



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 14, 2010

Ms. Deborah F. Harrison
Assistant District Attorney
Special Crimes Division - Civil Section
Collin County District Attorney's Office
210 South McDonald, Suite 324
McKinney, Texas 75069

OR2010-15689

Dear Ms. Harrison:

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# 396880.

The Collin County District Attorney's Office (the "district attorney") received a request for all criminal records regarding a named individual, including those pertaining to an incident that occurred on December 11, 2009. You provide documentation reflecting the district attorney does not have some of the requested criminal records.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.111, 552.130, 552.132, and 552.1325 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

First, you claim section 552.101 of the Government Code excepts from disclosure the submitted information in its entirety. 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. This section encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts, the

¹The Act does not require a governmental body to release information that did not exist when a request for information was received, create responsive information, or obtain information not held by or on behalf of the governmental body that received the request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *See 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. *See id.* at 681-82. 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 that a compilation of a private citizen's criminal history is generally not of legitimate concern to the public.

In this instance, the request is for any records pertaining to a named individual, but also references a particular incident. You only submitted information pertaining to the case arising from the specified incident. We therefore find the release of the submitted information does not implicate the privacy interests of the named individual. Accordingly, the district attorney may not withhold the submitted information as a criminal history compilation under section 552.101 in conjunction with common-law privacy.

Next, we note the submitted information is subject to section 552.022(a)(1) of the Government Code, which provides:

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:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The submitted information consists of the district attorney's completed investigation file from its prosecution of the case arising from the December 11, 2009 incident. A completed investigation must be released under section 552.022(a)(1) unless the information is excepted from disclosure under section 552.108 or expressly confidential under "other law." Although you seek to withhold the submitted information under section 552.111 of the Government Code, this section is a discretionary exception to disclosure that a governmental body may waive. *See Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally).* Accordingly, section 552.111 is not "other law" that makes information confidential for purposes of section 552.022. Therefore, the district attorney may not withhold any of the submitted information under section 552.111. We note the attorney work product privilege is also found in rule 192.5 of the Texas Rules of Civil Procedure. The Texas Supreme Court held that "[t]he Texas Rules of Civil Procedure . . . are 'other law' within the meaning of

section 552.022.” *In re City of Georgetown*, 53 S.W.3d 328, 337 (Tex. 2001). The Texas Rules of Civil Procedure, however, apply only to “actions of a civil nature.” *See* TEX. R. CIV. P. 2. Thus, because the submitted information relates to a criminal investigation, the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure does not apply to any of the information at issue. However, because sections 552.101, 552.130, 552.132, and 552.1325 constitute “other law” for purposes of section 552.022, we will address your remaining arguments under these exceptions.

Portions of the submitted information reveal medical details that are subject to common-law privacy as encompassed by section 552.101 of the Government Code. This office has also found some kinds of medical information or information indicating disabilities or specific illnesses are 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 have marked the portions of the submitted information that contain private medical details that are not of legitimate public interest in this instance and therefore are confidential under common-law privacy. However, the requestor is an attorney who may represent the arrestee whose private medical information is at issue. Section 552.023 of the Government Code 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); *see* Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when an individual or authorized representative asks governmental body to provide information concerning that individual). Consequently, if the requestor in this instance is not the authorized representative of the arrestee, then the district attorney must withhold the information we marked under section 552.101 in conjunction with common-law privacy. However, if the requestor is the authorized representative of the arrestee in the submitted information, then, pursuant to section 552.023, this information may not be withheld from this requestor pursuant to the doctrine of common-law privacy.

Section 552.101 also encompasses information protected by other statutes. The submitted information contains a CR-3 accident report completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer’s accident report). Section 550.065(b) states that except as provided by subsection (c) or subsection (e), accident reports are privileged and confidential. Section 550.065(c)(4) provides for the release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *Id.* § 550.065(c)(4). Under this provision, the Texas Department of Transportation or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more pieces of information specified by the statute. *Id.* In this case, the requestor has provided the district attorney with two of the three pieces of information described in section 550.065(c)(4). Although you contend that some information in the accident report is excepted from disclosure under section 552.130 of the Government Code, as a general rule, statutes governing the release of

specific information prevail over the exceptions to disclosure found in the Act. Attorney General Opinion DM-146 at 3 (1992); *see also* Open Records Decision Nos. 613 at 4 (1993) (exceptions in Act cannot impinge on statutory right of access to information), 451 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under the Act). Thus, the district attorney must release the accident report, which we marked, in its entirety to the requestor pursuant to section 550.065(c)(4) of the Transportation Code.

Section 552.101 also encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. Section 159.002 of the MPA provides in part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Id. § 159.002(a)-(c). The protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Medical records must be released upon the patient's signed, written consent, provided the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). We have marked the submitted medical record that is subject to the MPA. Thus, the marked medical record may only be released in accordance with the MPA. However, the remaining records you marked under the MPA were created by either the crime victim, the Plano Police Department, or the district attorney. You have not shown that these records constitute communications between a physician and a patient or document the identity, diagnosis, evaluation, or treatment of a patient by a physician. Thus, these records do not constitute medical records for purposes of the MPA, and they may not be withheld on that basis.

Section 552.101 of the Government Code also encompasses criminal history record information ("CHRI") generated by the National Crime Information Center (the "NCIC") or

the Texas Crime Information Center (the "TCIC"). 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. ORD 565. 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 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. *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 have marked the portions of the submitted file that constitute CHRI generated by the NCIC or the TCIC. The district attorney must withhold this marked CHRI under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. *See* Gov't Code § 411.083(b)(3).

Section 552.101 also encompasses article 20.02(a) of the Code of Criminal Procedure, which provides "[t]he proceedings of the grand jury shall be secret." Crim. Proc. Code art. 20.02(a). When construing article 20.02(a), the types of "proceedings" Texas courts have generally stated are secret are testimony presented to the grand jury and the deliberations of the grand jury. *In re Reed*, 227 S.W.3d 273, 276 (Tex. App.—San Antonio 2007, no pet.); *see also Stern v. State*, 869 S.W.2d 614 (Tex. App.—Houston [14th Dist] 1994, no writ) (stating anything that takes place before bailiffs and grand jurors, including deliberations and testimony, is secret). The information you marked under article 20.02 consists of a letter that was sent to notify the named individual that a grand jury was going to consider possible charges related to the December 11, 2009 incident. This letter does not reveal any actual grand jury testimony or deliberations. Thus, we conclude article 20.02(a) is not applicable to this document, and the district attorney may not withhold the letter you marked on that basis.

You assert that portions of the remaining information are excepted under section 552.132 of the Government Code, which provides in relevant part the following:

(b) The following information held by the crime victim's compensation division of the attorney general's office is confidential:

- (1) the name, social security number, address, or telephone number of a crime victim or claimant; or
- (2) any other information the disclosure of which would identify or tend to identify the crime victim or claimant.

...

(d) An employee of a governmental body who is also a victim under Subchapter B, Chapter 56, Code of Criminal Procedure, regardless of whether the employee has filed an application for compensation under that subchapter, may elect whether to allow public access to information held by the attorney general's office or other governmental body that would identify or tend to identify the victim, including a photograph or other visual representation of the victim.

Gov't Code § 552.132(b), (d). The submitted information is held by the district attorney, not the crime victim's compensation division of this office; therefore, section 552.132(b) is not applicable to this information. Additionally, you provide no representation the victim is an employee of the district attorney who elected in accordance with section 552.132(d). We therefore conclude that the district attorney may not withhold any portion of the remaining information under section 552.132 of the Government Code.

You also assert that portions of the remaining information are excepted under section 552.1325 of the Government Code, which 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.

Id. § 552.1325. Upon review, a portion of the information you marked 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 also find 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. Section 552.1325 is intended to protect the victim's privacy. *See* House Comm. on State Affairs, Bill Analysis, Tex. S.B. 1015, 78th Leg., R.S. (2003) (provision intended to protect "best interests" of crime victims). Therefore, 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 other information being released reveals the identity of the victim, withholding only the victim's identifying information under section 552.1325 would not effectuate the purpose of the statute. Accordingly, we conclude the victim impact statement we marked is confidential in its entirety under section 552.1325 of the Government Code. However, the requestor is an attorney who may represent the crime victim in this instance. Thus, pursuant to section 552.023, he may have a right of access to this information that would ordinarily be withheld to protect the victim's privacy. Gov't Code § 552.023(a); *see* ORD 481 at 4. Consequently, if the requestor in this instance is not the authorized representative of the crime victim, then the district attorney must withhold the victim impact statement we marked in its entirety under section 552.1325 of the Government Code. However, if the requestor is the authorized representative of the crime victim in the submitted information, then, pursuant to section 552.023, the victim impact statement may not be withheld from this requestor under section 552.1325.

You claim portions of the remaining information are subject to section 552.130 of the Government Code. Section 552.130 provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title, registration, or personal identification document issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a). We have marked the Texas motor vehicle record information in the remaining information that is subject to section 552.130. However, section 552.130 is also based on principles of privacy, and the requestor may represent the arrestee whose Texas motor vehicle record information is at issue. As noted above, an attorney has a right of access to information that would be protected from public disclosure for the purpose of protecting his client's own privacy interests. *See id.* § 552.023(a); ORD 481 at 4. Accordingly, the district attorney must release the Texas motor vehicle record information we marked if the requestor is an authorized representative for the arrestee. However, if the requestor is not the authorized representative of the arrestee, this individual's information must be withheld under section 552.130 of the Government Code.²

In summary, if the requestor is not the authorized representative of the arrestee, the district attorney must withhold the private medical information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The district attorney must release the marked CR-3 accident report in its entirety pursuant to section 550.065(c)(4) of the Transportation Code. The marked medical record may only be released in accordance with the MPA. The district attorney must withhold the CHRI we marked under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. If the requestor is not the authorized representative of the crime victim in the submitted information, then the district attorney must withhold the victim impact statement we marked in its entirety under section 552.1325 of the Government Code. The district

²We 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 Texas driver's license and license plate numbers under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.

attorney must also withhold the Texas motor vehicle record information we marked under section 552.130 of the Government Code if the arrestee is not the requestor's client. The remaining information must be released.³

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,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/tp

Ref: ID# 396880

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³The remaining information contains social security numbers. 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. Gov't Code § 552.147(b). However, because section 552.147 is based on principles of privacy, the requestor has a right of access to his client's social security number. *See id.* § 552.023(b). We note the information being released may include information to which the requestor has a right of access under section 552.023 of the Government Code. In such case, because this information would be confidential with respect to the general public, the district attorney must again seek a ruling from this office if it receives another request for this information from another requestor.