



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 29, 2014

Ms. Anne Marie P. Hillis
Civil Section
Bexar County District Attorney's Office
300 Delarosa, Fifth Floor
San Antonio, Texas 78205-3030

OR2014-01713

Dear Ms. Hillis:

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# 512030.

The Bexar County District Attorney's Office (the "district attorney's office") received a request for information regarding two specified cases. You claim the submitted 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 information.

Initially, we note a portion of the submitted information, which we have marked, is not responsive to the instant request because it was created after the request was received. This ruling does not address the public availability of non-responsive information, and the district attorney's office is not required to release non-responsive information in response to this request.

You assert the responsive information is excepted under section 552.108 of the Government Code, which provides the following:

- (a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 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; [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 the requirements of Section 552.021 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.

Gov't Code § 552.108(a)(1)-(2), (4), (b). A governmental body raising section 552.108 must reasonably explain the applicability of section 552.108. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). A governmental body claiming subsection 552.108(a)(1) or 552.108(b)(1) must reasonably explain how and why the release of the requested

information would interfere with law enforcement. *See id.* § 552.108(a)(1), (b)(1); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Generally speaking, subsections 552.108(a)(1) and 552.108(b)(1) are mutually exclusive of subsections 552.108(a)(2) and 552.108(b)(2). Subsection 552.108(a)(1) protects information, the release of which would interfere with a particular pending criminal investigation or prosecution, while subsection 552.108(b)(1) encompasses internal law enforcement and prosecution records, the release of which would interfere with law enforcement and prosecution efforts in general. In contrast, subsections 552.108(a)(2) and 552.108(b)(2) protect information that relates to a concluded criminal investigation or prosecution that did not result in a conviction or deferred adjudication. Additionally, in *Curry v. Walker*, 873 S.W.2d 379 (Tex. 1994), the Texas Supreme Court held that a request for a district attorney's "entire litigation file" was "too broad" and, quoting *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458 (Tex. 1993) held, "the decision as to what to include in [the file] necessarily reveals the attorney's thought processes concerning the prosecution or defense of the case." *Curry*, 873 S.W.2d at 380 (internal quotations omitted). Accordingly, the court concluded in such an instance, the district attorney's entire litigation file is privileged attorney work product.

You assert subsection 552.108(a)(4) applies to the entire file of the case at issue in Exhibit C. However, we disagree that the requestor has sought the entire prosecution file for this case. Rather, the requestor has specifically itemized the precise documents he seeks that are held by the district attorney's office. Such a request does not constitute a request for the "entire" file. Thus, the present request is not a request for the entire prosecution file, and, as a result, the district attorney's office may not withhold Exhibit C under *Curry*.

You indicate both Exhibits C and D contain the mental impressions and legal reasoning of attorneys representing the State of Texas and state the documents were prepared in the course of preparing for criminal litigation. However, you have not explained, and our review of information at issue does not reveal, how any of the responsive information was prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation or that it reflects the mental impressions or legal reasoning of an attorney representing the state. *See Gov't Code* § 552.108(a)(4), (b)(3). Accordingly, the district attorney's office may not withhold any of the responsive information under subsections 552.108(a)(4) or 552.108(b)(3) of the Government Code.

You state the information in Exhibit D pertains to an investigation that did not result in an indictment, and, therefore, indicate this information pertains to a case that concluded in a result other than a conviction or a deferred adjudication. Accordingly, you assert Exhibit D is excepted from disclosure under subsections 552.108(a)(2) and 552.108(b)(2). However, you also cite subsections 552.108(a)(1) and 552.108(b)(1), state the information in Exhibit D pertains to a pending criminal investigation, and state its release would interfere with the investigation and prosecution of crime. Because you have provided this office with contradictory representations, we find you have failed to demonstrate the applicability of subsections 552.108(a)(1), 552.108(a)(2), 552.108(b)(1), and 552.108(b)(2) to Exhibit D.

See id. § 552.301(e)(1)(A). Therefore, we conclude the district attorney's office may not withhold any of the information in Exhibit D under subsections 552.108(a)(1), 552.108(a)(2), 552.108(b)(1), and 552.108(b)(2) of the Government Code.

You raise subsections 552.108(a)(1) and 552.108(b)(1) for the information in Exhibit C and state the defendant at issue has filed a writ of habeas corpus. However, we note a habeas corpus proceeding is a civil proceeding. Therefore, the district attorney's office has not shown how a habeas corpus proceeding is a criminal prosecution for purposes of subsections 552.108(a)(1) and 552.108(b)(1). Therefore, we conclude the district attorney's office may not withhold any of Exhibit C under subsections 552.108(a)(1) and 552.108(b)(1) 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." *Id.* § 552.101. This section encompasses information protected by other statutes, such as 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 other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

(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.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Occ. Code § 1703.306. Upon review we find the information we have marked constitutes information acquired from a polygraph examination and is, therefore, within the scope of section 1703.306. It does not appear the requestor falls into any of the categories of individuals who are authorized to receive the polygraph information under section 1703.306(a). Accordingly, the district attorney's office must withhold the polygraph information we have marked under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.

Section 552.101 of the Government Code also encompasses section 411.153 of the Government Code. Section 411.153 provides as follows:

- (a) A DNA record stored in the DNA database is confidential and is not subject to disclosure under the public information law, Chapter 552.
- (b) A person commits an offense if the person knowingly discloses to an unauthorized recipient information in a DNA record or information related to a DNA analysis of a sample collected under this subchapter.
- (c) An offense under this section is a state jail felony.
- (d) A violation under this section constitutes official misconduct.

Gov't Code § 411.153. A "DNA record" means the results of a forensic DNA analysis performed by a DNA laboratory. *See id.* § 411.141(6), (7). "Forensic analysis" is defined as "a medical, chemical, toxicologic, ballistic, or other expert examination or test performed on physical evidence, including DNA evidence, for the purpose of determining the connection of the evidence to a criminal action." *See* Crim. Proc. Code art. 38.35(4); *see also* Gov't Code § 411.141(10) (providing that "forensic analysis" has meaning assigned by Crim. Proc. Code art. 38.35). A "DNA database" means "one or more databases that contain forensic DNA records maintained by the director [of the Department of Public Safety ("DPS)]." Gov't Code § 411.141(5); *see id.* § 411.001(3).

The director of DPS is required to establish certain procedures for DNA laboratories. *See id.* §§ 411.144(a), .142(h) (requiring director establish standards for DNA analysis). Section 411.144 of the Government Code provides that a DNA laboratory conducting a forensic DNA analysis under subchapter G of chapter 411 shall comply with subchapter G and the rules adopted under subchapter G. *See id.* § 411.144(d); 37 T.A.C. § 28.82(a). The director of DPS has adopted rules that govern the regulation of forensic DNA laboratories in this state. *See* 37 T.A.C. §§ 28.81, .82 (describing minimum standards by which forensic DNA laboratory must abide); *see also* Gov't Code § 411.147(b). The director of DPS may release a DNA record in certain instances, including to a criminal justice agency for criminal justice or law enforcement purposes. *See* Gov't Code § 411.147(c).

We have marked DNA records relating to DNA analyses of samples that appear to have been collected under subchapter G of chapter 411 of the Government Code. We note the information at issue is contained in records of a criminal investigation and appears to be the result of forensic DNA analyses performed by a DNA laboratory in accordance with DPS regulations. Thus, we conclude the district attorney's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 411.153 of the Government Code.

Section 552.101 of the Government Code also encompasses the doctrine of 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. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. See Open Records Decision No. 455 (1987). Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. 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.

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, or a personal identification document issued by an agency of this state or another state or country is excepted from public release.¹ Gov't Code § 552.130(a). Upon review, we find the district attorney's office must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.²

In summary, the district attorney's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code, section 411.153 of the Government Code, and common-law privacy, and the motor vehicle record information we have marked under section 552.130 of the

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

²Section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsection 552.130(a) without the necessity of seeking a decision from the attorney general. See Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). See *id.* § 552.130(d), (e).

Government Code. The district attorney's office must release the remaining information to the requestor.³

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Kathryn R. Mattingly
Assistant Attorney General
Open Records Division

KRM/bhf

Ref: ID# 512030

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³We note the remaining information contains social security numbers. 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. Gov't Code § 552.147(b).