



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 17, 2012

Ms. Myrna Reingold
Legal Department
Galveston County
722 Moody, Fifth Floor
Galveston, Texas 77550-2317

OR2012-20276

Dear Ms. Reingold:

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# 473823.

The Galveston County District Attorney's Office (the "district attorney's office") received a request for all complaints alleging a public official violated the law regarding his or her office during a specified period. You state the district attorney's office has released some of the information with redactions pursuant to section 552.130 of the Government Code.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, 552.108, 552.111, 552.117, 552.1175,

¹Section 552.130 of the Government Code permits a governmental body to withhold certain motor vehicle record information without requesting a decision from this office. A governmental body that redacts such information must provide notice to the requestor. See Gov't Code § 552.130(c)-(e).

552.130, 552.136, 552.137, and 552.147 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

You state the district attorney's office is in communication with the requestor regarding clarification and narrowing of the request for information. *See id.* § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request). We note a governmental body has a duty to make a good-faith effort to relate a request for information to information the governmental body holds. Open Records Decision No. 561 (1990). In this case, as you have submitted information responsive to the request and have made arguments against disclosure of this information, we will address your arguments for the submitted information.⁴

Next, you argue some of the requested information is not subject to the provisions of the Act because it is held by the district attorney's office as an agent of the grand jury. Section 552.003(b) of the Government Code excludes the judiciary from the Act. This office has determined that a grand jury, for purposes of the Act, is a part of the judiciary, and therefore not subject to the Act. Open Records Decision No. 411 (1984). Further, records kept by a governmental body acting as an agent for a grand jury are considered records in the constructive possession of the grand jury, and therefore are also not subject to the Act. Open Records Decisions Nos. 513 (1988), 411, 398 (1983). *But see* ORD 513 at 4 (defining limits of judiciary exclusion). You state the information at issue was obtained by the district attorney's office pursuant to a grand jury subpoena or at the direction of the grand jury.

²We understand you have marked some of the submitted information under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. However, you have not provided arguments to support that exception. Accordingly, we find the district attorney's office has waived its claim under this exception. *See* Gov't Code § 552.301(e) (governmental body must provide comments stating why exceptions raised should apply to information requested); Open Records Decision No. 549 (1990) (purpose of informer's privilege is to protect the flow of information to a governmental body, rather than to protect a third party).

Although you assert section 552.101 of the Government Code in conjunction with section 552.107 and the attorney-client and attorney work-product privileges, we note section 552.101 does not encompass other exceptions found within the Act and does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002). However, we will consider your assertion of the attorney-client privilege under section 552.107 of the Government Code and your assertion of the work-product privilege under section 552.111 of the Government Code.

³We 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 those submitted to this office.

⁴*See City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

Based on your representations and our review of the information, we agree it is not subject to disclosure under the Act. The district attorney's office is not required to release this information in response to the request.

Next, you claim some of the information is not subject to the Act pursuant to section 571.139(a) of the Government Code. Section 571.139 provides in part:

(a) . . . Chapter 552 does not apply to documents or any additional evidence relating to the processing, preliminary review, preliminary review hearing, or resolution of a sworn complaint or motion.

Gov't Code § 571.139(a). Alternatively, you claim this information is confidential under section 571.140 of the Government Code which provides:

(a) Except as provided by Subsection (b) . . . proceedings at a preliminary review hearing performed by the [Texas Ethics Commission (the "commission")], a sworn complaint, and documents and any additional evidence relating to the processing, preliminary review, preliminary review hearing, or resolution of a sworn complaint or motion are confidential and may not be disclosed unless entered into the record of a formal hearing or a judicial proceeding, except that a document or statement that was previously public information remains public information.

(b) An order issued by the commission after the completion of a preliminary review or hearing determining that a violation other than a technical or de minimis violation has occurred is not confidential.

Gov't Code § 571.140(a), (b). You state the information at issue is a sworn complaint pending before the commission and you assert this information is not subject to the Act in accordance with section 571.139. Alternatively, you argue if the information is subject to the Act, it is confidential under section 571.140. In Ethics Advisory Opinion No. 8 (1992), the commission considered whether section 571.140 acts as a broad prohibition against disclosure of an ethics complaint and related documents. Guided by federal court cases interpreting similar provisions, the commission determined that such a broad restriction would violate the First Amendment to the United States Constitution. Ethics Advisory Opinion No. 8 at 2-4 (1992) (citing *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (law allowing criminal prosecution of newspaper for printing information about complaint proceedings was unconstitutional); *Doe v. Gonzalez*, 723 F. Supp. 690 (S.D. Fla. 1988) aff'd 886 F.2d 1323 (11th Cir. Fla. 1989) (statute prohibiting complainant from discussing ethics complaint was unconstitutional); *Providence Journal Co. v. Newton*, 723 F. Supp. 846 (D.R.I. 1989) (law prohibiting all public discussion of ethics complaint was unconstitutional)). Instead, the commission construed the confidentiality provision to apply only to its own members and staff and not to third parties. Thus, we will defer to the

commission's interpretation of its own statute in this situation.⁵ *See Tex. Water Comm'n v. Brushy Creek Mun. Util. Dist.*, 917 S.W.2d 19, 21 (Tex. 1996) (“[T]he construction of a statute by an agency charged with its execution is entitled to serious consideration unless the agency's construction is clearly inconsistent with the Legislature's intent.”); *see also* Attorney General Opinions JC-0114 at 2 (1999) (same), JM-1212 at 8 (1990) (same). Accordingly, we find that neither section 571.139 nor section 571.140 applies to the information in the hands of the district attorney's office. Thus, we will address your remaining arguments against disclosure for this information.

We note some of the submitted information contains court-filed documents. A document that has been filed with a court is expressly public under section 552.022 of the Government Code and may not be withheld unless it is made confidential under the Act or other law. *See* Gov't Code § 552.022(a)(17). Although you seek to withhold this information under section 552.108 of the Government Code, this is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). As such, section 552.108 does not make information confidential for purposes of section 552.022(a)(17). Thus, the district attorney's office may not withhold the court-filed documents we have marked under section 552.108 of the Government Code, and they must be released.

We next address your assertion of section 552.108 of the Government Code, as it is potentially the most encompassing. Section 552.108 of the Government Code 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:

(1) release of the information would interfere with the detection, investigation or prosecution of crime [or]

(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 [or]

...

4) it is information that:

⁵In the opinion, the commission clearly indicates that it construed the statute narrowly “because a statute is to be construed in a manner that renders it constitutional.” Ethics Advisory Opinion No. 8 at 4 (1992) (citing *State v. Shoppers World, Inc.*, 380 S.W.2d 107, 111 (Tex. 1964); *Earle v. Program Centers of Grace Union Presbytery, Inc.*, 670 S.W.2d 777, 779–80 (Tex. App.—Fort Worth 1984, no writ)).

(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)(1), (2), (4). Section 552.108(a)(1) is applicable to information pertaining to a pending criminal investigation or prosecution. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Section 552.108(a)(2) protects law enforcement records pertaining to a closed criminal investigation or prosecution that concluded in a final result other than a conviction or a deferred adjudication. Section 552.108(a)(4) protects information that was prepared by an attorney for the state for litigation or that reflects an attorney's legal reasoning. A governmental body that claims section 552.108 must reasonably explain its applicability. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must provide comments explaining why claimed exceptions to disclosure apply); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

You state the information you have marked pursuant to section 552.108(a)(1) relates to pending criminal investigations and prosecutions, and release of this information would interfere with the investigation and prosecution of crime. Based on this representation and our review, we find section 552.108(a)(1) of the Government Code is applicable to that information. You state the information you have marked pursuant to section 552.108(a)(2) relates to concluded investigations that did not result in conviction or deferred adjudication. Based on this representation and our review, we find section 552.108(a)(2) of the Government Code is applicable to that information. You state some of the information you have marked consists of notes made by a prosecutor in the course of preparing for litigation. Based on this representation and our review, we agree the district attorney's office may withhold that information under section 552.108(a)(4) of the Government Code.

However, section 552.108 does not except from disclosure basic information about a crime. Gov't Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle*. 531 S.W.2d at 186–87. This information includes, but is not limited to, the identity of the complainant and a sufficient portion of the narrative to include a detailed description of the offense. *See* Open Records Decision No. 127 (1976) (summarizing types of information deemed public by *Houston Chronicle*). Thus, with the exception of basic information, the district attorney's office may withhold the information at issue under section 552.108(a)(1), section 552.108(a)(2), and 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 laws that make criminal history record information (“CHRI”) confidential. CHRI generated by the National Crime Information Center or by the Texas Crime Information Center is confidential under federal and state law. 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. Open Records Decision No. 565 at 7 (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 the Department of Public Safety (“DPS”) maintains, except 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) of the Government Code authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for criminal justice purposes. *See id.* § 411.089(b)(1). Upon review, we find the district attorney’s office 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.

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). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681–82. 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. Upon review, we find the information we have marked is highly intimate or embarrassing and of no legitimate public interest. The district attorney’s office must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). The Texas Supreme Court held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336, 348 (Tex. 2010). Thus, under *Texas Comptroller*, section 552.102(a) is applicable to the birth date of an employee of a governmental body in a record maintained by his or her employer in an employment context. The information you have marked is held by the district attorney’s office in a law enforcement context. Accordingly, section 552.102(a) is not applicable and the information you have marked may not be withheld on that basis.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family

member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request under section 552.024 the information be kept confidential. We note section 552.117 also encompasses a personal cellular telephone or pager number, unless the cellular or pager service is paid for by a governmental body. *See* Open Records Decision No. 506 at 5-7 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Therefore, to the extent the individuals at issue timely requested confidentiality, the district attorney's office must withhold the information we have marked under section 552.117(a)(1) of the Government Code. However, the district attorney's office may not withhold the marked cellular telephone number if the service is paid for with public money. We note section 552.117 is applicable only to information held in an employment context. The remaining information you have marked is held by the district attorney's office in a law enforcement context. Section 552.117 is not applicable to this information, and it may not be withheld on that basis.

Section 552.117(a)(2) of the Government Code excepts the same information from disclosure for a peace officer, as defined by article 2.12 of the Code of Criminal Procedure, regardless of whether the peace officer made an election under section 552.024 of the Government Code. Gov't Code § 552.117(a)(2); Open Records Decision No. 622 (1994). The district attorney's office must withhold the information we have marked under section 552.117(a)(2) of the Government Code.

You have marked several e-mail addresses for redaction. Section 552.137 of the Government Code provides, "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). The district attorney's office must withhold the e-mail addresses you have marked, and the additional e-mail addresses we have marked, under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release.

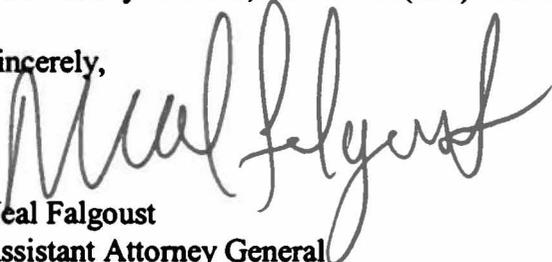
In summary, with the exception of the information we have marked that is subject to section 552.022(a)(17) of the Government Code and basic information, the district attorney's office may withhold the information at issue under sections 552.108(a)(1), 552.108(a)(2), and 552.108(a)(4) of the Government Code. The district attorney's office 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 common-law privacy. To the extent the individuals at issue timely requested confidentiality, the district attorney's office must withhold the information we have marked under section 552.117(a)(1) of the Government Code. However, the district attorney's office may not withhold the marked cellular telephone number if the service is paid for with public money. The district attorney's office must withhold the e-mail addresses you have marked, and the additional e-mail addresses we have marked, under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release.⁶ 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,



Neal Falgoust
Assistant Attorney General
Open Records Division

NF/ag

Ref: ID# 473823

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁶As our rulings are dispositive, we do not address your remaining claimed exceptions.