



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 20, 2012

Mr. Tommy L. Coleman
Assistant District Attorney
Williamson County
405 Martin Luther King Street, Suite 1
Georgetown, Texas 78626

OR2012-09478

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# 456072.

The Williamson County District Attorney's Office (the "district attorney's office") received a request for all documents and materials in the care, custody, or control of the district attorney's office pertaining to a specified case. You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.111, 552.130, 552.132, 552.1325, and 552.147 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the submitted information is a completed investigation that is subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by section 552.108." Gov't Code § 552.022(a)(1). Pursuant to section 552.022(a)(1), a completed investigation is expressly public unless it is either excepted under section 552.108 of the Government Code or is made

¹Although you raise section 552.101 of the Government Code in conjunction with section 405(c)(2)(C)(vii) of title 42 of the United States Code to withhold social security numbers, we note that section 552.147 is the proper exception to raise for this information.

confidential under the Act or other law. You claim portions of the completed investigation are excepted from disclosure as attorney work product under section 552.111 of the Government Code. However, section 552.111 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *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), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). As such, section 552.111 does not make information confidential for purposes of section 552.022(a)(1). Therefore, the district attorney's office may not withhold any of the submitted information under section 552.111 of the Government Code. We note the attorney work product privilege is found at rule 192.5 of the Texas Rules of Civil Procedure, which has been held to be other law within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Those rules are only applicable, however, to "actions of a civil nature." *See* TEX. R. CIV. P. 2. Thus, rule 192.5 is not applicable to the submitted information. Therefore, the district attorney's office may not withhold the submitted information on the basis of Texas Rule of Civil Procedure 192.5. Because information subject to section 552.022(a)(1) may be withheld under section 552.108 of the Government Code, we will consider your claims under section 552.108. Further, as sections 552.101, 552.130, 552.132, 552.1325, and 552.147 of the Government Code make information confidential under the Act or other law, we will also consider the applicability of those sections to the submitted 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:

...

(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)(4). A governmental body that claims 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 contend portions of the information at issue constitute attorney work product that is confidential under section 552.108. You state the information at issue includes the mental impressions of the prosecutor or investigator toward the case. Upon review, we find the information at issue 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, we conclude section 552.108(a)(4) is applicable to the pages you have labeled 000001, 000002, 000006 through 000016, 000018, 000019, 000028 through 000089, and 000096 through 000182 in the submitted information. Accordingly, the district attorney's office may withhold this information under section 552.108(a)(4) of the Government Code.

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 information protected by the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code, which provides in relevant part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(a)-(c). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has determined that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). The medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be

released. Occ. Code §§ 159.004, .005. Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). Upon review, we agree the information at issue includes medical records subject to the MPA. Therefore, the district attorney's office may only release the medical records we have marked in accordance with the MPA.²

Section 552.101 of the Government Code also encompasses federal and state laws that make criminal history record information ("CHRI") confidential. CHRI refers to "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). Federal law governs the dissemination of CHRI obtained from the National Crime Information Center network. Federal regulations prohibit the release to the general public of CHRI maintained in state and local CHRI systems. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given."); *see also id.* § 20.21(c)(2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). The federal regulations allow each state to follow its own individual law with respect to CHRI that it generates. *See* Open Records Decision No. 565 at 10-12 (1990); *see generally* Gov't Code ch. 411 subch. F. Although sections 411.083(b)(1) and 411.089(a) of the Government Code authorize a criminal justice agency to obtain CHRI, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *See id.* § 411.089(b). 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) (criminal justice agency allowed to disclose information pertaining to person's current involvement in the criminal justice system). Further, CHRI does not include driving record information. *Id.* § 411.082(2)(B). Upon review, we agree a portion of the submitted information, which we have marked, constitutes CHRI that is confidential under section 411.083. Thus, the district attorney's office must withhold the CHRI we have marked under section 552.101 of the Government Code in conjunction with federal law and subchapter F of chapter 411 of the Government Code. However, we find the district attorney's office has failed to demonstrate that any of the remaining information constitutes CHRI for purposes of chapter 411 or federal law. Therefore, the district attorney's office may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with federal law or subchapter F of chapter 411 of the Government Code.

²As our ruling is dispositive with respect to the information at issue, we do not address your remaining argument under section 181.001 of the Health and Safety Code.

The district attorney's office also seeks to withhold CHRI under section 552.101 of the Government Code in conjunction with article 60.03 of the Code of Criminal Procedure, which provides, in pertinent part:

(a) Criminal justice agencies . . . are entitled to access to the data bases of the Department of Public Safety, the Texas Juvenile Probation Commission, the Texas Youth Commission, and the Texas Department of Criminal Justice in accordance with applicable state or federal law or regulations. The access granted by this subsection does not grant an agency . . . the right to add, delete, or alter data maintained by another agency.

...

(c) . . . a criminal justice agency . . . may [not] disclose to the public information in an individual's criminal history record if the record is protected by state or federal law or regulation.

Crim. Proc. Code art. 60.03. The remaining information the district attorney's office seeks to withhold pursuant to article 60.03 of the Code of Criminal Procedure does not constitute criminal history information for purposes of that article and, therefore, the district attorney's office may not withhold it under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information if it (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 highly 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. *Id.* at 683; *see also Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546 (Tex. App.—Austin 1983, *writ ref'd n.r.e.*). Additionally, 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 an individual's privacy interest, the Court recognized a distinction between public records found in courthouse and police station files and a compiled summary of information, while noting an individual's significant privacy interest in a compilation of his or her criminal history). Furthermore, we find that a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. Personal financial information related only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See generally* Open Records Decision Nos. 545 (1990)

(deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). Additionally, this office has found some kinds of medical information or information indicating disabilities or specific illnesses are generally highly intimate or embarrassing. See Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps).

You cite *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), in your argument against disclosure based on section 552.101 in conjunction with common-law privacy. In *Ellen*, the court addressed the applicability of the common-law privacy doctrine to files of an investigation of sexual harassment. Here, however, the information at issue does not relate to an investigation of sexual harassment. Because the information does not concern sexual harassment, we find *Ellen* is not applicable in this instance.

Upon review, we find the information we have marked is highly intimate or embarrassing and of no legitimate public concern. Therefore, the district attorney's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find you have failed to demonstrate that any of the remaining information is highly intimate or embarrassing and of no legitimate public concern. Accordingly, the district attorney's office may not withhold any of the remaining information on the basis of section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.130 excepts from disclosure information related to a motor vehicle operator's or driver's license or permit issued by an agency of this state or another state or country; a motor vehicle title or registration issued by an agency of this state or another state or country; or a personal identification document issued by an agency of this state or another state or country or a local agency authorized to issue an identification document. Gov't Code § 552.130(a). Therefore, the district attorney's office must withhold the information we have marked under section 552.130 of the Government Code. However, we find you have failed to demonstrate the applicability of section 552.130 to any of the remaining information. Accordingly, the district attorney's office may not withhold any of the remaining information on the basis of section 552.130 of the Government Code.

You claim portions of the remaining information are protected from public disclosure 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's office, 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 that the victims are employees of the district attorney's office who made an election in accordance with section 552.132(d). Accordingly, the district attorney's office may not withhold any of the submitted information under section 552.132 of the Government Code.

You also claim portions of the remaining information are protected from public disclosure under section 552.1325 of the Government Code, which provides, in relevant part, the following:

(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.

Gov't Code § 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). The remaining information includes victim impact statements as defined by article 56.03 of the Code of Criminal Procedure that were completed by the victims in the specified case, as well as information submitted for purposes of preparing a victim impact statement. *See id.* § 56.03. The statements reflect the victims suffered economic and mental harm as a result of the criminally injurious conduct. Therefore, the district attorney's office must withhold the information we have marked under section 552.1325 of the Government Code. However, we find you have failed to demonstrate the applicability of section 552.1325 to any of the remaining information. Accordingly, the district attorney's office may not withhold any of the remaining information on the basis of section 552.1325 of the Government Code.

Section 552.147 of the Government Code provides, "[t]he social security number of a living person is excepted from" required public disclosure under the Act. Gov't Code § 552.147(a). Accordingly, the district attorney's office may withhold the social security numbers we have marked under section 552.147 of the Government Code.³

In summary, the district attorney's office may withhold the pages you have labeled 000001, 000002, 000006 through 000016, 000018, 000019, 000028 through 000089, and 000096 through 000182 under section 552.108(a)(4) of the Government Code. The district attorney's office may only release the medical records we have marked in accordance with the MPA. The district attorney's office must withhold the CHRI we have marked under section 552.101 of the Government Code in conjunction with federal law and subchapter F of chapter 411 of the Government Code, the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy, the information we have marked under section 552.130 of the Government Code, and the information we have marked under section 552.1325 of the Government Code. The district attorney's office may withhold the social security numbers we have marked under section 552.147 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.

³We note 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.

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,



Benjamin A. Bellomy
Assistant Attorney General
Open Records Division

BAB/dls

Ref: ID# 456072

Enc. Submitted documents

c: Requestor
(w/o enclosures)