



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 13, 2011

Mr. Michael M. Kelley
Assistant Criminal District Attorney
Victoria County District Attorney
205 North Bridge Street, Suite 301
Victoria, Texas 77901

OR2011-13177

Dear Mr. Kelley:

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# 429803.

The Victoria County District Attorney's Office (the "district attorney") received a request for a specified file pertaining to a named individual. You state the district attorney has released some information to the requestor. You claim the remaining requested information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

We first address the district attorney's arguments under section 552.108(a) of the Government Code, as it is the most encompassing exception the district attorney raises. We understand you to assert that the information you have marked is excepted under section 552.108 as interpreted by *Holmes v. Morales*, 924 S.W.2d 920 (Tex. 1996). In

¹We assume the "representative sample" of information submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than those submitted to this office.

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, in pertinent part, 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.

Gov’t Code § 552.108(a). 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). 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. 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.

A governmental body claiming subsection 552.108(a)(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. *See* Gov't Code § 552.108(a)(2). Based upon our review of the information at issue, the prosecution of this matter concluded with a guilty plea by the named individual. 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) to the information at issue. Section 552.108(a)(3) of the Government Code is also inapplicable, as the information at issue does not relate to a threat against a police officer. *See id.* § 552.108(a)(3).

Lastly, you do not assert that the information at issue was prepared by an attorney representing the state or that it reflects the mental impressions or legal reasoning of an attorney representing the state. *See id.* § 552.108(a)(4). Therefore, the district attorney may not withhold any of the information at issue under section 552.108(a)(4).

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 exception 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." *Id.* § 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 the Texas 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. *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). Upon review, we find a portion of the information at issue, which we have marked, constitutes CHRI and must be withheld under section 552.101 of the Government Code in conjunction with of the Government Code and federal law.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types 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. Upon review, however, we find you have failed to demonstrate how any of the remaining information at issue is highly intimate or embarrassing and not of legitimate public interest. Therefore none of the remaining information at issue may be withheld 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[.]"² 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 information we have marked under section 552.130 of the Government Code.

Section 552.136 of the Government Code provides that "[n]otwithstanding any other provision of this chapter, 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." Gov't Code § 552.136(b); *see also id.* § 552.136(a) (defining "access device"). Upon review, we find the district attorney must withhold the debit card number we have marked under section 552.136 of the Government Code.³

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

³We note Open Records Decision No. 684 (2009) is a previous determination authorizing all governmental bodies to withhold ten categories of information, including a Texas driver's license number and the portion of a photograph that reveals Texas license plate numbers under section 552.130 of the Government Code, and a debit card number under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

In summary, 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 have marked under sections 552.130 and 552.136 of the Government Code. The district attorney must release the remaining information at issue.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

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⁴We note the remaining information at issue includes the requestor's client's Texas driver's license number, which the department would ordinarily be required to withhold under section 552.130 of the Government Code, and the requestor's client's social security number, which the department would ordinarily be able to withhold under section 552.147 of the Government Code. Because sections 552.130 and 552.147 protect personal privacy, the requestor has a special right of access to her client's Texas driver's license number and social security number. *See* Gov't Code § 552.023(a). As previously noted, however, Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information without the necessity of requesting an attorney general decision, including a Texas driver's license number, under section 552.130. Further, 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. *Id.* § 552.147(b). Thus, if the district attorney receives another request for these same records from a person other than one with a right of access under section 552.023, the district attorney is authorized to withhold the requestor's client's Texas driver's license number and social security number under sections 552.130 and 552.147(b), respectively, without the necessity of requesting an attorney general decision.

Ref: ID# 429803

Enc. Submitted documents

c: Requestor
(w/o enclosures)