



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 3, 2004

Ms. Patricia J. Acosta
Assistant District Attorney
34th Judicial District
500 East San Antonio Street, 2nd Floor
El Paso, Texas 79901-2420

OR2004-3598

Dear Ms. Acosta:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 200777.

The District Attorney for the 34th Judicial District (the "district attorney") received a request for information relating to a specified cause number. You inform us that some of the requested information has been released. You claim that the remaining 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 have reviewed the information you submitted.

Initially, we address the requestor's contention that information disclosed to defense counsel may not subsequently be withheld from disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. We note that in *Brady v. Maryland*, 373 U.S. 83 (1963), the United States Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87; *see also Wyatt v. State*, 23 S.W.3d 18, 27 (Tex. Crim. App. 2000) ("[A] due process violation [under *Brady*] has occurred if a prosecutor: (1) fails to disclose evidence, (2) favorable to the accused, (3) which creates a probability of a different outcome."). You inform us that the district attorney allows a defendant's attorney to review the State's case file in order to comply with the constitutional requirements of due process. We conclude that previous disclosure of information to defense counsel under such circumstances does not waive the district attorney's right to claim an exception to disclosure

under section 552.108. *See* Open Records Decision Nos. 579 at 9 (1990) (exchanging information among litigants in informal discovery is not voluntary release of information for purposes of statutory predecessor to Act), 454 at 2 (1986) (governmental body that disclosed information because it reasonably concluded it had constitutional obligation to do so could still invoke statutory predecessor to Gov't Code § 552.108); *compare* Open Records Decision No. 177 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). Likewise, such disclosure does not waive statutory confidentiality provisions that are incorporated by section 552.101. *See* Gov't Code § 552.007(a); Open Records Decision No. 166 (1977) (information excepted from disclosure under statutory predecessor to Gov't Code § 552.101 may not be released at governmental body's discretion). Accordingly, we will address the district attorney's claims under sections 552.101, 552.108, and 552.130 with regard to all of the information at issue.

Section 552.101 excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information that other statutes make confidential. Chapter 611 of the Health and Safety Code provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002 provides in part:

(a) 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.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b). 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. Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). In this instance, the information in enclosure 5 is confidential under section 611.002. We note that the requestor appears to be an attorney for the individual to whom this information pertains. In that event, the requestor may have a statutory right of access to the information in enclosure 5. *See* Health & Safety Code §§ 611.004, .0045. Otherwise, the district attorney must withhold the information in enclosure 5 under section 552.101 of the Government Code.

Section 552.101 also incorporates sections 560.001, 560.002, and 560.003 of the Government Code. These sections govern the public availability of fingerprint information and 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 fingerprint information that we have marked in enclosure 3 is confidential under section 560.003. If the requestor is an attorney for the person to whom this fingerprint information pertains, then he would have a right of access to his client's fingerprint information. *See id.* § 560.002(1). Otherwise, the district attorney must withhold the fingerprint information in enclosure 3 under section 552.101.

¹These sections, formerly codified 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-eighth 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.

The social security number in enclosure 3 is confidential under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if a governmental body obtained or maintains the social security number under any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 at 2-4 (1994). It is not apparent to this office that this social security number is confidential under section 405(c)(2)(C)(viii)(I) of the federal law. You have cited no law, and we are aware of no law, enacted on or after October 1, 1990 that requires or authorizes the district attorney to obtain or maintain a social security number. Thus, we have no basis for concluding that the social security number in enclosure 3 was obtained or is maintained under such a law and is therefore confidential under the federal law. We caution you, however, that the Act imposes criminal penalties for the release of confidential information. *See* Gov't Code §§ 552.007, .352. Therefore, before releasing this social security number to a member of the public, you should ensure that it was not obtained and is not maintained by the district attorney under any provision of law enacted on or after October 1, 1990. We note, however, that the requestor would have a right of access to his client's social security number under section 552.023 of the Government Code. A social security number to which a requestor has a right of access under section 552.023 may not be withheld under section 552.101 in conjunction with section 405(c)(2)(C)(viii)(I) of the federal law.²

Section 552.130 excepts from public disclosure information that relates to "a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]" Gov't Code § 552.130(a)(1). The Texas driver's license number in enclosure 3 must be withheld from the public under section 552.130. However, because section 552.130 protects privacy interests, the requestor would also have a right of access under section 552.023 to his client's Texas driver's license number.

Lastly, we address your claim under section 552.108. Section 552.108(a)(4) provides as follows:

- (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:

...

- (4) it is information that:

²*See* Gov't Code § 552.023(a) (person or person's authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and is protected from public disclosure by laws intended to protect person's privacy interests); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself).

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) represents the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a)(4). You state that the information in enclosure 4 consists of notes prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation and reflects the attorney's mental impressions or legal reasoning. Based on your representations, we conclude that the district attorney may withhold the information in enclosure 4 under section 552.108(a)(4).

In summary: (1) the district attorney must withhold the information in enclosure 5 under section 552.101 in conjunction with section 611.002 of the Health and Safety Code, unless the requestor has a right of access to that information under sections 611.004 and 611.0045 of the Health and Safety Code; (2) the fingerprint information in enclosure 3 must be withheld under section 552.101 in conjunction with section 560.003 of the Government Code, unless the requestor has a right of access to that information under section 560.002; (3) the district attorney may be required to withhold the social security number in enclosure 3 under section 552.101 in conjunction with section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code, unless the requestor has a right of access to the social security number under section 552.023; (4) the district attorney must withhold the Texas driver's license number in enclosure 3 under section 552.130, unless the requestor has a right of access to the driver's license number under section 552.023; and (5) the district attorney may withhold the information in enclosure 4 under section 552.108(a)(4).³ As we are able to make these determinations, we need not address your other arguments against disclosure.

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

³Should the district attorney receive another request for this same information from a requestor who would have no right of access to it, the district attorney should resubmit this same information and request another decision. *See* Gov't Code §§ 552.301, .302; Open Records Decision No. 673 (2001).

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,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is written in a cursive style with a long horizontal line extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 200777

Enc: Submitted documents

c: Mr. James D. Lucas
303 Texas Avenue, Suite 806
El Paso, Texas 79901
(w/o enclosures)