



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 25, 2011

Ms. Paula M. Rosales  
Assistant District Attorney  
Dallas County District Attorney's Office  
113 North Riverfront Boulevard, LB-19  
Dallas, Texas 75207-4399

OR2011-12330

Dear Ms. Rosales:

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# 426890.

The Dallas County District Attorney's Office (the "district attorney") received a request for sixteen categories of information related to a specified case. You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.130, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you state the requestor has excluded from his request polygraph reports, attorney work product, medical records, biomedical identifiers including DNA results, and compiled criminal histories. Any such information is therefore not responsive to the request. 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 submitted information contains search warrants signed by a magistrate. A document that has been filed with a court is expressly public under section 552.022 of the Government Code and may not be withheld unless it is confidential under other law. *See* Gov't Code § 552.022(a)(17). You claim the court-filed documents are excepted from disclosure under section 552.108 of the Government Code. However, section 552.108 is a discretionary exception that protects a governmental body's interests and, therefore, is not

“other law” for purposes of section 552.022(a)(17). *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 586 (1991) (governmental body may waive section 552.108). Therefore, the district attorney may not withhold the court-filed documents, which we have marked, under section 552.108 of the Government Code. Furthermore, although we understand you to raise section 552.101 of the Government Code in conjunction with common-law privacy for the search warrants, information that has been filed with a court is not protected by common-law privacy. *See Star-Telegram v. Walker*, 834 S.W.2d 54 (Tex. 1992) (common-law privacy not applicable to court-filed document). Thus, these court-filed documents may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. However, because section 552.130 of the Government Code is “other law” for purposes of section 552.022(a)(17), we will consider the applicability of this exception to these court-filed documents, as well as to the remaining information.

Section 552.130 of the Government Code provides that 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 or another state or 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). Therefore, the district attorney must withhold the information we have marked under section 552.130 in the court-filed documents and in the remaining information.<sup>1</sup>

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses the common-law right of privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (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 or 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. *See id.* at 683. You claim a portion of the remaining information is excepted from required disclosure under section 552.101 in conjunction with common-law privacy and “special circumstances” because release of the information would likely cause someone to face an imminent threat of physical danger.

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<sup>1</sup>Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a Texas driver’s license number and a Texas license plate number under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.

For many years, this office determined section 552.101 of the Government Code, in conjunction with the common-law right to privacy, protects information from disclosure when “special circumstances” exist in which the disclosure of information would place an individual in imminent danger of physical harm. *See, e.g.*, Open Records Decision Nos. 169 (1977) (special circumstances required to protect information must be more than mere desire for privacy or generalized fear of harassment or retribution), 123 (1976) (information protected by common-law right of privacy if disclosure presents tangible physical danger). However, the Texas Supreme Court recently held freedom from physical harm does not fall under the common-law right to privacy. *Tex. Dep’t of Pub. Safety v. Cox Tex. Newspapers, L.P. & Hearst Newspapers, L.L.C.*, 54 Tex. Sup. Ct. J. 1428, 2011 WL 2586861 at \*4 (Tex. July 1, 2011) (holding “freedom from physical harm is an independent interest protected under law, untethered to the right of privacy”). Instead, in *Cox*, the court recognized, for the first time, a separate common-law physical safety exception to required disclosure that exists independent of the common-law right to privacy. *Id.* at \*5. Pursuant to this common-law physical safety exception, “information may be withheld [from public release] if disclosure would create a substantial threat of physical harm.” *Id.* In applying this new standard, the court noted “deference must be afforded” law enforcement experts regarding the probability of harm, but further cautioned that “vague assertions of risk will not carry the day.” *Id.* at \*6.

You state the information contains the identities of witnesses to a violent sexual assault, including the victim of that crime. You assert harassment against the witnesses is possible because the case involved a violent crime, and release of information regarding the witnesses would therefore compromise their safety. Upon review, we find you have made only vague assertions of risk of harm if the information at issue is released. Furthermore, you have not provided this office with the opinions of any other law enforcement experts regarding the probability of harm from the release of the information at issue, nor have you established that any of the witnesses are confidential informants. Accordingly, we find you have not established disclosure of this information would create a substantial threat of physical harm to an individual, and the district attorney may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.

You also raise common-law privacy for a portion of the remaining information. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are protected by 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). In addition, a compilation of an individual’s criminal history record information is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (finding significant privacy interest in compilation of individual’s criminal history by recognizing distinction between public records found in courthouse files and local police stations and compiled summary of criminal history information). 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 criminal justice system). In addition, this office has concluded information that either identifies or tends to identify a victim of sexual assault or other sex-related offense must be withheld under common-law privacy. Open Records Decision No. 393 at 2 (1983); *see also Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information). 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 this information under section 552.101 of the Government Code in conjunction with common-law privacy. However, the remaining information is either not highly intimate or embarrassing or is of legitimate public interest, and the district attorney may not withhold it under section 552.101 on that basis.

You raise section 552.108 of the Government Code for a portion of the remaining information. Section 552.108 provides in part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

[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:

...

(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.

Gov't Code § 552.108(a)(1), (4), (b)(3). A governmental body claiming an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information the governmental body seeks to withhold. *See id.* §§ 552.108, .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). You assert the information at issue is excepted from disclosure under section 552.108(a)(1). We note, however, the information pertains to a case that resulted in the conviction of the defendant. You do not inform us the information at issue pertains to an ongoing criminal investigation or prosecution, nor have you explained how its release would otherwise interfere in some way with the detection, investigation, or prosecution of crime. Thus, you have not met your burden under section 552.108(a)(1) of the Government Code. You also contend the information at issue reflects the mental impressions or legal reasoning of an attorney representing the State of Texas. *See id.* § 552.108(a)(4), (b)(3). Upon review, we agree Exhibits I and J 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 sections 552.108(a)(4) and 552.108(b)(3) of the Government Code. However, the remaining information at issue consists of Dallas Police Department records pertaining to the incident at issue. We find you have failed to demonstrate how this information 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. Therefore, as you have not established the remaining information falls within the scope of section 552.108(a)(1), section 552.108(a)(4), or section 552.108(b)(3), we conclude the district attorney may not withhold any of the remaining information under section 552.108 of the Government Code.

In summary, the district attorney must release the court-filed documents we have marked pursuant to section 552.022(a)(17). The district attorney must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code. The district attorney must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. The district attorney may withhold Exhibits I and

J under subsections 552.108(a)(4) and (b)(3) of the Government Code. The district attorney must release the remaining information.<sup>2</sup>

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](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,



Mack T. Harrison  
Assistant Attorney General  
Open Records Division

MTH/em

Ref: ID# 426890

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>2</sup>We note the information being released 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).