



May 30, 2002

Ms. Larissa T. Roeder
Assistant District Attorney
Dallas County
133 North Industrial Boulevard, LB 19
Dallas, Texas 75207-4399

OR2002-2920

Dear Ms. Roeder:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 163636.

The Dallas County District Attorney (the "district attorney") received a request for all documentation regarding a named individual "specifically including but not limited to criminal records, incident records or any other such records reflecting same." You state that some responsive information has been destroyed under the record retention and destruction policy in effect at the time. The Public Information Act (the "Act") does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986). You state that some responsive information has been released to the requestor. You claim that a portion of the requested information is excepted from disclosure under sections 552.101, 552.108, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, some of which you indicate consists of representative samples.¹

¹We assume that 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 that those records contain substantially different types of information than that submitted to this office.

You assert that the prosecution files submitted to this office in Exhibits 2, 3, and 4 are excepted from disclosure under section 552.108 of the Government Code. Section 552.108, the "law enforcement exception," provides in relevant 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:

...

(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[.]

...

(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:

...

(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 [.]

Gov't Code § 552.108(a)(2), (b)(2). A governmental body that raises section 552.108 must reasonably explain, if the responsive information does not supply the explanation on its face, how and why section 552.108 is applicable to that information. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). Section 552.108(a)(2) and (b)(2) protect information relating to a concluded criminal investigation that did not result in a conviction or a deferred adjudication. You inform us that the grand jury "no billed" the three offenses submitted in Exhibits 2, 3, and 4. We thus understand you to represent to this office that the investigation and prosecution of those three offenses have concluded in a final result other than conviction or deferred adjudication. Based on your representations and our review of the information at issue, we agree that section 552.108(a)(2) is applicable.

We note, however, that section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. *See Gov't Code* § 552.108(c). Basic information refers to the information held to be in *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976), and includes the identification and description of the complainant. Open Records Decision No. 127 (1976). However, because the offense

report in Exhibit 3 contains information about an alleged sexual assault, certain front page offense report information is excepted from disclosure under section 552.101 of the Government Code. In sexual assault cases, section 552.101 excepts from public disclosure certain information that is not normally excepted under section 552.108. Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Under section 552.101, information may be withheld on the basis of common-law privacy. The doctrine of common-law privacy protects information if it is highly intimate or embarrassing such that its release would be highly objectionable to a reasonable person and the public has no legitimate interest in it. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In Open Records Decision No. 339 (1982), we concluded that a sexual assault victim has a common-law privacy interest which prevents disclosure of information that would identify the victim. *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). Accordingly, we have marked the sexual assault victim's identifying information that the district attorney must withhold pursuant to common-law privacy. *See* Open Records Decision Nos. 393 (1983), 339 (1982). The district attorney must release all other front page offense report information in Exhibits 2, 3, and 4. However, the district attorney may withhold the remaining information in Exhibits 2, 3, and 4 from disclosure pursuant to section 552.108(a)(2) of the Government Code.

You argue that the criminal history information in Exhibit 5 is private and must be withheld from public disclosure under section 552.101 of the Government Code. Criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential. 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 (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 Department of Public Safety ("DPS") maintains, except that the 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. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. A portion of the information submitted for our review is

CHRI generated by TCIC and NCIC. Accordingly, the CHRI that we have marked is excepted from required public disclosure by section 552.101 of the Government Code.

Where an individual's criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual's right to privacy. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). However, we note that the privacy rights of an individual lapse upon death. *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ ref'd n.r.e.); *see also Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-47 (N.D. Tex. 1979) (“action for invasion of privacy can be maintained only by a living individual whose privacy is invaded”) (quoting Restatement of Torts 2d). Thus, we conclude that the district attorney may not withhold any of the remaining submitted information in Exhibit 5 regarding criminal history from disclosure pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy. *See generally* Attorney General Opinion H-917 at 3-4 (1976); *see also* Open Records Decision No. 272 at 1 (1981).

Next, you seek to withhold from disclosure certain information that you represent consists of grand jury records. The Act does not apply to information within the actual or constructive possession of the grand jury. Open Records Decision No. 513 (1988). Information obtained pursuant to a grand jury subpoena issued in connection with an investigation is within the grand jury's constructive possession and is not subject to the Act. *Id.*; *see also* Gov't Code § 552.003. However, if an investigation began before any information was submitted to the grand jury, and the grand jury did not formally request or direct all of the governmental body's actions in the investigation, then the information is not deemed to be in the grand jury's constructive possession. The fact that information collected or prepared by a governmental body is submitted to the grand jury, when taken alone, does not mean that the information is in the grand jury's constructive possession when the same information is also held by the governmental body. Open Records Decision No. 513 (1988). Therefore, to the extent that any of the documents you seek to withhold were obtained at the direction of the grand jury or pursuant to a grand jury subpoena, these documents are not subject to the Act.

You claim that vehicle identification information contained within the submitted records is excepted from public disclosure under section 552.130 of the Government Code. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

To the extent that the responsive information in Exhibit 7 contains Texas license plate or vehicle identification numbers, this information must be withheld under section 552.130. Out-of-state motor vehicle information is not excepted from public disclosure under section 552.130 and must be released.

In summary, the district attorney may withhold most of the requested information in Exhibits 2, 3, and 4 from disclosure based on section 552.108(a)(2). However, with the exception of the identity of the sexual assault victim which is private under section 552.101, basic front page information must be released from those exhibits. The information that we have marked in Exhibit 5 is CHRI that is excepted from required public disclosure by section 552.101 of the Government Code. Documents obtained at the direction of the grand jury or pursuant to a grand jury subpoena are not subject to the Act. To the extent that the responsive information in Exhibit 7 contains Texas license plate or vehicle identification numbers, this information must be withheld under section 552.130. The remainder of the submitted information must be released to the requestor.

Finally, you request that this office issue a "previous determination" that would permit the district attorney in the future to withhold from disclosure prosecution files in "No Billed" cases, grand jury information, criminal history information, and vehicle identification information without the need of requesting a ruling from us about whether such information can be withheld from disclosure. While we decline to issue such a previous determination at this time for prosecution files in "No Billed" cases, grand jury information, and criminal history information, this letter ruling shall serve as a previous determination under section 552.301(a) that Texas license plate and vehicle identification numbers are excepted from public disclosure under section 552.130. *See Gov't Code § 552.301(a), (f); see also Open Records Decision No. 673 (2001).*

However, we note that section 552.130 protects the privacy of the individual to whom the information relates. Therefore, a person's section 552.130 information must be released to that person or that person's authorized representative. *See Gov't Code § 552.023 (person or person's authorized representative has a special right of access to information that is protected by laws intended to protect a person's privacy).* Moreover, because this provision was enacted to protect the privacy of an individual, the protection extinguishes upon the individual's death. This conclusion is consistent with prior decisions of this office, which held that exceptions of the Public Information Act that only protect a person's privacy interest do not survive the death of that person. *See Attorney General Opinion H-917 (1976) (common-law privacy under sections 552.101 and 552.102 lapses on person's death); Open Records Decision Nos. 536 (1989) (section 552.119 does not except peace officer's photograph after officer's death), 524 (1989) (section 552.114 does not except student records after student's death).* Thus, the district attorney may not withhold a deceased person's section 552.130 information.

This previous determination applies only to Texas license plate and vehicle identification numbers requested of the Dallas County District Attorney. *See* Open Records Decision No. 673 at 7 (2001). Moreover, so long as the elements of law, fact and circumstances do not change so as to no longer support the findings set forth above, the district attorney need not ask for a decision from this office again with respect to this type of information requested of the Dallas County District Attorney. *See id.*

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Cindy Nettles". The signature is fluid and cursive, with the first name "Cindy" written in a larger, more prominent script than the last name "Nettles".

Cindy Nettles
Assistant Attorney General
Open Records Division

CN/seg

Ref: ID# 163636

Enc. Submitted documents

c: Mr. Scott A. Cummings
Suchocki, Bullard & Cummings
One Summit Avenue, Suite 312
Fort Worth, Texas 76102
(w/o enclosures)