



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 26, 2011

Mr. Tommy L. Coleman
Assistant District Attorney
Williamson County District Attorney's Office
405 South Martin Luther King #1
Georgetown, Texas 78626

OR2011-15744

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# 434224.

The Williamson County District Attorney's Office (the "district attorney") received a request for any information pertaining to a specified prosecution file. You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.111, 552.130, 552.132, and 552.1325 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note the submitted information consists of a completed investigation 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 of the Government Code. Gov't Code § 552.022(a)(1). Section 552.111 of the Government Code is a discretionary exception and does not make information confidential; therefore, the district attorney may not withhold any of the submitted 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

¹We assume the "representative sample" of records 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 that submitted to this office.

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 submitted 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. Further, as sections 552.101, 552.130, 552.132, and 552.1325 of the Government Code constitute “other law” that makes information confidential for the purposes of section 552.022, we will also consider the applicability of those sections.

We next address your arguments under section 552.108 of the Government Code for the submitted information, as it is the most encompassing exception you raise. We understand you to assert the submitted information 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 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 “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 others, 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 the 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(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 have not stated the submitted information pertains to an ongoing criminal investigation or prosecution, nor have you explained 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 concluded case in which the defendant pleaded guilty and was sentenced to fifteen years in prison. Thus, we find you have failed to demonstrate the applicability of section 552.108(a)(1) to the submitted information and no information may be withheld on that basis.

Section 552.108(b)(1) of the Government Code 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) exempts 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) of the Government Code applies to the submitted information. Thus, we find you have failed to meet your burden to demonstrate how the release of the submitted information would interfere with law enforcement and crime prevention. Accordingly, the district attorney may not withhold any of the submitted information under section 552.108(b)(1).

A governmental body claiming section 552.108(a)(2) or section 552.108(b)(2) of the Government Code must demonstrate the requested information relates to a criminal investigation or prosecution that concluded in a final result other than a conviction or deferred adjudication. As stated above, you state the prosecution of this matter concluded with the defendant pleading guilty and being sentenced to fifteen years of incarceration. Accordingly, the investigation and prosecution of this matter resulted in a conviction. Thus, we find you have failed to demonstrate the applicability of section 552.108(a)(2) or section 552.108(b)(2) to the submitted information. Section 552.108(a)(3) is also inapplicable, as the submitted information does not relate to a threat against a police officer. *See* Gov't Code § 552.108(a)(3).

You contend documents 003 through 005, 018 through 022, and 025 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 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 documents 003 through 005, 018 through 022, and 025 under subsections 552.108(a)(4) and 552.108(b)(3).

Section 552.101 of the Government Code exempts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. Section 552.101 encompasses information 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, 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 submitted documents, and no portion of the submitted information may be withheld under section 552.101 of the Government Code on that basis. We caution, however, section 552.353 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing a social security 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, 1990.²

Section 552.101 of the Government Code also encompasses title 28, part 20 of the Code of Federal Regulations, which governs the release of criminal history record information (“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 law with respect to CHRI it generates. *Id.* 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. *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. Upon review, we agree documents 049 through 051 and the information you seek to withhold from document 024, which we have marked, consists of CHRI, and must be withheld under section 552.101 in conjunction with section 411.083 and federal law.³

Section 552.101 of the Government Code also encompasses chapter 560 of the Government Code, which provides that a governmental body may not release biometric identifier information except in certain limited circumstances. *See id.* §§ 560.001 (defining “biometric identifier” to include fingerprints and records of hand geometry), .002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), .003 (providing that biometric identifiers in possession of governmental body are exempt from disclosure under the Act). You do not inform us, and the submitted information does not indicate, section 560.002 permits the disclosure of the submitted fingerprints.

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. *See* Gov’t Code § 552.147(b).

³As our ruling is dispositive for the information we marked, we need not address your remaining arguments against its disclosure.

Therefore, the district attorney must withhold the fingerprints we have marked under section 552.101 in conjunction with section 560.003.⁴

Section 552.101 of the Government Code also encompasses information made confidential by section 1703.306 of the Occupations Code, which provides:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person[.]

(b) The [Texas Department of Licensing and Regulation] or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

Occ. Code § 1703.306(a), (b). The remaining information contains information acquired from a polygraph examination. The requestor does not fall within any of the categories of individuals who are authorized to receive the submitted polygraph information under section 1703.306(a). Accordingly, we agree the district attorney must withhold document 002 under section 552.101 in conjunction with section 1703.306.⁵

Section 552.101 of the Government Code also encompasses article 42.12 of the Code of Criminal Procedure. *See* Code Crim. Proc. art. 42.12, § 9(j). Article 42.12 is applicable to pre-sentence 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;

⁴Open Records Decision No. 684 (2009) is a previous determination authorizing all governmental bodies to withhold ten categories of information, including fingerprints under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code, without the necessity of requesting an attorney general decision.

⁵As our ruling is dispositive for this information, we need not address your remaining arguments against its release.

(2) pursuant to Section 614.017, Health and Safety Code; or

(3) as directed by the judge for the effective supervision of the defendant.

Id. Upon review we agree the pre-sentence investigation report contained in documents 007 through 015 must be withheld under section 552.101 in conjunction with article 42.12 of the Code of Criminal Procedure.

The doctrine of common-law privacy, which is also encompassed by section 552.101 of the Government Code, 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. Common-law privacy also protects information pertaining to the identities of victims of sexual assault. *See* Open Records Decision No. 339 (1982); *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 the marked information under section 552.101 in conjunction with common-law privacy. None of the remaining information is highly intimate or embarrassing; thus, the district attorney may not withhold any of the remaining information under section 552.101 in conjunction with common-law privacy.

Next, you raise articles 57.02 and 57.03 of the Code of Criminal Procedure, which are also encompassed by section 552.101 of the Government Code. Article 57.02 provides that a completed pseudonym form is confidential and may not be disclosed to any person other than a defendant in the case or the defendant's attorney, except by court order. Code Crim. Proc. art. 57.02. Article 57.03 provides, in relevant part:

(a) A public servant with access to the name, address, or telephone number of a victim 17 years of age or older who has chosen a pseudonym under this chapter commits an offense if the public servant knowingly discloses the name, address, or telephone number of the victim to any person who is not assisting in the investigation or prosecution of the offense or to any person other than the defendant, the defendant's attorney, or the person specified in the order of a court of competent jurisdiction.

Id. art. 57.03(a). None of the remaining information includes a pseudonym form or pertains to a victim who has chosen a pseudonym. Accordingly, articles 57.02 and 57.03 are not applicable to the remaining information.

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 an agency of this state or an agency of 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). Accordingly, the district attorney must withhold the motor vehicle record information we have marked under section 552.130.

You assert portions of the remaining information are 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, you provide 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 any portion of the remaining information under section 552.132.

You also assert portions of the remaining information are 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. Code Crim. Proc. art. 56.32(a)(10), (11). Upon our review, we find documents 052 through 060 neither include a victim impact statement for the purposes of section 552.1325, nor has the district attorney explained that any of the information within documents 052 through 060 was submitted for the purposes of preparing a victim impact statement. As such, section 552.1325 is not applicable to the remaining information in documents 052 through 060 and the district attorney may not withhold these documents on this basis.

In summary, the district attorney may withhold documents 003 through 005, 018 through 022, and 025 under subsections 552.108(a)(4) and 552.108(b)(3) of the Government Code. The district attorney must withhold documents 049 through 051 and the information we have marked in document 024 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 also withhold (1) the fingerprints we have marked under section 552.101 in conjunction with section 560.003 of the Government Code; (2) document 002 under section 552.101 in conjunction with section 1703.306 of the Occupations Code; (3) documents 007 through 015 under section 552.101 in conjunction with article 42.12 of the Code of Criminal Procedure; (4) the information we have marked under section 552.101 in conjunction with common-law privacy; and the motor vehicle record information we have marked under section 552.130 of the Government Code. The remaining information must be released.

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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/agn

Ref: ID# 434224

Enc. Submitted documents

c: Requestor
(w/o enclosures)