



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 10, 2003

Mr. John Holleman
Criminal District Attorney
Polk County
P.O. Box 1717
Livingston, Texas 77351

OR2003-8104

Dear Mr. Holleman:

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# 190714.

The Polk County District Attorney (the "District Attorney") received a request for "a copy of the file and any evidence for case # 14918 Polk County vs. Daniel Bart Snyder." You assert the submitted information is excepted from disclosure under section 552.101 of the Government Code in conjunction with common-law privacy. We reviewed the information you submitted and considered the exception you claim.

Initially, we note that you have submitted tangible evidentiary items for our review. 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 District Attorney is not public information as that term is defined in section 552.002 of the Government Code. Consequently, the District Attorney is not required to release such evidence to the requestor under the Act. *See Gov't Code §§ 552.002, .021.*

Additionally, we note that the submitted information includes an arrest warrant. The 78th Legislature recently amended article 15.26 of the Code of Criminal Procedure to add language providing:

The arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, *is public information*, and beginning immediately when the warrant is executed the magistrate's clerk shall make a copy of the warrant and the affidavit available for public inspection in the clerk's office during normal business hours. A person may request the clerk to provide copies of the warrant and affidavit on payment of the cost of providing the copies.

Act of May 31, 2003, 78th Leg., R.S., ch. 390, § 1, Tex. Sess. Laws Serv. 1631 (to be codified as amendment to Code Crim. Proc. art. 15.26) (emphasis added). Thus, article 15.26 makes the submitted warrant expressly public. Therefore, the District Attorney must release the information we have marked, in its entirety, in accordance with article 15.26 of the Code of Criminal Procedure.

With respect to the remainder of the submitted information, we note the applicability of section 552.022 of the Government Code. Section 552.022 provides, in pertinent part, as follows:

[T]he 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). Here, the submitted information consists of a completed investigation. Thus, we conclude that the District Attorney must release the submitted information at issue under section 552.022(a)(1), unless it is expressly confidential under other law or excepted from disclosure under section 552.108. Because you assert section 552.101 of the Government Code, which constitutes other law for purposes of section 552.022, we will address your arguments under this exception.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses the confidentiality provisions of other statutes and the doctrine of common-law privacy. First, we note that the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code, governs some of the submitted information. Section 159.002 of the MPA reads, in part, as follows:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is

confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(a), (b), (c). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). In this instance, the submitted information contains medical records created by either a physician or someone under the supervision of a physician. Therefore, we conclude that the District Attorney must release the information we have marked only in accordance with the MPA. *See* Occ. Code §§ 159.004, .005; Open Records Decision No. 598 (1991).

Also, we note some of the submitted information is governed by chapter 611 of the Health and Safety Code, which provides for the confidentiality of records created or maintained by a mental health professional. Specifically, section 611.002(a) states the following:

Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

Health & Safety Code § 611.002. Section 611.001 defines a "professional" as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See* Health and Safety Code § 611.001. Sections 611.004 and 611.0045 provide for access to mental health records only for certain individuals. *See* Open Records Decision No. 565 (1990). Therefore, we conclude that the District Attorney may release the submitted mental health records, which we have marked, only in accordance with chapter 611 of the Health and Safety Code.

Next, we note that the submitted information contains a pseudonym form. Article 57.02 of the Code of Criminal Procedure provides that a completed pseudonym form is confidential and may not be disclosed to any person other than a defendant in the case or the defendant's attorney, except by court order. Code Crim. Proc. art. 57.02. Therefore, we conclude that

the District Attorney must withhold this form, in its entirety, in accordance with article 57.02 of the Code of Criminal Procedure.

Further, as you assert, the doctrine of common-law privacy protects information from disclosure when (1) it contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the public has no legitimate interest in the information. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The types 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. *Id.* at 683. 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). Further, in Open Records Decision No. 393 (1983), this office concluded that, generally, only that information which either identifies or tends to identify a victim of sexual assault or other sex-related offense may be withheld under common-law privacy, but because the identifying information was inextricably intertwined with other releasable information, the governmental body was required to withhold the entire report. Open Records Decision No. 393 at 2 (1983).

In this case, we agree that the submitted information contains information relating to sexual assault allegations that warrants protection under common-law privacy. However, we find that the identifying information of the victim is not so inextricably intertwined as to require the District Attorney to withhold all of the submitted information. Therefore, we conclude that the District Attorney must withhold the sexual assault victim's identifying information, which we have marked, under section 552.101 and common-law privacy. *See* Open Records Decision Nos. 393 (1983), 339 (1982).

In addition, we note federal law governs and restricts access to criminal history record information ("CHRI") obtained from the National Crime Information Center ("NCIC"). *See* 28 C.F.R. §§ 20.1 *et seq.*; Open Records Decision No. 565 at 10-12 (1990). The relevant federal regulations permit each state to follow its own applicable law with respect to the CHRI that it generates. ORD 565 at 11-12. Sections 411.083 and 411.089 of the Government Code authorize a criminal justice agency to obtain CHRI from the Texas Crime Information Center ("TCIC"). However, CHRI obtained from the TCIC network may be released by a criminal justice agency only to another criminal justice agency for a criminal justice purpose. Gov't Code § 411.089(b)(1). Thus, CHRI generated by the federal government or another state may be obtained only in accordance with the relevant federal regulations, and CHRI obtained from the Texas Department of Public Safety or another Texas criminal justice agency through the TCIC must be withheld in accordance with

subchapter F of chapter 411 of the Government Code. Accordingly, to the extent that the District Attorney maintains CHRI obtained from the NCIC or TCIC, it must withhold such information from the requestor under chapter 411 of the Government Code.

We also note the applicability of sections 560.001, 560.002, and 560.003 of the Government Code, which govern the public availability of fingerprint information. These sections provide as follows:

Sec. 560.001. DEFINITIONS. In this chapter:

- (1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.
- (2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 560.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

- (1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:
 - (A) the individual consents to the disclosure;
 - (B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or
 - (C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and
- (2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 560.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

Gov't Code §§ 560.001, 560.002, 560.003.¹ The submitted information contains an individual's fingerprint. There is no indication that the requestor has a right of access to this information under section 560.002. Therefore, we find the fingerprint we have marked is confidential under section 560.003. Accordingly, the District Attorney must withhold this information under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code.

Further, we note that the submitted information contains social security numbers we have not marked that may be confidential under federal law.² A social security number may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the social security numbers in the responsive records are confidential under section 405(c)(2)(C)(viii)(I), and therefore, excepted from public disclosure under section 552.101 and the referenced federal provision. However, we caution the District Attorney that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number, you should ensure that no such information was obtained or is maintained by the District Attorney pursuant to any provision of law enacted on or after October 1, 1990.

Last, the submitted documents contain information subject to section 552.130 of the Government Code. This provision excepts from public disclosure information relating to a driver's license or a motor vehicle title or registration issued by an agency of this state. *See* Gov't Code § 552.130. Here, the submitted information contains driver's license numbers and a license plate number and an associated expiration date. Therefore, the District Attorney must withhold the motor vehicle information, which we have marked, under section 552.130 of the Government Code.

In summary, the District Attorney need not release the submitted tangible evidence as it is not subject to the Act. The District Attorney must release the submitted arrest warrant we have marked, in its entirety, in accordance with article 15.26 of the Code of Criminal Procedure. The District Attorney may release the medical and mental health records we have marked only in accordance with the MPA or chapter 611 of the Health and Safety Code. The District Attorney must withhold the following information, which we have marked under

¹These sections, formerly found at chapter 559 of the Government Code as sections 559.001, 559.002, and 559.003, were renumbered by the Regular Session of the Seventy-eight Legislature, effective September 1, 2003. *See* Act of May 20, 2003, 78th Leg., R.S., ch. 1275, § 2 (78), 2003 Tex. Sess. Law Serv. 4140, 4144.

² We note that the social security numbers we have marked warrant protection in this instance under common-law privacy.

section 552.101 of the Government Code in conjunction with the stated statute or doctrine: 1) the pseudonym form in accordance with article 57.02 of the Code of Criminal Procedure; 2) the sexual assault victim's identifying information under common-law privacy; 3) any NCIC or TCIC information pursuant to chapter 411 of the Government Code; 4) the fingerprint information we have marked under section 560.003 of the Government Code; and 5) if applicable, the unmarked social security numbers in accordance with federal law. The District Attorney must withhold the motor vehicle information we have marked under section 552.130 of the Government Code. The District Attorney must release the remainder of the submitted information to the requestor.

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 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/seg

Ref: ID# 190714

Enc: Submitted documents

c: Ms. Tracie Rozell
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(w/o enclosures)