



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 5, 2010

Mr. Robert Yack  
Assistant District Attorney  
Fort Bend County  
301 Jackson Street, Room 101  
Richmond, Texas 77469

OR2010-00127

Dear Mr. Yack:

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# 366244.

The Fort Bend County District Attorney's Office (the "district attorney") received a request for a copy of the district attorney's entire file regarding a specified offense. You state you have released some of the requested information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.114 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code, which provides in pertinent part:

(a) Without limiting the amount or kind of information that is public information under this chapter, 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:

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(17). The submitted information includes court-filed documents. These documents fall within the purview of subsection 552.022(a)(17). The district attorney may only withhold the information subject to section 552.022 if it is confidential under other law. You claim the information subject to section 552.022 is excepted under

section 552.101. Because section 552.101 of the Government Code is "other law" for purposes of section 552.022, we will address the applicability of this exception for the information subject to section 552.022.

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 former section 51.14(d) of the Family Code. Prior to its repeal by the Seventy-fourth Legislature, section 51.14(d) of the Family Code provided for the confidentiality of juvenile law enforcement records. *See* Open Records Decision No. 181 (1977) (concluding that former section 51.14(d) of the Family Code excepts police reports which identify juvenile suspects or furnish basis for their identification). Law enforcement records pertaining to juvenile criminal conduct occurring before January 1, 1996, are governed by former section 51.14 of the Family Code, which was continued in effect for that purpose.<sup>1</sup> Section 51.14 applies to records of a "child," which is defined as a person who is ten years of age or older and under seventeen years of age. *See* Fam. Code § 51.02(2). Former section 51.14 provided in relevant part as follows:

(d) Except as provided by Article 15.27, Code of Criminal Procedure, and except for files and records relating to a charge for which a child is transferred under Section 54.02 of this code to a criminal court for prosecution, the law-enforcement files and records are not open to public inspection nor may their contents be disclosed to the public, but inspection of the files and records is permitted by:

- (1) a juvenile court having the child before it in any proceeding;
- (2) an attorney for a party to the proceeding; and
- (3) law-enforcement officers when necessary for the discharge of their official duties.

Fam. Code § 51.14. Because the submitted information pertains to juvenile conduct that occurred prior to January 1, 1996, we conclude that it is governed by section 51.14. In this case, however, you state the defendant listed in the submitted information was certified and prosecuted as an adult and transferred under section 54.02 of the Family Code to a criminal court for prosecution. Because the juvenile defendant in the case was tried as an adult in accordance with section 54.02 of the Family Code, the resulting criminal trial was not a proceeding subject to the provisions of the Family Code. Consequently, none of the information pertaining to that charge is confidential under section 51.14. However, we note that the submitted information contains offense reports related to other juveniles. This information, which we have marked, is confidential under section 51.14 and must be withheld under section 552.101 of the Government Code.

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<sup>1</sup>Act of May 27, 1995, 74<sup>th</sup> Leg., R.S., ch. 262, § 100, 1995 Tex. Gen. Laws 2517, 2591.

We note the remaining information contains confidential criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center and subject to chapter 411 of the Government Code. Section 552.101 of the Government Code also encompasses Title 28, part 20 of the Code of Federal Regulations, which 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 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. Furthermore, 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. Upon review, we find that the information we have marked consists of CHRI which must be withheld under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that (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). 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. In addition, this office has found that medical information or information indicating disabilities or specific illnesses is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we find that a portion of the remaining information, which we have marked, is highly intimate or embarrassing and not of legitimate public interest. Thus, this information must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

You seek to withhold Exhibit D under section 552.114 of the Government Code, which exempts from disclosure student records "at an educational institution funded wholly or partly by state revenue." *Gov't Code* § 552.114(a). The Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(a), governs the availability of student records held by educational institutions or agencies receiving federal funds. These provisions only apply to

student records in the custody of educational institutions and to records directly transferred from the educational institution to the third party. 34 C.F.R. § 99.33(a)(2). The district attorney, which maintains the information at issue, is not an educational institution. *See* Open Records Decision No. 309 at 3 (1983) (City of Fort Worth is not an “educational agency” within FERPA). You do not assert, nor does it appear from our review, that the district attorney received these documents directly from the educational institutions at issue; therefore, the district attorney has not established that section 552.114 and FERPA are applicable to the information at issue, and the district attorney may not withhold the information on those grounds.

Next, section 552.108(b)(3) of the Government Code provides:

(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(b)(3). A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

You state that the submitted information in Exhibit J and Exhibit K was prepared by a prosecutor representing the state. You explain that Exhibit J and Exhibit K contain handwritten attorney notes that were made in preparation for litigation. Based on your representations and our review of the information at issue, we find that the information we have marked in Exhibit J and the entirety of Exhibit K reflect the mental processes or legal reasoning of an attorney representing the state. We therefore conclude that this information is excepted from disclosure under section 552.108(b)(3) of the Government Code. However, we note that the remaining information was not prepared by an attorney for the district attorney's office, and you have not adequately explained how this information reflects the mental impressions of a prosecutor. Therefore, we conclude that you may not withhold the remaining information in Exhibit J under section 552.108(b)(3).

In summary, the district attorney must withhold the information we have marked under section 552.101 of the Government Code in conjunction with: 1) section 51.14 of the Family Code, 2) chapter 411 of the Government Code, and 3) common-law privacy. The district

attorney may withhold the information we have marked in Exhibit J and the entirety of Exhibit K under section 552.108(b)(3) of the Government Code. The remaining information must be released.<sup>2</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,



Tamara Wilcox  
Assistant Attorney General  
Open Records Division

TW/dls

Ref: ID# 366244

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>2</sup>We note the remaining information includes social security numbers belonging to individuals other than the requestor's client. 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. We also note that the remaining information being released contains the requestor's client's confidential information, to which the requestor in this instance has a special right of access. See Gov't Code § 552.023(a) (person or person's authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and is protected from public disclosure by laws intended to protect person's privacy interests); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual asks governmental body to provide him with information concerning himself). If the district attorney receives another request for this particular information from a different requestor, then the district attorney should again seek a decision from this office.