



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 16, 2012

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

OR2012-10955

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# 459501.

The Williamson County District Attorney's Office (the "district attorney's office") received a request for a specified case file. You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.108, 552.111, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We note the submitted information falls within the scope of section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless the information is excepted from disclosure under section 552.108 of the Government Code or made confidential under the Act or other law. Gov't Code § 552.022(a)(1). In this instance, the submitted information constitutes a completed investigation made by the district attorney's office. Although you seek to withhold portions of the submitted information as attorney work product under 552.111 of the Government Code, 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 have 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, which pertains to a criminal investigation. Therefore, the district attorney's office may not withhold any of 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 for portions of the submitted information under section 552.108. We also will consider your claims for the submitted information under sections 552.101 and 552.130 of the Government Code, both of which make information confidential for purposes of section 552.022(a)(1).

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 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's office 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's office pursuant to any provision of law enacted on or after October 1, 1990.¹

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

¹We note section 552.147(b) of the Government Code authorizes a governmental body to redact the social security number of a living person without the necessity of requesting a decision from this office under the Act. *See* Gov't Code § 552.147(b).

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 find the information we have marked consists of confidential 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, 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 on that basis.

You also seek 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. Upon review, we find 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 also encompasses common-law privacy, which 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 satisfied. *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; *see also Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546 (Tex. App.—Austin 1983, *writ ref'd n.r.e.*). 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 a portion of the information at issue consists of information that is highly intimate or embarrassing and of no legitimate public concern. Accordingly, 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, none of the remaining information may be withheld on this basis.

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, and 000003 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 552.130 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. Gov't Code § 552.130(a)(1). Therefore, the district attorney's office must withhold the information we have marked under section 552.130 of the Government Code.

In summary, the district attorney's office must withhold the CHRI we have marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code and federal law and the information we have marked under section 552.101 in conjunction with common-law privacy. The district attorney's office may withhold the pages you have labeled 000001, 000002, and 000003 under section 552.108(a)(4) of the Government Code. The district attorney's office must withhold the 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,



Kristi L. Wilkins
Assistant Attorney General
Open Records Division

KLW/eb

Ref: ID# 459501

Enc. Submitted documents

c: Requestor
(w/o enclosures)