



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 26, 2004

Mr. Bruce P. Sadler
Assistant District Attorney
47th Judicial District of Texas
501 S Fillmore, Suite 5A
Amarillo, Texas 79101-2449

OR2004-4326

Dear Mr. Sadler:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 202158.

The District Attorney for the 47th Judicial District (the "district attorney") received a request for copies of any and all records in Cause No. 46716-0 and copies of the district attorney's procedures and guidelines in plea bargains. You state that the district attorney makes plea bargain offers on a case-by-case basis and does not maintain any written procedures and/or guidelines covering plea bargain offers. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986) (governmental body not required to disclose information that did not exist at time request was received). You claim that portions of the remaining requested information are excepted from disclosure under sections 552.026, 552.101, 552.108, and 552.114 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, some of which consists of representative samples.¹

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

¹We assume that the "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.

section encompasses information another statute makes confidential. Section 11 of article 49.25 of the Code of Criminal Procedure provides as follows:

The medical examiner shall keep full and complete records properly indexed, giving the name if known of every person whose death is investigated, the place where the body was found, the date, the cause and manner of death, and shall issue a death certificate The records are subject to required public disclosure in accordance with Chapter 552, Government Code, except that a photograph or x-ray of a body taken during an autopsy is excepted from required public disclosure in accordance with Chapter 552, Government Code, but is subject to disclosure:

- (1) under a subpoena or authority of other law; or
- (2) if the photograph or x-ray is of the body of a person who died while in the custody of law enforcement.

Code Crim. Proc. art. 49.25, § 11. Pursuant to section 11, the autopsy photographs submitted as Exhibit I are confidential and must be withheld because neither exception applies in this instance.

We next note that Exhibit K contains psychological evaluations of the defendant. The release of these documents is governed by chapter 611 of the Health and Safety Code. Section 611.002 of the Health and Safety Code applies to “[c]ommunications 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.” *See also* Health & Safety Code § 611.001 (defining “patient” and “professional”). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). We have marked those records in Exhibit K that the district attorney may release only in accordance with the access provisions of chapter 611. Health & Safety Code § 611.002(b); *see id.* §§ 611.004, 611.0045.

Next, criminal history record information (“CHRI”) obtained from the National Crime Information Center (the “NCIC”) or the Texas Crime Information Center (the “TCIC”) is confidential under federal and state law. Federal law governs the dissemination of CHRI obtained from the NCIC network. Federal regulations prohibit the release to the general public of CHRI that is maintained in state and local CHRI systems. *See* 28 C.F.R. § 20.21(c)(1) (“Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given”) and (c)(2) (“No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself”); *see also* Open Records Decision No. 565 at 10-12 (1990). The federal regulations

allow each state to follow its own individual law with respect to CHRI that it generates. *See id.* at 10-12.

Sections 411.083(b)(1) and 411.089(a) of the Government Code 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. *See* Gov't Code § 411.089(b). Thus, CHRI generated by the federal government or another state may be disclosed only in accordance with the federal regulations. Likewise, CHRI held by the Texas Department of Public Safety or another criminal justice agency must be withheld from the public as provided by subchapter F of chapter 411 of the Government Code. Therefore, any CHRI obtained from the NCIC or TCIC that is confidential under federal law or subchapter F of chapter 411 of the Government Code must be withheld under section 552.101.

A social security number 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 any social security number contained in the submitted documents is confidential under section 405(c)(2)(C)(viii)(I) of the federal law. We note that the submitted information also contains the social security number of a deceased individual. Federal law regarding the confidentiality of social security numbers protects the privacy interests of individuals. The right of privacy is purely personal and lapses at death. *See Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); *see also* Attorney General Opinions JM-229 (1984); H-917 (1976). Thus, the district attorney may not withhold the deceased individual's social security number under section 552.101 in conjunction with section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. 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 any social security number contained in the submitted documents was obtained or is maintained under such a law and is therefore confidential under the federal law. Therefore, before releasing the social security numbers of living persons, the district attorney should ensure that they were not obtained and are not maintained under any provision of law enacted on or after October 1, 1990. We caution, however, that the Public Information Act (the "Act") imposes criminal penalties for the release of confidential information. *See* Gov't Code §§ 552.007, .352.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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. *Id.* at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under common-law privacy: an individual's criminal history when compiled by a governmental body, *see* Open Records Decision No. 565 (citing *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)); personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). We have reviewed the submitted records and marked the information that must be withheld under section 552.101 in conjunction with common-law privacy.

Next, you argue that Exhibit H is excepted under section 552.108 of the Government Code, which provides in pertinent part:

(a) [i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of 552.021 if . . . (4) it is information that: (A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or (B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(b) [a]n 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 the requirements of 552.021 if: . . . (3) the internal record or notation: (A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or (B) reflects the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a)(4), (b)(3), (c). A governmental body that raises section 552.108 must reasonably explain how and why section 552.108 applies to that information. *See* Gov't Code § 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). You state that the information in Exhibit H consists of the district attorney's work product. Upon review of Exhibit H, we conclude that this information was either prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation or reflects the mental processes or legal reasoning of an attorney representing the state. Therefore, we conclude that Exhibit H may be withheld from disclosure under section 552.108(a)(4) and 552.108(b)(3).

Next, we address your argument that Exhibit M is confidential under section 39.030 of the Education Code. Section 39.030 of the Education Code states the following:

(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].

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.

Next, we address your argument that Exhibit M is excepted from disclosure under the Family Educational Rights and Privacy Act of 1974 ("FERPA"), as well as sections 552.026 and 552.114 of the Government Code. *See* 20 U.S.C. § 1232g (FERPA). Section 552.026 of the Government Code incorporates FERPA into chapter 552 of the Government Code. *See* Open Records Decision No. 634 at 6-8 (1995). 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.

Section 552.114 of the Government Code excepts from public disclosure student records at an educational institution funded completely or in part by state revenue. This office generally applies the same analysis to section 552.114 as to FERPA. *See* Open Records Decision No. 539 (1990). 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" are those records, files, documents, and other materials that (1) contain

information directly related to a student and (2) are maintained by an educational agency or institution or by a person acting for such agency or institution. 20 U.S.C. § 1232g(a)(4)(A). We note that the district attorney is not an educational agency or institution as defined by FERPA. *See id.* § 1232g(a)(3) (defining educational agency or institution). Therefore, the submitted information is not confidential under FERPA, and it may not be withheld from the requestor on that basis.

Finally, section 552.130 of the Government Code excepts from disclosure information relating to a Texas motor vehicle driver's license and information relating to a Texas motor vehicle title or registration. Gov't Code § 552.130. Thus, the district attorney must withhold most of the Texas driver's license numbers you have marked and license plate numbers we have marked under section 552.130. We note, however, that section 552.130 protects privacy interests, and thus this section is not applicable to the driver's license number of an individual who is deceased. *See Moore*, 589 S.W.2d at 491; Open Records Decision No. 272 at 1 (1981).

In summary, we have marked those records in Exhibit K that the district attorney may release only in accordance with the access provisions of chapter 611 of the Health and Safety Code. We also conclude that the district attorney must withhold the following information under section 552.101: (1) the autopsy photographs in conjunction with section 11 of article 49.25 of the Code of Criminal Procedure, (2) any CHRI in its possession, (3) social security numbers of living individuals if they were obtained or are maintained by the district attorney pursuant to any provision of law enacted on or after October 1, 1990, and (4) the information we have marked under common-law privacy. The district attorney may withhold Exhibit H under section 552.108 of the Government Code. The district attorney must withhold the driver's license numbers of living individuals pursuant to section 552.130 of the Government Code. The remaining information must be released.

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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/krl

Ref: ID# 202158

Enc. Submitted documents

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(w/o enclosures)