



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

May 14, 2003

Mr. Rene Guerra
Criminal District Attorney
Hidalgo County
100 North Closner, Room 303
Edinburg, Texas 78539

OR2003-3280

Dear Mr. Guerra:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 180299.

The Hidalgo County Sheriff's Department (the "sheriff") received a request for the investigation file from a capital murder case. You claim that the requested information is excepted from disclosure under sections 411.083, 411.084, 508.313, 552.024, 552.108, and 552.305 of the Government Code, as well as sections 28.058, 39.030, and 39.096 of the Education Code, article 39.14 of the Code of Criminal Procedure, section 1232g, title 20 of the United States Code, section 405, title 42, of the United States Code, and Open Records Decision No. 252. We have considered your arguments and reviewed the submitted information.

We begin by noting that section 552.305 of the Government Code is not an exception to disclosure under the Public Information Act (the "Act"), but rather is a procedural provision permitting an interested third party to submit to the attorney general reasons why requested information should not be released. Gov't Code § 552.305; *see* Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). Thus, the sheriff may not withhold any of the submitted information under section 552.305.

You also contend that, pursuant to Open Records Decision No. 252 (1980), "any physical evidence is exempt from any viewing or release." This office has ruled that tangible physical items are not the type of information contemplated under the Act. *See, e.g.*, Open Records Decision No. 581 (1990). Thus, we find that any responsive tangible physical evidence that

is maintained by the sheriff is not public information as that term is defined in section 552.002 of the Government Code. Consequently, the sheriff is not required to release such evidence to the requestor under the Act. *See* Gov't Code §§ 552.002, .021.

We also note that some of the submitted information appears to have been obtained pursuant to a grand jury subpoena. This office has concluded that grand juries are not governmental bodies that are subject to the Act, so that records that are within their actual or constructive possession are not subject to disclosure under the Act. *See* Gov't Code §§ 552.003(1)(B), .0035(a); *see also* Open Records Decision No. 513 (1988); Open Records Decision No. 398 at 2 (1983) (grand jury is part of judiciary for purposes of the Act). When an individual or entity acts at the direction of the grand jury as its agent, information prepared or collected by the agent is within the grand jury's constructive possession and is not subject to chapter 552. Open Records Decision No. 513 at 3. Information that is not so held or maintained is subject to chapter 552 and may be withheld from disclosure only if a specific exception to disclosure is applicable. *Id.* To the extent the sheriff maintains any of the submitted documents for or on behalf of the grand jury, they are in the custody of the sheriff as agent of the grand jury and are not subject to disclosure under the Act. To the extent that the submitted documents are not so maintained, they are subject to the Act and may be withheld only if an exception under the Act is shown to apply. As we are unable to determine the extent to which the submitted documents are maintained for or on behalf of the grand jury, we will also address the exceptions that you claim under the Act for these documents.

Next, we note that the submitted information contains several search warrant affidavits. A search warrant affidavit is made public by statute if the accompanying search warrant has been executed. *See* Code Crim. Proc. art. 18.01(b). Thus, the sheriff must release the submitted search warrant affidavits to the requestor in their entirety under article 18.01(b) of the Code of Criminal Procedure.

You contend that the remainder of the submitted information is excepted from disclosure under section 552.108(a)(1) of the Government Code. Section 552.108(a)(1) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime." Generally, a governmental body claiming section 552.108(a)(1) must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(a); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You acknowledge that the defendant in this case has been "successfully prosecuted" for the capital murder. However, you contend that "[t]he documents should remain exempt because [the defendant's] case at some point may be reviewed again by the U.S. Supreme Court based on the recent decision of the World Court stating that the case should be reversed based on the Vienna Convention" Upon review of your arguments and the submitted information, however, we find you have not adequately demonstrated that the information relates to a pending investigation or prosecution or that the release of the submitted

information would otherwise interfere with law enforcement. *See Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); *cf.* Gov't Code § 552.108(a)(2) (excepting information that relates to a case that has concluded in a final result other than conviction or deferred adjudication). We therefore determine that the sheriff may not withhold any of the submitted information pursuant to section 552.108 of the Government Code.

You also contend that portions of the submitted information are confidential under various provisions of the law. 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 section encompasses information protected by other statutes. You appear to contend that some of the submitted information is confidential under article 39.14 of the Code of Criminal Procedure. Article 39.14 governs the discovery of information and the testimony of witnesses in criminal proceedings. *See* Code Crim. Proc. art. 39.14. Discovery privileges are not covered under section 552.101 of the Government Code. Open Records Decision No. 575 (1990); *see* Gov't Code §§ 552.005, .006. Further, we find that article 39.14 does not make the submitted information confidential. *See* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality must be express, and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to public). Therefore, the submitted information is not excepted from disclosure under section 552.101 of the Government Code in conjunction with article 39.14 of the Code of Criminal Procedure.

You also contend that school records contained in the submitted information are confidential under section 1232g, title 20 of the United States Code. Section 1232g(b)(1), title 20 of the United States Code, part of the Family Educational Rights and Privacy Act of 1974 ("FERPA"), provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). This office generally applies the same analysis under section 552.114 and FERPA. Open Records Decision No. 539 (1990).

Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. Section 552.026 provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

Thus, FERPA and the accompanying Government Code provisions govern the availability of student or education records held by educational agencies or institutions. *See* 20 U.S.C. § 1232g(b)(1); Gov't Code §§ 552.026, 552.114. FERPA generally does not govern access to records in the custody of governmental bodies that are not educational agencies or institutions. *See* Open Records Decision No. 390 at 3 (1983). Furthermore, this office has determined that FERPA and the predecessor to section 552.114 do not prevent a governmental body from making the education records of deceased students available to members of the public. *See* Open Records Decision No. 524 (1989). Consequently, we find that none of the submitted information is confidential under FERPA or section 552.114 of the Government Code. *Id.*; ORD 390 at 3; *see* 20 U.S.C. § 1232g(a)(3), (b)(4)(B).

Next, we address your contention that school records contained in the submitted information are confidential under sections 28.058, 39.030, and 39.096 of the Education Code. Section 28.058 makes confidential “[a]ll information regarding an individual student received by the commissioner under [subchapter C, chapter 28 of the Education Code] from a school district or student” Similarly, section 39.096 makes confidential “[a]ll information and reports received by the commissioner under [subchapter E, chapter 39 of the Education Code] from schools or school districts.” Thus, sections 28.058 and 39.096 apply only to information received by the commissioner. The commissioner, for the purpose of sections 28.058 and 39.096, is the commissioner of education. Educ. Code § 5.001(3). Because the information here is maintained by the sheriff, not the commissioner of education, we find that none of the information is confidential under section 28.058 or 39.096 of the Education Code.

Section 39.030 of the Education Code states:

(a) In adopting academic skills assessment instruments under [subchapter B, chapter 39 of the Education Code], the State Board of Education or a school district shall ensure the security of the instruments and tests in their preparation, administration, and grading. Meetings or portions of meetings held by the State Board of Education or a school district at which individual assessment instruments or assessment instrument items are disclosed or adopted are not open to the public under Chapter 551, Government Code, and the assessment instruments or assessment instrument items are confidential.

(b) The results of individual student performance on academic skills assessment instruments administered under [subchapter B, chapter 39 of the Education Code] are confidential and may be released only in accordance with [FERPA].

Educ. Code § 39.030. You do not indicate, nor does it appear, that the submitted information contains any assessment instruments, assessment instrument items, or results of individual student performance on academic skills assessment instruments as contemplated by subchapter B, chapter 39 of the Education Code. Therefore, we find that none of the submitted information is confidential under section 39.030 of the Education Code.

You further contend that “information contained in the Texas Department of Criminal Justice Records” is confidential under section 508.313(a) of the Government Code. Section 508.313 provides in part:

(a) All information obtained and maintained, including a victim protest letter or other correspondence, a victim impact statement, a list of inmates eligible for release on parole, and an arrest record of an inmate, is confidential and privileged if the information relates to:

- (1) an inmate of the institutional division [of the Department of Criminal Justice] subject to release on parole, release to mandatory supervision, or executive clemency;
- (2) a releasee; or
- (3) a person directly identified in any proposed plan of release for an inmate.

Gov’t Code § 508.313; *see also id.* § 508.001(9) (providing that “releasee” means “a person released on parole or to mandatory supervision”). Section 508.313 protects records held by the Texas Department of Criminal Justice (“TDCJ”). Although you state that TDCJ records are exempt from disclosure under this provision, you have not marked any specific document, nor can we locate any document, that was obtained or is maintained by TDCJ. We therefore conclude that none of the submitted information is confidential under section 508.313 of the Government Code.

In addition, you argue that NCIC and TCIC reports contained in the submitted information are confidential under section 411.038 and 411.084 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.

You contend that all social security number information is confidential under section 405, title 42 of the United States Code. A social security number is excepted from required public disclosure under section 552.101 of the act in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). Because this federal provision is intended to protect the privacy interests of individuals, this provision does not encompass the social security numbers of deceased individuals. *See* Attorney General Opinion H-917 at 3-4 (1976); Open Records Decision No. 272 at 1 (1981). However, the submitted information contains other social security numbers that may be confidential under section 552.101 in conjunction with the federal law. We have no basis for concluding that any of these social security numbers are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the sheriff pursuant to any provision of law, enacted on or after October 1, 1990. We have marked the social security number information that may be confidential under section 405(c)(2)(C)(viii)(I).

We note that some of the submitted is confidential under common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). 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. 540 S.W.2d at 683. We have marked the information that is confidential under common-law privacy and must be withheld under section 552.101 of the Government Code.

We also note that some of the submitted information is confidential under section 12.003 of the Human Resources Code. Section 12.003 of the provides:

- (a) Except for purposes directly connected with the administration of the [Department of Human Service's] assistance programs, it is an offense for a person to solicit, disclose, receive, or make use of, or to authorize, knowingly

permit, participate in, or acquiesce in the use of the names of, or any information concerning, persons applying for or receiving assistance if the information is directly or indirectly derived from the records, papers, files, or communications of the [Department of Human Services] or acquired by employees of the [Department of Human Services] in the performance of their official duties.

Hum. Res. Code § 12.003(a). In Open Records Decision No. 584 (1991), this office concluded that “[t]he inclusion of the words ‘or any information’ juxtaposed with the prohibition on disclosure of the names of the [Department of Human Service’s] clients clearly expresses a legislative intent to encompass the broadest range of individual client information, and not merely the clients’ names and addresses.” Consequently, it is the specific information pertaining to individual clients, and not merely the clients’ identities, that is made confidential under section 12.003. *See* Hum. Res. Code § 21.012 (department shall provide safeguards restricting use or disclosure of information concerning applicants for or recipients of department’s assistance programs to purposes directly connected with administration of programs); *see also* Open Records Decision No. 166 (1977). In this instance, release of the information at issue would not be for purposes directly connected with the administration of the Department of Human Service’s assistance programs. Therefore, the submitted client information, which we have marked, is confidential under sections 12.003 of the Human Resources Code and must be withheld from disclosure under section 552.101 of the Government Code. *See* Attorney General Opinion JM-851 (1988) (confidentiality of client information continues after the death of the client); Open Records Decision No. 667 (2000) (information may be transferred between governmental bodies without violating confidentiality).

Next, you argue that personnel information regarding current or past employees contained in the submitted information is excepted from disclosure under section 552.024 of the Government Code. Section 552.024 of the Government Code allows employees and former employees of governmental bodies to elect whether to allow public access to their home address, home telephone number, social security number, and information that reveals whether the employee has family members. Section 552.117(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. You do not specifically identify, nor can we find, the home address, home telephone number, social security number, or family member information of any sheriff employee or former employee in the submitted information. Furthermore, we note that section 552.117 only applies to information that the governmental body holds in its capacity as an employer. *See* Gov’t Code §§ 552.024, .117. In this instance, the submitted information is held by the sheriff in its capacity as law enforcer, not as employer. Therefore, we find that none of the submitted information is excepted from disclosure under section 552.117 of the Government Code.

Finally, we note that a portion of the submitted is or may be excepted from 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;
- (2) a motor vehicle title or registration issued by an agency of this state; or
- (3) a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document.

We have marked Texas driver's license information and license plate information that must be withheld under section 552.130. We have also marked identification numbers contained in the submitted information that must be withheld under section 552.130 if they relate to "a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document."

In summary, the sheriff need not release any tangible physical evidence responsive to the instant request for information. Furthermore, any responsive documents maintained by the sheriff for or on behalf of a grand jury are not subject to disclosure under the Act. The sheriff must withhold any CHRI generated by NCIC or TCIC under section 552.101 of the Government Code. The sheriff must also withhold certain information that we have marked under section 552.101 and common-law privacy. The sheriff must withhold the marked social security number information under section 552.101 of the Government Code in conjunction with federal law if the social security numbers were obtained or maintained pursuant to a provision of law enacted on or after October 1, 1990. The sheriff must also withhold the Texas driver's license and license plate information we have marked under section 552.130 of the Government Code. Likewise, the sheriff must withhold the identification numbers we have marked under section 552.130 if they relate to "a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document." The sheriff must release the remainder 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).

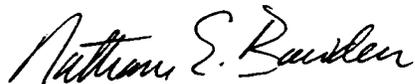
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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); *Tex. Dep't of Pub. 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,



Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/sdk

Ref: ID# 180299

Enc: Submitted documents

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