



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 2, 2011

Mr. Thomas A. Mitchell
Assistant District Attorney
25th Judicial District of Texas
113 South River Street, Suite 205
Seguin, Texas 78155

OR2011-12757

Dear Mr. Mitchell:

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# 428794.

The 25th Judicial District Attorney (the "district attorney") received a request for all documents contained in the district attorney's file for a specified cause number. You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.130 of the Government Code. You also indicate release of the submitted information may implicate the privacy interests of third parties whose information is at issue. Accordingly, you notified these individuals of the request and of their right to submit arguments to this office as to why their information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have also received and considered comments submitted by the requestor. *Id.* We have considered the submitted arguments and reviewed the submitted information.

Initially, we must address the requestor's argument that the district attorney failed to comply with the Act's procedural requirements under section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply not later than the tenth business day after the date of receiving the written request. *See id.* § 552.301(b). Within fifteen days of receiving the request, the governmental body must submit to this office (1) general written comments

stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e). The district attorney contends it received the request for information on June 13, 2011. However, the requestor asserts, and provides a facsimile transmission verification report demonstrating, that he originally submitted the instant request for information to the district attorney on May 19, 2011. Pursuant to section 552.303 of the Government Code, we asked the district attorney whether it received the requestor's original request by facsimile on May 19, 2011.¹ In response, you state the district attorney was "unaware of the request" until June 13, 2011, when the requestor called the district attorney and faxed another copy of the request. You further state that you "cannot say the request was not received [on May 19, 2011]." Simply stating when the district attorney became aware of the request does not establish when the district attorney received the request. Further, the district attorney does not refute the requestor's assertion that the request was received by facsimile on May 19, 2011. Accordingly, we find the district attorney received the request for information on May 19, 2011. Thus, the district attorney's ten-business-day deadline under section 552.301(b) was June 3, 2011, and the district attorney's fifteen-business-day deadline under section 552.301(e) was June 10, 2011.² Furthermore, in your response you state that the district attorney sought and received clarification from the requestor on June 13, 2011. Thus, we understand you to claim the deadlines should be reset because the district attorney asked for clarification from the requestor. However, we note the district attorney did not request clarification of the request until after the ten-business-day and fifteen-business-day deadlines had passed. As such, the statutory deadlines for requesting an opinion from this office and submitting the required documentation were not reset and must be measured from the date the district attorney received the request for information on May 19, 2011. *See generally City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (after requesting clarification within ten-business-day deadline, city timely submitted request for opinion within ten business days after receiving clarification). Therefore, because the district attorney submitted its request for a decision from this office and the required documentation in a letter postmarked on June 28, 2011, more than a month after the request for information was received, we find the district attorney failed to comply with section 552.301. *See Gov't Code* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail).

¹See Gov't Code § 552.303(c)-(d) (if attorney general determines that information in addition to that required by section 552.301 is necessary to render decision, written notice of that fact shall be given to governmental body and requestor, and governmental body shall submit necessary additional information to attorney general not later than seventh calendar day after date of receipt of notice).

²We understand that the district attorney was closed on May 30, 2011, in observance of Memorial Day.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of the Act results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). The presumption that information is public under section 552.302 can be overcome by demonstrating that the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Although you raise section 552.108 of the Government Code as an exception to disclosure of the submitted information, this exception is discretionary in nature. It serves only to protect a governmental body's interests, and may be waived; as such, it does not constitute a compelling reason to withhold information for purposes of section 552.302. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (waiver of discretionary exceptions), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). Thus, no portion of the submitted information may be withheld under section 552.108 of the Government Code. However, because sections 552.101 and 552.130 of the Government Code can provide compelling reasons to withhold information, we will consider whether or not any of the submitted information is excepted from disclosure under these sections.

Next, we note the submitted information includes sexual offender registration information. 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. This exception encompasses information other statutes make confidential, including article 62.005(b) of the Code of Criminal Procedure. Article 62.051 of the Code of Criminal Procedure requires a sex offender registrant to provide the following information to the Texas Department of Public Safety ("DPS") sex offender registration database: the person's full name; each alias; date of birth; sex; race; height; weight; eye color; hair color; social security number; driver's license number; shoe size; home address; a recent color photograph, or if possible, an electronic image of the person; a complete set of fingerprints; the type of offense the person was convicted of; the age of the victim; the date of conviction; the punishment received; an indication as to whether the person is discharged, paroled, or released on juvenile probation, community supervision, or mandatory supervision; an indication of each license, as defined by article 62.005(g), that is held or sought by the person; an indication as to whether the person is or will be employed, carrying on a vocation, or a student at a particular public or private institution of higher education in this state or another state, and the name and address of that institution; and any other information required by DPS. *See* Crim. Proc. Code art. 62.051(c). This information is public information with the exception of the person's social security number, driver's license number, telephone number, all information required by DPS outside of the enumerated

categories of information, and any information that would identify the victim of the offense for which the person is subject to registration. *See id.* art. 62.005(b). Thus, the district attorney must withhold or release the marked information that is subject to article 62.005 of the Code of Criminal Procedure in accordance with article 62.005(b). *See* 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).

Section 552.101 of the Government Code also encompasses information protected by chapter 411 of the Government Code, which deems confidential criminal history record information (“CHRI”) generated by the National Crime Information Center or by the Texas Crime Information Center. 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 that states obtain from the federal government or other states. *See* Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* at 10-12. Section 411.083 of the Government Code deems confidential CHRI that 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. *See 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. We note 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). Further, CHRI does not include driving record information. *See id.* § 411.082(2)(B) (term CHRI does not include driving record information). Upon review, we find a portion of the submitted information, which we have marked, constitutes CHRI and must be withheld under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code and federal law. However, none of the remaining information consists of CHRI and no portion of it may be withheld under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses doctrine of common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information 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. 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. U. S. 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. We understand you to claim the home addresses and telephone numbers within the remaining information are also confidential under section 552.101 in conjunction with common-law privacy. We note, however, the addresses and telephone numbers of members of the public are not excepted from required public disclosure under common-law privacy. *See Open Records Decision Nos. 551 at 3 (1990) (disclosure of person's name, address, or telephone number not an invasion of privacy), 455 at 7 (1987) (home addresses and telephone numbers not protected under privacy).* 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. However, you have failed to demonstrate how any of the remaining information is highly intimate or embarrassing and not of legitimate public interest. Therefore, we conclude the district attorney may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.130 of the Government Code excepts from disclosure "information [that] relates to (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state or another state or country; [or] (2) a motor vehicle title or registration issued by an agency of this state or another state or country[.]" 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(a)(1)-(2)). Upon review, we find the district attorney must withhold the motor vehicle record information we have marked under section 552.130.³ However, the remaining information does not consist of motor vehicle record information and, as such, may not be withheld under section 552.130.

In summary, the district attorney must withhold or release the marked information that is subject to article 62.005 of the Code of Criminal Procedure in accordance with article 62.005(b). The district attorney must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code and federal law. The district attorney must withhold the information we

³We note Open Records Decision No. 684 (2009) is a previous determination authorizing all governmental bodies to withhold ten categories of information, including 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, without the necessity of requesting an attorney general decision.

have marked under section 552.101 of the Government Code in conjunction with common-law privacy. 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 release the remaining information.⁴

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,



Sean Nottingham
Assistant Attorney General
Open Records Division

SN/agn

Ref: ID# 428794

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴The remaining information contains social security numbers. We note that 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).