



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 6, 2011

Mr. Tommy L. Coleman
Assistant District Attorney
Williamson County District Attorney
405 M.L.K., No. 1
Georgetown, Texas 78626

Ms. Katie Lentz
Open Records
Williamson County Sheriff's Office
508 South Rock Street
Georgetown, Texas 78626

OR2011-09570

Dear Mr. Coleman and Ms. Lentz:

You each 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# 422943.

The Williamson County District Attorney (the "district attorney") and the Williamson County Sheriff's Office (the "sheriff") each received a request for sixteen categories of information pertaining to a specified conviction. The district attorney claims that the requested information is excepted from disclosure under sections 552.101, 552.108, 552.111, 552.130, 552.132, and 552.1325 of the Government Code. The sheriff claims some of the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exceptions the district attorney and the sheriff claim and reviewed the representative sample of information submitted by the district attorney and the information submitted by the sheriff.¹

¹This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

Initially, we note the sheriff has submitted information responsive to only a portion of the request for information. Thus, to the extent information responsive to the remaining requested items existed and was maintained by the sheriff on the date the sheriff received the request for information, we presume the sheriff has released it. If not, the sheriff must do so at this time. *See* Gov't Code §§ 552.301, .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to the requested information, it must release the information as soon as possible).

Next, we note the district attorney's information is subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[.]" unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). In this instance, the district attorney's information consists of a completed investigation that is subject to section 552.022(a)(1). The district attorney raises the attorney work product privilege found in section 552.111 of the Government Code for documents 991, 1013, and 1014; however, section 552.111 is a discretionary exception and does not make information confidential; therefore, the district attorney may not withhold any of its information under this exception. *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). The attorney work product privilege is also found in rule 192.5 of the Texas Rules of Civil Procedure. The Texas Supreme Court has held "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d 328, 336 (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 district attorney's documents 991, 1013, and 1014 relate 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 this information and these documents may not be withheld on that basis. However, we will consider the district attorney's arguments under section 552.108, as well as sections 552.101, 552.130, 552.132, and 552.1325 of the Government Code, which constitute "other law" that makes information confidential for the purposes of section 552.022.

We next address the district attorney's arguments under section 552.108 of the Government Code, as it is the most encompassing exception the district attorney raises. We understand the district attorney to assert that the information at issue is excepted under section 552.108 as interpreted by *Holmes v. Morales*. *See Holmes v. Morales*, 924 S.W.2d 920 (Tex. 1996). In *Holmes*, the Texas Supreme Court held that the plain language of section 552.108 did not require a governmental body to show that release of the information would unduly interfere with law enforcement. *Id.* at 925. The *Holmes* case further held that "section 552.108's plain language makes no distinction between a prosecutor's 'open' and 'closed' criminal litigation files" and concluded that 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 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;

(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 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). The district attorney has not stated that the information at issue pertains to an ongoing criminal investigation or prosecution, nor has the district attorney explained how its release would interfere in some way with the detection, investigation, or prosecution of crime. In fact, the district attorney specifically states that this information pertains to a concluded case in which the defendant pleaded guilty and was sentenced. Thus, we find the district attorney has failed to demonstrate the applicability of section 552.108(a)(1) to the information at issue and no 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, the district attorney has not provided any argument as to how section 552.108(b)(1) applies to the information at issue. Thus, we find the district attorney has failed to meet its burden to demonstrate how the release of the information at issue would interfere with law enforcement and crime prevention. Accordingly, the district attorney may not withhold any of the information at issue 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. The district attorney states that the prosecution of this matter concluded with a guilty plea by the defendant who, consequently, was sentenced to ten years of incarceration. Accordingly, the investigation and prosecution of this matter resulted in a conviction. Thus, we find the district attorney has failed to demonstrate the applicability of subsection 552.108(a)(2) or subsection 552.108(b)(2) to the information at issue. Section 552.108(a)(3) is also inapplicable, as the information at issue does not relate to a threat against a police officer. *See* Gov't Code § 552.108(a)(3).

The district attorney contends that documents 991, 1013, and 1014 pertain to the work product and include the mental impressions or legal reasoning of the prosecutor representing the state. *See id.* § 552.108(a)(4), (b)(3). Upon review, we agree document 991 was either 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. Therefore, the district attorney may withhold document 991 under subsections 552.108(a)(4) and 552.108(b)(3) of the Government Code. However, we find the district attorney has not demonstrated how documents 1013 or 1014 were 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. Thus, we find the district attorney has not established that documents 1013 and 1014 are subject to section 552.108(a)(4) and 552.108(b)(3) and the district attorney may not withhold them on that basis.

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. Section 552.101 encompasses information that other statutes make confidential, such as 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, the district attorney cites 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, the district attorney has failed to demonstrate the applicability of section 405 of title 42 of the United States Code to any social security numbers within the remaining information at issue, and no portion of it 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 number, the district attorney 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, 1990.²

²Section 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 laws that make criminal history record information (“CHRI”) confidential. CHRI generated by the National Crime Information Center or by the Texas Crime Information Center is confidential under federal and state law. CHRI means “information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions.” Gov’t Code § 411.082(2). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI obtained from the National Crime Information Center network or other states. *See* 28 C.F.R. § 20.21. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. Open Records Decision No. 565 at 7 (1990); *see generally* Gov’t Code ch. 411 subch. F. Section 411.083 of the Government Code deems confidential CHRI the Texas Department of Public Safety (“DPS”) maintains, except 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). Thus, 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. However, section 411.083 does not apply to active warrant information or other information relating to one’s current involvement with the criminal justice system. *See id.* § 411.081(b) (police department allowed to disclose information pertaining to person’s current involvement in the criminal justice system). Upon review, we find the information in the district attorney’s documents 986 through 988 and the information we have marked in the sheriff’s submitted information consists of CHRI that must be withheld under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code and federal law.³ However, the sheriff’s remaining information does not consist of CHRI and may not be withheld under section 552.101 of the Government Code on that basis.

We note the district attorney’s document 1011 contains a fingerprint. Section 552.101 of the Government Code also encompasses section 560.003 of the Government Code. Section 560.003 provides that “[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act].”⁴ Gov’t Code § 560.003; *see also id.* §§ 560.001(1) (defining “biometric identifier” to include fingerprints), .002(1)(A) (governmental body may not sell, lease, or otherwise disclose individual’s biometric identifier to another person unless individual consents to disclosure). Therefore, the district attorney must withhold the fingerprint we have marked in document 1011 under section 552.101 in conjunction with section 560.003 of the Government Code.

³As our ruling is dispositive for the district attorney’s information, we need not address the district attorney’s remaining arguments against its disclosure.

⁴The 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).

Section 552.130 provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by an agency of Texas, another state, or another country is excepted from public release. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 4 (to be codified as an amendment to Gov't Code § 552.130). We find the district attorney and the sheriff must withhold the information we have marked under section 552.130 of the Government Code.

The district attorney asserts document 990 is 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, the district attorney provides no representation the victim is an employee of the district attorney who elected in accordance with section 552.132(d). We, therefore, conclude the district attorney may not withhold document 990 under section 552.132 of the Government Code.

The district attorney also asserts document 990 is 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. The definition of a victim under article 56.32 of the Code of Criminal Procedure includes an individual who suffers physical or mental harm as a result of criminally injurious conduct. Crim. Proc. Code § 56.32(a)(10), (11). Upon our review, we find document 990 neither includes a victim impact statement for the purposes of section 552.1325, nor has the district attorney explained that any of the information within document 990 was submitted for the purposes of preparing a victim impact statement. As such, section 552.1325 is not applicable to any of the information in document 990, and the district attorney may not withhold this document on this basis.

In summary: (1) the district attorney may withhold document 991 under subsections 552.108(a)(4) and 552.108(b)(3) of the Government Code; (2) the district attorney must withhold documents 986 through 988 and the sheriff must withhold the CHRI we have marked in the sheriff's submitted information under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code and federal law; (3) the district attorney must withhold the fingerprint we have marked in document 1011 under section 552.101 in conjunction with section 560.003 of the Government Code; and (4) the district attorney and the sheriff must withhold the information we have marked under section 552.130 of the Government Code.⁵ The district attorney and the sheriff must release the remainder of their information.

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

⁵We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including: a fingerprint under section 552.101 in conjunction with section 560.003 of the Government Code; and a Texas driver's license number under section 552.130 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, 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,

A handwritten signature in black ink that reads "Lindsay E. Hale". The signature is written in a cursive style with a large initial "L".

Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/em

Ref: ID# 422943

Enc. Submitted documents

c: Requestor
(w/o enclosures)