OFFICE OF THE ATTORNEY GENERAL · STATE OF TEXAS
JOHN CORNYN

July 10, 2002

Mr. Fred Hernandez
District Attorney
63rd Judicial District
P.O. Box 1405
Del Rio, Texas 78841-1405

OR2002-3753

Dear Mr. Hernandez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 165479.

The District Attorney for the 63rd Judicial District (the "district attorney") received a request for "each and every file(s) or record(s)" regarding a named individual, including information relating to a particular case in which he was the defendant. You state that the district attorney has released some of the requested information. The district attorney claims that the remaining requested information is excepted from disclosure under sections 552.101, 552.108, and 552.111 of the Government Code. We have considered the exceptions you raise and have reviewed the information you submitted.

First, we must address the request for "each and every file(s) or record(s)" regarding the individual in question. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses the common-law right to privacy. Common-law privacy protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, *and* (2) of no legitimate public interest. *See Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). When a law enforcement agency is asked to compile criminal history information that pertains to a particular individual, the compiled information takes on a character that implicates that individual's right to privacy in a manner that the same information in an uncompiled state does not. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); *see also* Open Records Decision No. 616 at 2-3 (1993).

In part, this request is for unspecified law enforcement records that involve the named individual. That aspect of the request implicates the individual's right to privacy. Therefore, to the extent that the district attorney maintains any records that depict this individual as a suspect, arrestee, or defendant, other than those that relate to the case to which the requestor refers, the district attorney must withhold all such records in their entirety under section 552.101 of the Government Code in conjunction with *Reporters Committee*.

Next, we address the information that relates to the case that the requestor references. We note that this information is subject to section 552.022 of the Government Code. Section 552.022 provides that

> the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:
>
> > (1) 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). In this instance, the information in question constitutes a completed investigation made of, for, or by a governmental body. Therefore, the district attorney must release this information under section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 or expressly confidential under other law. Section 552.111 of the Government Code is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. As such, section 552.111 is not other law that makes information confidential for the purposes of section 552.022. *See* Open Records Decision No. 470 at 7 (1987) (governmental body may waive statutory predecessor). Thus, the district attorney may not withhold the information submitted as Items 2 and 3 as attorney work product under section 552.111.

The attorney work product privilege also is found in rule 192.5 of the Texas Rules of Civil Procedure. The Texas Supreme Court has held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). However, the Texas Rules of Civil Procedure apply only to "actions of a civil nature." Tex. R. Civ. P. 2. Thus, the attorney work product privilege found in rule 192.5 does not apply to Items 2 and 3, which relate to a criminal case. Therefore, the district attorney must release Items 2 and 3.

The district attorney raises section 552.108 of the Government Code with respect to the information submitted as Item 1. Section 552.108(a)(2) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . 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[.]" A governmental body that raises section 552.108 must reasonably explain, if the requested information does not supply an explanation on its face, how and why section 552.108 is applicable to that information. *See* Gov't Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

The district attorney states that Item 1 is an investigation of the criminal case to which the requestor refers. The district attorney also informs us that the case is closed and did not result in a conviction. Based on these representations and our review of the information in question, we find that section 552.108(a)(2) is applicable to the information submitted as Item 1.

Section 552.108 does not except from disclosure "basic information about an arrested person, an arrest, or a crime." Gov't Code § 552.108(c). Section 552.108(c) refers to the basic front-page information held to be public 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). The district attorney must release basic information under section 552.108(c), including a detailed description of the offense. *See Houston Chronicle,* 531 S.W.2d at 186-87; Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). The district attorney may withhold the remaining information in Item 1 under section 552.108(a)(2).

Lastly, we address the district attorney's claim under section 552.101. This exception also encompasses information that another statute makes confidential. The district attorney claims that the information submitted as Item 4 is confidential under article 35.29 of the Code of Criminal Procedure. Article 35.29 provides as follows:

> Information collected by the court or by a prosecuting attorney during the jury selection process about a person who serves as a juror, including the juror's home address, home telephone number, social security number, driver's license number, and other personal information, is confidential and may not be disclosed by the court, the prosecuting attorney, the defense counsel, or any court personnel except on application by a party in the trial or on application by a bona fide member of the news media acting in such capacity to the court in which the person is serving or did serve as a juror. On a showing of good cause, the court shall permit disclosure of the information sought.

Crim. Proc. Code art. 35.29. Article 35.29 makes confidential certain personal information pertaining to an individual who actually served on a petit jury in a criminal trial. The district attorney states that Item 4 is a list of petit jurors who were summoned for trial. The district attorney has not demonstrated, however, nor does the submitted information itself reflect, that any of the listed individuals ever actually served on a petit jury in a criminal trial. Thus,

the district attorney has not shown that any of the information in Item 4 is confidential under article 35.29 of the Code of Criminal Procedure. Therefore, Item 4 is not excepted from disclosure under section 552.101 of the Government Code and must be released.

In summary, any law enforcement records held by the district attorney that depict the named individual as a criminal suspect, arrestee, or defendant, other than records that relate to the specified case, must be withheld under section 552.101 of the Government Code in conjunction with *Reporters Committee*. The district attorney may withhold Item 1 under section 552.108(a)(2) of the Government Code, but must release basic information under section 552.108(c). The district attorney must release the rest of the submitted information.

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).

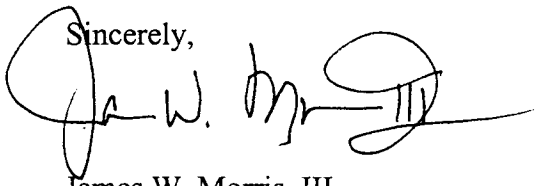
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,



James W. Morris, III
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JWM/sdk

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Enc: Submitted documents

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