



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 18, 2011

Mr. Tommy L. Coleman  
Williamson County District Attorney's Office  
405 M.L.K. Street, #1  
Georgetown, Texas 78626

OR2011-06995

Dear Mr. Coleman:

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# 417882.

The Williamson County District Attorney's Office (the "district attorney") received a request for all records pertaining to the arrest and prosecution of a named individual for a specified offense. You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.111, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note a portion of the submitted information, which we have marked, is not responsive to the instant request for information because it consists of the request for information. This ruling does not address the public availability of non-responsive information, and the district attorney is not required to release non-responsive information in response to this request.

Next, we note the responsive information consists of a completed investigation, which is subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides a completed investigation is public information unless it is confidential by other law or excepted from disclosure under section 552.108. Gov't Code § 552.022(a)(1). You claim section 552.111 of the Government Code for portions of the responsive information. Section 552.111 is a discretionary exception and does not make information confidential; therefore, the district attorney may not withhold any of the responsive information under this exception. *See id.* § 552.007; 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). 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). We note, however, the Texas Rules of Civil Procedure apply only to “actions of a civil nature.” *See* TEX. R. CIV. P. 2. Thus, because the responsive information relates to a criminal case, the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure does not apply to the information at issue and the information may not be withheld on that basis. However, pursuant to section 552.022(a)(1), we will consider your claim under section 552.108 of the Government Code. Further, as sections 552.101, 552.130, and 552.136 of the Government Code are other laws that make information confidential for the purposes of section 552.022, we will consider the applicability of those sections.<sup>1</sup>

We next address your arguments under section 552.108 of the Government Code for the responsive information as it is the most encompassing exception you raise. We understand you to assert the responsive information is excepted under section 552.108 as interpreted by *Holmes v. Morales*. *See* 924 S.W.2d 920 (Tex. 1996). In *Holmes*, the Texas Supreme Court held the plain language of section 552.108 did not require a governmental body to show release of the information would unduly interfere with law enforcement. *Id.* at 925. The *Holmes* case further held “section 552.108’s plain language makes no distinction between a prosecutor’s ‘open’ and ‘closed’ criminal litigation files” and concluded the Harris County District Attorney may withhold his closed criminal litigation files under that exception. *Id.* Subsequent to the interpretation of section 552.108 in *Holmes*, the Seventy-fifth Legislature amended section 552.108 extensively. *See* Act of June 1, 1997, 75th Leg., R.S., ch. 1231, § 1, 1997 Tex. Gen. Laws 4697. As amended, section 552.108 now expressly requires a governmental body to explain, among other things, how release of the information would interfere with law enforcement. Accordingly, the court’s ruling in *Holmes*, which construed former section 552.108, is superseded by the amended section, which now reads as follows:

(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:

- (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;

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<sup>1</sup>The Office of the Attorney General will raise a mandatory exception, such as section 552.136 of the Government Code, 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) it is information relating to a threat against a peace 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 [required public disclosure] 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.

(c) This section does not except [from public disclosure] information that is basic information about an arrested person, an arrest, or a crime.

Gov't Code § 552.108. A governmental body claiming section 552.108(a)(1) must reasonably explain how and why release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You do not state the responsive information pertains to an ongoing criminal investigation or prosecution, nor do you explain how its release would interfere in some way with the detection, investigation, or prosecution of crime. In fact, you specifically state this information pertains to a case in which the defendant's community supervision was revoked and the defendant was sentenced to ten years in prison. Thus, we find you have failed to demonstrate the applicability of section 552.108(a)(1) to the responsive information and no portion of the submitted information may be withheld on that basis.

Section 552.108(b)(1) is intended to protect "information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State." *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.). To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a governmental body must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. Instead, the governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. *See* Open Records Decision No. 562 at 10 (1990) (construing statutory predecessor). In addition, generally known policies and techniques may not be withheld under section 552.108. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common law rules, and constitutional limitations on use of force are not protected under law enforcement exception), 252 at 3 (1980) (governmental body did not meet burden because it did not indicate why investigative procedures and techniques requested were any different from those commonly known). The determination of whether the release of particular records would interfere with law enforcement is made on a case-by-case basis. *See* Open Records Decision No. 409 at 2 (1984) (construing statutory predecessor).

In this instance, you have provided no argument as to how section 552.108(b)(1) applies to the responsive information. Thus, we find you have failed to meet your burden to demonstrate how the release of the responsive information would interfere with law enforcement and crime prevention. Accordingly, the district attorney may not withhold any of the responsive information under section 552.108(b)(1).

A governmental body claiming subsection 552.108(a)(2) or subsection 552.108(b)(2) must demonstrate the requested information relates to a criminal investigation or prosecution that has concluded in a final result other than a conviction or deferred adjudication. As noted above, you state the matter at issue concluded with the defendant's community supervision being revoked and the defendant being sentenced to ten years in prison. Thus, the investigation and prosecution of this matter resulted in a conviction. Therefore, we find you have failed to demonstrate the applicability of subsection 552.108(a)(2) or subsection 552.108(b)(2) to the responsive information. Section 552.108(a)(3) is also inapplicable, as the responsive information does not relate to a threat against a police officer. *See* Gov't Code § 552.108(a)(3). Accordingly, the district attorney may not withhold any of the responsive information under subsection 552.108(a)(2), subsection 552.108(b)(2), or subsection 552.108(a)(3) of the Government Code.

You contend portions of the responsive information reflect the mental impressions or legal reasoning of the prosecutor representing the state. *See id.* § 552.108(a)(4), (b)(3). Upon review, we agree some of the documents at issue were either prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation or reflect the mental processes or legal reasoning of an attorney representing the state. Therefore, the district attorney may withhold this information, which we have marked, under subsections 552.108(a)(4) and 552.108(b)(3) of the Government Code. However, we find

you have not demonstrated how the remaining information at issue either was prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation or reflects the mental processes or legal reasoning of an attorney representing the state. Thus, we find you have not established the remaining information at issue is subject to section 552.108(a)(4) or section 552.108(b)(3) and no portion of the remaining information may be withheld on that basis.

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 information protected by other statutes. Article 55.03 of the Code of Criminal Procedure concerns the effect of an expunction order and provides the following:

When the order of expunction is final:

- (1) the release, maintenance, dissemination, or use of the expunged records and files for any purpose is prohibited;
- (2) except as provided in Subdivision (3) of this article, the person arrested may deny the occurrence of the arrest and the existence of the expunction order; and
- (3) the person arrested or any other person, when questioned under oath in a criminal proceeding about an arrest for which the records have been expunged, may state only that the matter in question has been expunged.

Code Crim. Proc. art. 55.03. Article 55.04 imposes sanctions for violations of an expunction order and provides, in relevant part, the following:

A person who acquires knowledge of an arrest while an officer or employee of the state or of any agency or other entity of the state . . . and who knows of an order expunging the records and files relating to that arrest commits an offense if he knowingly releases, disseminates, or otherwise uses the records or files.

*Id.* art. 55.04, § 1. This office has previously determined the expunction statute prevails over the Act. *See* Open Records Decision No. 457 at 2 (1987) (governmental body prohibited from releasing or disseminating arrest records subject to expunction order, as "those records are not subject to public disclosure under the [Act]"). We note the submitted documents include a copy of an expunction order. It appears the expunction order pertains to portions of the responsive information. Accordingly, to the extent any portion of the responsive information is subject to the final order of expunction, the district attorney must withhold such information under section 552.101 of the Government Code in conjunction with article 55.03 of the Code of Criminal Procedure. To the extent the responsive information

is not subject to the final order of expunction, we will consider your arguments against its disclosure.

Section 552.101 of the Government Code also encompasses information protected by chapter 411 of the Government Code, which makes confidential criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center. *See* Gov't Code § 411.083(a). 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 laws with respect to the 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 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. Thus, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 in conjunction with chapter 411, subchapter F of the Government Code. Upon review, we find a portion of the responsive information, which we have marked, consists of CHRI that is confidential under section 411.083. Thus, the district attorney must withhold the marked information under section 552.101 in conjunction with section 411.083 of the Government Code.<sup>2</sup>

Section 552.101 of the Government Code also encompasses information other statutes make confidential. You argue social security numbers within the responsive documents should be withheld pursuant to section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), which make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). However, you cite no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes the district attorney to obtain or maintain a social security number. Consequently, you have failed to demonstrate the applicability of section 405 of title 42 of the United States Code to any social security numbers within the responsive documents, and no portion of the responsive information may be withheld under section 552.101 of the Government Code on that basis. We caution, however, that section 552.353 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing a social security

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<sup>2</sup>As our ruling is dispositive with respect to the information at issue, we need not address your remaining argument under article 60.03 of the Code of Criminal Procedure.

number, you should ensure it was not obtained or is not maintained by the district attorney pursuant to any provision of law enacted on or after October 1, 1990.<sup>3</sup>

Section 552.101 of the Government Code also 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 presentence 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.

Crim. Proc. Code art. 42.12 § 9(j). The submitted presentence investigation report, which we have marked, must be withheld under section 552.101 of the Government Code in conjunction with article 42.12 of the Code of Criminal Procedure.

Section 552.101 of the Government Code 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].” Gov’t Code § 560.003; *see id.* § 560.001(1) (“biometric identifier” means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry). We have no indication the requestor has a right of access to the submitted fingerprints under section 560.002. *See id.* § 560.002(1)(A) (governmental body may not sell, lease, or otherwise disclose individual’s biometric identifier to another person unless the individual consents to disclosure). Accordingly, the district attorney must withhold the fingerprints, which we have marked, under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code.

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<sup>3</sup>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.

Section 552.101 of the Government Code also encompasses common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) 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 demonstrated. See *id.* at 681-82. The type 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. The doctrine of common-law privacy protects a compilation of an individual's criminal history, which 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. However, active warrant information or other information relating to an individual's current involvement in the criminal justice system does not constitute criminal history information for the purposes of section 552.101. See Gov't Code § 411.081(b) (police department allowed to disclose information pertaining to person's current involvement in the criminal justice system). This office has 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 No. 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure). Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the district attorney must withhold the marked information under section 552.101 of the Government Code in conjunction with common-law privacy.

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. Gov't Code § 552.130(a)(1), (2). Upon review, we find portions of the responsive information consist of Texas motor vehicle record information. Accordingly, the district attorney must withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code.

The remaining documents also include information that is subject to section 552.136 of the Government Code. Section 552.136 provides, "[n]otwithstanding any other provision of [the Act], 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(b). Section 552.136(a) defines "access device" as "a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access

that alone or in conjunction with another access device may be used to . . . obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument.” *Id.* § 552.136(a). Accordingly, the district attorney must withhold the bank account and routing numbers we have marked under section 552.136 of the Government Code.

We note some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the district attorney may withhold the information we have marked under subsections 552.108(a)(4) and 552.108(b)(3) of the Government Code. To the extent any portion of the responsive information is subject to a final order of expunction, the district attorney must withhold such information under section 552.101 of the Government Code in conjunction with article 55.03 of the Code of Criminal Procedure. The district attorney must withhold (1) the marked information under section 552.101 in conjunction with section 411.083 of the Government Code; (2) the marked presentence investigation report under section 552.101 of the Government Code in conjunction with article 42.12 of the Code of Criminal Procedure; (3) the marked fingerprints under section 552.101 in conjunction with section 560.003 of the Government Code; (4) the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy; (5) the Texas motor vehicle record information we have marked under section 552.130 of the Government Code; and (6) the bank account and routing numbers we have marked under section 552.136 of the Government Code.<sup>4</sup> The remaining information must be released; however, any information protected by copyright may be released only in accordance with copyright law.

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

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<sup>4</sup>We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including fingerprint information under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code; a Texas driver’s license number under section 552.130 of the Government Code; and bank account and bank routing numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

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,



Claire V. Morris Sloan  
Assistant Attorney General  
Open Records Division

CVMS/bs

Ref: ID# 417882

Enc. Submitted documents

c: Requestor  
(w/o enclosures)