ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

June 7, 2010

Ms. J. Macklin Milligan
Assistant District Attorney
Office of the General Counsel
Harris County
1201 Franklin, Suite 600
Houston, Texas 77002-1901

OR2010-08295

Dear Ms. Milligan:

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# 381708.

The Harris County District Attorney (the "district attorney") received a request for all information related to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.1325 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments submitted by an interested third party. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

We note that a portion of the submitted information is subject to required public disclosure under section 552.022 of the Government Code, which provides in relevant part:

> 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[.]

Id. § 552.022(a)(17). In this instance, the submitted information in Appendix B-4 includes a document filed with a court. This information is expressly public under section 552.022(a)(17) and the district attorney must release it unless it is confidential under other law. You raise section 552.108 of the Government Code for this information. However, this is a discretionary exception to disclosure that protect the governmental body's interests and do not qualify as "other law" for the purposes of section 552.022. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 586 (1991) (governmental body may waive section 552.108). Accordingly, the district attorney may not withhold the court-filed document under section 552.108 of the Government Code. However, you also raise section 552.101 of the Government Code for the information subject to section 552.022(a)(17). Section 552.101 is "other law" for purposes of section 552.022. Therefore, we will address the applicability of this exception to the court-filed document. We will also address your claimed exceptions for the information not 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. Section 552.101 encompasses the common-law informer's privilege, which Texas courts have long recognized. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). The informer's privilege protects the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. *See* Open Records Decision Nos. 515 at 3 (1998), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." *See* Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988). The privilege excepts the informer's statement only to the extent necessary to protect the informer's identity. *See* Open Records Decision No. 549 at 5 (1990).

The district attorney states portions of the court-filed document and portions of the information not subject to section 552.022(a)(17) consist of the identifying information of an informer who reported a violation of the Texas Penal Code. However, in this instance, the submitted information reveals the subject of the complaint knows the identity of the informer. Accordingly, we conclude that you have failed to demonstrate the applicability of the common-law informer's privilege with regard to the informer's identifying information. Therefore, no portion of the submitted information may be withheld under section 552.101 in conjunction with the common-law informer's privilege.

Section 552.101 of the Government Code also encompasses information protected by other statutes, including section 411.083 of the Government Code which pertains to criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that state agencies obtain from the federal government or other states. *See* Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *See 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 in accordance with 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 only release CHRI to another criminal justice agency for a criminal justice purpose. *See id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from the 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 agree a portion of the information in Appendix B-3, which we have marked, constitutes CHRI. Thus, the district attorney must withhold the marked information in Appendix B-3 under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code. *See id.* § 411.083(b)(3). However, none of the remaining information in Appendix B-3 consists of CHRI subject to chapter 411, and no portion of it may be withheld under section 552.101 on that basis.

Section 552.108 of the Government Code provides in relevant 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:
>
> . . .
>
> (2) it is information that the deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication; [or]
>
> . . .
>
> (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) reflects the mental impressions or legal reasoning of an attorney representing the state [and]

Gov't Code §§ 552.108(a)(2), 552.108(a)(4). 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 that the governmental body seeks to withhold. *See* Gov't Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). Further, a governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e) (governmental body must provide comments explaining why exceptions raised should apply to information requested). You state that the remaining information in Appendix B-4 relates to a concluded criminal investigation that did not result in conviction or deferred adjudication. Based on your representation and our review of the submitted information, we conclude that section 552.108(a)(2) is applicable to the information in Appendix B-4.

You state the information in Appendices B-1 and B-5 is excepted from disclosure under section 552.108(a)(4) of the Government Code. In *Curry v. Walker*, 873 S.W.2d 379 (Tex.1994), the Texas Supreme Court held that a request for a district attorney's "entire litigation file" was "too broad" and, quoting *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458 (Tex. 1993, orig. proceeding), held that "the decision as to what to include in [the file] necessarily reveals the attorney's thought processes concerning the prosecution or defense of the case." *Curry*, 873 S.W.2d at 380. The present request is for all information related to the requestor. You contend that the instant request encompasses the district attorney's entire prosecution file for two cases involving the requestor. You assert that release of the information in Appendices B-1 and B-5 would reveal the mental impressions or legal reasoning of prosecutors in the district attorney's office. Based on your representations and our review, we conclude section 552.108(a)(4) is applicable to the information in Appendices B-1 and B-5. Thus, the district attorney may withhold the information in Appendix B-1 under section 552.108(a)(4) of the Government Code and the court's ruling in *Curry* and may generally withhold the information in Appendix B-5 on that basis.

We note, however, that 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). Section 552.108(c) refers to basic "front-page" information held to be public in *Houston Chronicle Publishing Company v. City of Houston*, 531 S.W.2d 177 (Tex. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976).

See Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Thus, with the exception of basic information, which must be released, the district attorney may withhold the information in Appendix B-4 that is not subject to section 552.022 of the Government Code under section 552.108(a)(2) of the Government Code and the information in Appendix B-5 under section 552.108(a)(4) of the Government Code.[1]

Section 552.1325 of the Government Code provides as follows:

> (a) In this section:
>
> > (1) "Crime victim" means a person who is a victim as defined by Article 56.32, Code of Criminal Procedure.
> >
> > (2) "Victim impact statement" means a victim impact statement under Article 56.03,Code of Criminal Procedure.
>
> (b) The following information that is held by a governmental body or filed with a court and that is contained in a victim impact statement or was submitted for purposes of preparing a victim impact statement is confidential:
>
> > (1) the name, social security number, address, and telephone number of a crime victim; and
> >
> > (2) any other information the disclosure of which would identify or tend to identify the crime victim.

Gov't Code § 552.1325. The information in Appendix B-2 consists of a victim impact statement as defined by article 56.03 of the Code of Criminal Procedure. *See* Code Crim. Proc. art. 56.03. We note that the victim, in this instance, meets the definition of a crime victim under article 56.32 of the Code of Criminal Procedure. *See id.* art. 56.32. In most cases, the district attorney would only be allowed to withhold the victim's identifying information from public disclosure. In this instance, however, because the requestor knows the identity of the victim, withholding only the identifying information would not effectuate the purpose of the statute. Accordingly, we conclude the district attorney must withhold Appendix B-2 in its entirety pursuant to section 552.1325 of the Government Code.

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[1]As our ruling on this issue is dispositive, we do not address your remaining arguments against disclosure of this information.

We note a portion of the remaining information is subject to section 552.130 of the Government Code.[2] Section 552.130 excepts from disclosure information relating to a motor vehicle operator's or driver's license or permit issued by an agency of this state. *See* Gov't Code § 552.130(a)(1). Accordingly, the district attorney must withhold the Texas driver's license number we have marked under section 552.130 of the Government Code.[3] We note, however, that because this exception protects personal privacy, the requestor has a right of access to his own Texas motor vehicle record information under section 552.023 of the Government Code, and the district attorney may not withhold the requestor's information under section 552.130. *See id.* § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself).[4]

In summary, the district attorney must release the information we have marked in Appendix B-4 under section 552.022(a)(17) of the Government Code. The district attorney must withhold the information we have marked in Appendix B-3 under section 552.101 of the Government Code in conjunction with section 411.083 of the of the Government Code. With the exception of basic information and the information we marked for release under section 552.022, the district attorney may withhold the information in Appendix B-4 under section 552.108(a)(2) of the Government Code. The district attorney may withhold the information in Appendix B-1 under section 552.108(a)(4) of the Government Code, and with the exception of basic information, may also withhold the information in Appendix B-5 under section 552.108(a)(4). The district attorney must withhold the information in Appendix B-2 under section 552.1325 of the Government Code. The district attorney must also withhold the information we have marked in Appendix B-3 under section 552.130 of the Government Code. The remaining information in Appendix B-3 must be released.[5]

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

[3]We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a Texas driver's license number under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.

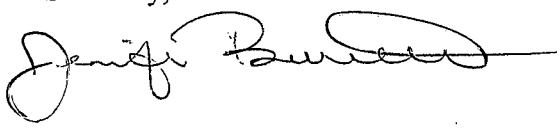
[4]Section 552.023(a) provides that "[a] person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests." Gov't Code § 552.023(a).

[5]We note that the information being released 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.

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 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,



Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/dls

Ref: ID# 381708

Enc. Submitted documents

c: Requestor
(w/o enclosures)