



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 7, 2010

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

OR2010-10017

Dear Mr. 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# 385719.

The District Attorney of the 81st Judicial District (the "district attorney") received a request for all documents, reports, statements, and photos related to the death of the requestor's son, excluding photos of the requestor's son. You claim that portions of the submitted information are 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).

Initially, we note you have redacted portions of the submitted information. Pursuant to section 552.301 of the Government Code, a governmental body that seeks to withhold requested information must submit to this office a copy of the information, labeled to indicate which exceptions apply to which parts of the copy, unless the governmental body has received a previous determination for the information at issue. *Id.* § 552.301(a), (e)(1)(D). We note you have redacted 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. *See id.* § 552.147. You have also redacted Texas driver's license numbers of living individuals, which you are authorized to redact pursuant to Open Records Decision No. 684

(2009).¹ However, you do not assert, nor does our review of the records indicate, that you have been authorized to withhold the remaining redacted information without seeking a ruling from this office. *See id.* § 552.301(a); Open Records Decision No. 673 (2000). In this instance, we can discern the nature of the redacted information; thus, being deprived of that information does not inhibit our ability to make a ruling. However, in the future, the district attorney must not redact requested information that it submits to this office in seeking an open records ruling, unless the information is the subject of a previous determination under section 552.301. *See Gov't Code* §§ 552.301(e)(1)(D), .302. Failure to comply with section 552.301 may result in the information being presumed public under section 552.302 of the Government Code. *See id.* § 552.302.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. This section encompasses article 42.12 of the Code of Criminal Procedure. *See* *Crim. Proc. Code* art. 42.12 § 9(j). Article 42.12 of the Code of Criminal Procedure is applicable to pre-sentence investigation reports and provides in 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.

¹We note this office recently issued Open Records Decision No. 684, a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas driver's license numbers under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.

Crim. Proc. Code art. 42.12 § 9(j). We have marked a pre-sentence investigation report that must be withheld under section 552.101 of the Government Code in conjunction with article 42.12 of the Code of Criminal Procedure.²

Section 552.101 also encompasses confidential 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 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. 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 agree that portions of the remaining information, which we have marked, consist of CHRI which must be withheld under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. However, we find that none of the remaining information constitutes CHRI for the purposes of chapter 411. Therefore, the district attorney may not withhold any portion of the remaining information on that basis.

Section 552.101 also encompasses the common-law right of 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). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *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. This office has found that some kinds of medical information or information indicating disabilities or specific illnesses are confidential 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). This office has also found that personal financial information not relating to the financial

²As our ruling is dispositive with respect to this information, we need not address the remaining arguments against disclosure of this information.

transaction between an individual and a governmental body is excepted from required public disclosure. See Open Records Decision Nos. 600 (1992), 545 (1990). Finally, 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. *United States 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 a compilation of a private citizen's criminal history is generally not of legitimate concern to the public.

In this instance, we find that some of the remaining information is highly intimate or embarrassing and of no legitimate public interest. Therefore, the district attorney must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.³ However, we note the submitted records contain references to a prior DWI conviction of the named individual. In the context of the current charge of intoxicated manslaughter with vehicle, information relating to the prior conviction for DWI is a matter of legitimate public interest and may not be withheld on privacy grounds under section 552.101. Further, we find that none of the remaining information is highly intimate or embarrassing and of no legitimate public interest, and consequently, the district attorney may not withhold any of the remaining information under section 552.101 on the basis of common-law privacy.

Section 552.101 also encompasses constitutional privacy, which consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. See *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5, 478 at 4 (1987), 455 at 3-7. The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. ORD 455 at 4. The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* at 7. The scope of information protected is narrower than that under the common-law doctrine of privacy; constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985)). Upon review, we find the district attorney has not demonstrated how any of the remaining information falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the district attorney may not withhold any of the remaining information under section 552.101 on the basis of constitutional privacy.

³As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

Section 552.101 also encompasses section 560.003 of the Government Code, which provides, “[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act].” *Id.* §§ 560.001 (defining “biometric identifier” to include fingerprints), .002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), .003 (providing that biometric identifiers in possession of governmental body are exempt from disclosure under Act). You do not inform us, and the submitted information does not indicate, that section 560.002 permits the disclosure of the fingerprint information at issue. Therefore, the district attorney must withhold the fingerprint information we have marked under section 552.101 in conjunction with section 560.003 of the Government Code.

Section 552.108 of the Government Code provides, in pertinent part:

(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;

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication;

(3) it is information relating to a threat against a peace officer or detention officer collected or disseminated under Section 411.048; 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.

(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 the requirements of Section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or

(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) reflects the mental impressions or legal reasoning of an attorney representing the state.

Id. § 552.108(a), (b). A governmental body claiming subsection 552.108 must reasonably explain how and why this exception is applicable to the information that the governmental body seeks to withhold. *See id.* §§ 552.108, .301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). You generally state portions of the submitted information are excepted under the law enforcement section of section 552.108. However, you make no arguments explaining how section 552.108 is applicable to the information at issue. Therefore, you have failed to demonstrate the applicability of section 552.108 to the information at issue. Gov't Code § 552.301(e)(1)(A) (governmental body must reasonably explain how and why exception is applicable to the information at issue). Consequently, none of the remaining information may be withheld on that basis.

Section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle operator's or driver's license or permit or a motor vehicle title or registration issued by an agency of this state.⁴ *See id.* § 552.130(a)(1)-(2). We note the vehicle identification numbers you have redacted are not subject to Open Records Decision No. 684 and may not be redacted without requesting an attorney general decision. Upon review, we find that the district attorney must withhold the vehicle identification numbers you have marked, as well as the additional Texas motor vehicle record information we have marked in the remaining information, under section 552.130 of the Government Code.

We note that a portion of the remaining information is subject to section 552.136 of the Government Code. Section 552.136 states 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. This office has determined that insurance policy numbers are access device numbers for purposes of section 552.136. *See id.* § 552.136(a) (defining "access device"). Accordingly,

⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

we find that the district attorney must withhold the insurance policy number we have marked under section 552.136 of the Government Code.

In summary, the district attorney must withhold the information we have marked under section 552.101 of the Government Code in conjunction with (1) article 42.12 of the Code of Criminal Procedure, (2) chapter 411 of the Government Code, (3) common-law privacy, and (4) section 560.003 of the Government Code. The district attorney must withhold the information we have marked under sections 552.130 and 552.136 of the Government Code.⁵ The remaining information must be released to the requestor.⁶

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,



Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/eeg

⁵As previously noted, this office recently issued Open Records Decision No. 684, a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including fingerprints under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code, Texas driver's license numbers, a copy of a Texas driver's license, and Texas license plate numbers under section 552.130 of the Government Code, and insurance policy numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

⁶We note the remaining information contains a social security number. As previously noted, 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. *See* Gov't Code § 552.147.

Ref: ID# 385719

Enc. Submitted documents

c: Requestor
(w/o enclosures)