AAAAA, F, L, and documents G-7 through G-14, except to note that basic information may generally not be withheld from public disclosure under section 552.103. Open Records Decision No. 597 (1991).

<sup>4</sup>Although you also generally claim section 552.108(b) of the Government Code for Appendix I, you have not submitted arguments explaining how this exception applies to the information at issue. Therefore, we presume you no longer assert this exception for Appendix I. See Gov't Code §§ 552.301, .302.

information, which we have marked, may be withheld under section 552.108(b)(1). However, the remaining information in Appendix D consists of e-mail addresses and blank pages. You have not provided any arguments explaining how the release of this information would interfere with your office's law enforcement or prosecutorial interests. Accordingly the remaining information in Appendix D may not be withheld under section 552.108(b)(1).

You claim that Appendices AA, AAAA, and documents G-1 through G-6 are excepted from disclosure under section 552.103 of the Government Code. Section 552.103 provides in part:

(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 purpose of section 552.103 is to protect the litigation interests of the governmental body claiming the exception. *See* Gov't Code § 552.103(a); Open Records Decision No. 638 at 2 (1996). To secure the protection of section 552.103, the governmental body must demonstrate the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 at 1 (1991).

You assert that Appendix AA relates to the disbursement of assets seized in forfeiture. However, Appendix AA relates to another district attorney's office's involvement in forfeiture proceedings. You do not argue that your office is a party in these forfeiture proceedings. You assert that Appendix AAAA relates to the prosecution of "particular cases" including a murder case. However, documents AAAA-1, AAAA-2, and AAAA-4 relate to another district attorney's office's cases. You have not demonstrated that your office is a party in these cases. You assert that documents G-1 through G-6 discuss "current cases involved in litigation." However, documents G-1 through G-6 are communications from employees of various district attorney's offices throughout the state regarding general bond issues and do not concern any specific litigation in which the district attorney is a party. Because you have not demonstrated that your office is a party to litigation related to Appendix AA, documents AAAA-1, AAAA-2, AAAA-4, and G-1 through G-6, you have failed to demonstrate the applicability of section 552.103 to this information. Although

document AAAA-3 is a communication between a law enforcement officer and the district attorney, you have not submitted any arguments explaining how this document is related to any specific pending or reasonably anticipated litigation by your office. Therefore, you have failed to demonstrate the applicability of section 552.103 to document AAAA-3. We conclude the district attorney may not withhold Appendices AA, AAAA, and documents G-1 through G-6 under section 552.103.

You claim that Appendices AAA, AAAA, and documents G-1 through G-6 are excepted from disclosure under the deliberative process privilege encompassed by section 552.111 of the Government Code. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. Although a governmental body's policymaking functions do not generally encompass routine internal administrative or personnel matters, a governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995).

Section 552.111 can also encompass communications between a governmental body and a third-party, including a consultant or other party with a privity of interest. *See* Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* ORD 561 at 9.

You claim that Appendix AAA consists of communications between members of the district attorney's office or between members of the district attorney's office and law enforcement reflecting advice, opinion, and/or recommendations regarding your office's policy towards investigation, destruction of evidence, and prosecution. Based on your representations and our review of the information at issue, we find that you have established that the deliberative process privilege is applicable to some of the information, which we have marked, in Appendix AAA. However you do not explain how the remaining information reveals the

advice, opinions, or recommendations of an attorney or employee of the district attorney on a specific policy matter. Therefore, the district attorney may only withhold the information we have marked in Appendix AAA under the deliberative process privilege of section 552.111.

You claim that Appendix AAAA reflects the sharing of information concerning the prosecution of particular cases. However you do not explain how the information at issue reveals the advice, opinions, or recommendations of an attorney or employee of the district attorney on a specific policy matter. Therefore, the district attorney may not withhold Appendix AAAA under the deliberative process privilege of section 552.111.

You claim that documents G-1 through G-6 consist of communications between attorneys around the state who are working together to achieve "forfeiture of assets and bonds regarding criminal defendants who fail to appear for court." Documents G-1 through G-6 do not reveal any advice, opinions, or recommendations of any employee of the district attorney's office pertaining to any policy of the district attorney's office. Therefore, the district attorney may not withhold documents G-1 through G-6 under the deliberative process privilege of section 552.111.

You claim that Appendix AAAA and documents G-1 through G-6 are excepted from disclosure under the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure, which is also encompassed by section 552.111 of the Government Code. *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 work product as:

- (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
- (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. A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.*; ORD 677 at 6-8. In order for this office to conclude the information was made or developed in anticipation of litigation, we must be satisfied: (a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation there was a substantial chance litigation would ensue; and (b) the party resisting discovery believed in good faith there was a substantial chance litigation would ensue and [created or obtained the

information] for the purpose of preparing for such litigation. *See Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7. The second prong of the work product test requires the governmental body to show the documents at issue contain the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. TEX. R. CIV. P. 192.5(b)(1).

As previously stated, a governmental body bears the burden of establishing the applicability of the work product privilege to information it seeks to withhold under section 552.111 of the Government Code. You generally assert that Appendix AAAA and documents G-1 through G-6 should be excepted under the work product privilege because they reflect the mental impressions and legal reasoning of attorneys. However, documents AAAA-1 and AAAA-4 are communications between members of the district attorney's office concerning materials prepared by another district attorney's office for that district attorney's office's cases. You do not explain how these communications were made by the district attorney for trial or in anticipation of litigation in which the district attorney is a party. Document AAAA-2 is a communication between a member of the district attorney's office and an employee of another district attorney's office. You do not explain how this communication was made between a party and the party's representatives or among a party's representatives. Documents G-1 through G-6 are communications from employees of other district attorney's offices throughout the state regarding general bond issues unrelated to any specific litigation. You do not explain how these communications were made by the district attorney for trial or in anticipation of litigation in which the district attorney is a party. You also do not explain how these communications were made between a party and the party's representatives or among a party's representatives. You have failed to establish the applicability of the attorney work product privilege to documents AAAA-1, AAAA-2, AAAA-4, and G-1 through G-6. Therefore, the district attorney may not withhold documents AAAA-1, AAAA-2, AAAA-4, and G-1 through G-6 under the attorney work product privilege of section 552.111.

Document AAAA-3 is a communication between a law enforcement officer and a member of the district attorney's office regarding an investigation of a case which you assert will be prosecuted before the district court. Because the communication was made between a party and a party's representative in anticipation of litigation, you have demonstrated the applicability of the attorney work product privilege to document AAAA-3. Thus, the district attorney may withhold document AAAA-3 under the attorney work product privilege of section 552.111 of the Government Code.

You claim that Appendices BB, C and CC are excepted from disclosure under section 552.134 of the Government Code. This exception provides in part:

(a) Except as provided by Subsection (b) or by Section 552.029 [of the Government Code], information obtained or maintained by the Texas Department of Criminal Justice [the "department"] is excepted from [required public disclosure] if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

Gov't Code § 552.134(a). Section 552.134 protects information obtained or maintained by the department about its inmates. The information you seek to withhold under section 552.134 is information maintained by the district attorney. While some of the information consists of communications between the department and the district attorney regarding inmates, you do not assert these are department documents that have been transferred to the district attorney. *See* Open Records Decision No. 667 (2000) (the department has discretion to transfer inmate's social security number made confidential by statutory predecessor to section 552.134 to voter registrar for purpose of maintaining accurate voter registration lists and transferred social security number remains confidential in possession of voter registrar). Thus, we find that the district attorney has failed to demonstrate the applicability of section 552.134 to Appendices BB, C, and CC.

You claim that portions of Appendices CC and I are excepted from disclosure under section 552.101 of the Government Code. 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. Section 552.101 encompasses the doctrine of 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). This office has found that 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.

You claim that portions of Appendix CC should be excepted from disclosure under section 552.101 in conjunction with common-law privacy because they detail the criminal history of an individual. The information you seek to withhold, however, is an inmate's disciplinary history while incarcerated and is not a compilation of the inmate's criminal history. Accordingly, the district attorney may not withhold any of the information in Appendix CC under section 552.101 in conjunction with common-law privacy.

Appendix CC contains the identities of an inmate's visitors. Section 552.101 also encompasses the doctrine of constitutional privacy. Constitutional privacy protects two kinds of interests. See *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first is the interest in independence in making certain important decisions related to the "zones of privacy," pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. See *Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981); ORD 455 at 3-7. The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. See *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual's privacy interest against the public's interest in the information. See ORD 455 at 7. Constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492).

In Open Records Decision Nos. 428 and 430, our office determined inmate visitor and mail logs that identify inmates and those who choose to visit or correspond with inmates are protected by constitutional privacy because people who correspond with inmates have a First Amendment right to do so that would be threatened if their names were released. Open Records Decision Nos. 430 (1985) and 428 (1985). The rights of those individuals to anonymity was found to outweigh the public's interest in this information. *Id.*; see ORD 430 (list of inmate visitors protected by constitutional privacy of both inmate and visitors). Thus, the district attorney must withhold the identities of inmate visitors, which we have marked, in Appendix CC under section 552.101 in conjunction with the constitutional right to privacy.

We understand you to claim that information in Appendix I which reveals the medical condition of a named individual is protected under the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-8. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. See Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 ("Privacy Rule"); see also Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. See 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, except as provided by parts 160 and 164 of the Code of Federal Regulations. See *id.* § 164.502(a). This office has addressed the interplay of the Privacy Rule and the Act. In Open Records Decision No. 681 (2004), we noted section 164.512 of title 45 of the Code of Federal Regulations provides a covered entity may use or disclose protected health information to the extent such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. See

45 C.F.R. § 164.512(a)(1). We further noted the Act “is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public.” *See* ORD 681 at 8; *see also* Gov’t Code §§ 552.002, .003, .021. We, therefore, held the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. *See Abbott v. Tex. Dep’t of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App.—Austin 2006, no pet.); ORD 681 at 9; *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Thus, because the Privacy Rule does not make information that is subject to disclosure under the Act confidential, the district attorney may withhold protected health information from the public only if the information is confidential by law or an exception in subchapter C of the Act applies.

We understand you to claim that information in Appendix I revealing the medical information of a living individual is excepted under section 552.101 in conjunction with common-law privacy. This office has found that some kinds of medical information or information indicating disabilities or specific illnesses is highly intimate or embarrassing. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). We agree that the medical condition of the living individual is highly intimate and embarrassing and not of legitimate public interest. However the remaining medical information in Appendix I is directly related to the death of another person, which was investigated by law enforcement. We find that there is a legitimate public interest in this information. We have marked the medical condition the district attorney may withhold in Appendix I under section 552.101 in conjunction with common-law privacy.

You claim that a credit card name in Appendix E and user IDs, passwords, and license keys in Appendix J are excepted from disclosure under section 552.136 of the Government Code.<sup>5</sup> Section 552.136 provides that “[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.” *Id.* § 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.* § 552.136(a). Upon review we find that the license keys in Appendix J,

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<sup>5</sup>We note that you have redacted the name of the credit card in Appendix E. You do not assert, nor does our review of our records indicate, that you have been authorized to withhold any such information without seeking a ruling from this office. *See* Gov’t Code § 552.301(a); Open Records Decision 673 (2000). Because we can discern the nature of the information that has been redacted, being deprived of this information does not inhibit our ability to make a ruling in this instance. Nevertheless, be advised that a failure to provide this office with requested information generally deprives us of the ability to determine whether information may be withheld and leaves this office with no alternative other than ordering the redacted information be released. *See* Gov’t Code §§ 552.301(e)(1)(D) (governmental body must provide this office with copy of “specific information requested” or representative sample), .302.

which can be used to register software, are access device numbers and must be withheld under section 552.136. However, you have not explained how the credit card name in Appendix E and the user IDs and passwords in Appendix J can be used to obtain money, goods, services, or another thing of value or initiate a transfer of funds. Thus, the credit card name in Appendix E and the user IDs and passwords in Appendix J may not be withheld under section 552.136.

You claim the user IDs and passwords in Appendix J are excepted under section 552.139 of the Government Code. As recently amended by the Eighty-first Legislature, section 552.139 of the Government Code provides in pertinent part:

(a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; and

(2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use.

Act of May 28, 2001, 77th Leg., R.S., ch. 1272, § 4.03, 2001 Tex. Gen. Laws 3049, 3057-58, amended by Act of May 19, 2009, 81st Leg., R.S., ch. 183, § 4, 2009 Tex. Sess. Law Serv. 528, 529-30 (Vernon) (to be codified as an amendment to Gov't Code § 552.139(a)-(b)).

Section 2059.055 of the Government Code provides in pertinent part:

(b) Network security information is confidential under this section if the information is:

(1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a state agency;

(2) collected, assembled, or maintained by or for a governmental entity to prevent, detect, or investigate criminal activity; or

(3) related to an assessment, made by or for a governmental entity or maintained by a governmental entity, of the vulnerability of a network to criminal activity.

Gov't Code § 2059.055(b). You assert that the user IDs and passwords in Appendix J allow access to the district attorney's computer system, programming, or accounts. Although you seek to withhold passwords and user IDs, the protection of section 2059.055(b)(1) only applies to components of the security system of a state agency. Sections 2059.001(4) and 2151.002(1) of the Government Code, when read together, provide that the term "state agency" in this context means "a department, commission, board, office, or other agency in the executive branch of state government created by the state constitution or a state statute." *See id.* §§ 2059.001(4), 2151.002(1). You have not explained how the user IDs and passwords you seek to withhold are related to the security system of a state agency as defined above. You also do not explain how the user IDs and passwords you seek to withhold were collected, assembled, or maintained to prevent, detect, or investigate criminal activity, or are related to an assessment of the vulnerability of a network to criminal activity. Thus, we find that the user IDs and passwords do not constitute confidential network security information as described in section 2059.055.

You assert that release of the user IDs and passwords in Appendix J could result in harm or unauthorized access to the district attorney's computer system, programming, or accounts. Some of the user IDs in Appendix J are government e-mail addresses. You have not demonstrated how these government e-mail addresses relate to the design, operation, or defense of the district attorney's computer network as contemplated in section 552.139(a). Furthermore, these government e-mail addresses are not a computer network vulnerability assessment or report as contemplated in section 552.139(b). Consequently, you have failed to demonstrate the applicability of section 552.139 to these government e-mail addresses. Upon review we find that the passwords and the unique user ID in Appendix J relate to the district attorney's computer network security. Therefore, the district attorney may withhold the passwords and the unique user ID, which we have marked, under section 552.139(a).

You claim that Appendix I is excepted from disclosure under section 552.140 of the Government Code. Section 552.140 provides in part:

(a) This section applies only to a military veteran's Department of Defense Form DD-214 or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003.

*Id.* § 552.140(a). Upon review of Appendix I, we find that it does not contain DD-214 forms or other military discharge records. Accordingly, the district attorney may not withhold Appendix I under section 552.140.

You claim Appendix BB is excepted under section 552.1175 of the Government Code. Section 552.1175 provides in part:

(a) This section applies only to:

...

(3) current or former employees of the Texas Department of Criminal Justice [the "department"] or of the predecessor in function of the department or any division of the department;

(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.

*Id.* § 552.1175(a)(3), (b). Upon review, we find that Appendix BB does not contain the home address and telephone number, social security number, or family member information of a department employee. Thus, you have failed to demonstrate how this section applies to Appendix BB. Consequently, Appendix BB may not be withheld under section 552.1175.

We understand you to raise section 552.117(a)(2) of the Government Code for portions of Appendix E.<sup>6</sup> Section 552.117(a)(2) excepts from public disclosure a peace officer's home address and telephone number, social security number, and family member information regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code. Gov't Code § 552.117(a)(2). Upon review, we find that Appendix E contains the home address and telephone number of a peace officer who works for the district attorney. Therefore, the district attorney must withhold the information we have marked in Appendix E under section 552.117(a)(2).

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<sup>6</sup>Although you raise section 552.1175 of the Government Code for portions of Appendix E, we note that section 552.117(a)(2) of the Government Code is the applicable exception for this type of information.

You claim that portions of Appendices B and H are excepted from disclosure under section 552.137 of the Government Code. Section 552.137 provides that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an e-mail address is not that of the employee as a "member of the public," but is instead the e-mail address of the individual as a government employee. Many of these e-mail addresses are government or institutional e-mail addresses and are not excepted from disclosure under section 552.137. However, some of the e-mail addresses are personal e-mail addresses of members of the public. We find that the e-mail addresses of members of the public in Appendices B and H are not of a type specifically excluded by section 552.137(c). You do not state that the owners of these e-mail addresses have consented to their public disclosure. Therefore the district attorney must withhold the e-mail addresses we have marked in Appendices B and H, and the additional e-mail addresses we have marked in the remaining information, under section 552.137, unless the owners of the e-mail addresses have affirmatively consented to their release. *See id.* § 552.137(b). We note that you seek to withhold names and telephone numbers under section 552.137. Section 552.137 only applies to e-mail addresses. The district attorney may not withhold names or telephone numbers under section 552.137.

We note that Appendix CC contains a Texas driver's license number. Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release.<sup>7</sup> Gov't Code § 552.130(a)(1), (2). Thus, the district attorney must withhold the Texas driver's license number we marked in Appendix CC under section 552.130.

In summary, with the exception of basic information in Appendix L, the district attorney may withhold Appendices A, AAAAA, F, L, and documents G-7 through G-14 under section 552.108(a)(1) of the Government Code. The district attorney may withhold the information we have marked in Appendix D under section 552.108(b)(1). The district attorney may withhold document AAAA-3 and the information we have marked in Appendix AAA under section 552.111. The district attorney must withhold the information we have marked in Appendices CC and I under section 552.101. The district attorney must withhold the information we have marked in Appendix J under sections 552.136 and 552.139(a). The district attorney must withhold the information we have marked in Appendix E under section 552.117(a)(2). The district attorney must withhold the e-mail addresses we have marked under section 552.137 unless the owners of the e-mail addresses have affirmatively

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<sup>7</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).

consented to their disclosure. The district attorney must withhold the Texas driver's license number we have marked in Appendix CC under section 552.130. The remaining information must be released.<sup>8</sup>

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](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 information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Jessica Eales  
Assistant Attorney General  
Open Records Division

JCE/eeg

Ref: ID# 355899

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>8</sup>We note Appendix I contains a partial social security number of a living person. 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.