



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 30, 2004

Ms. Judith Sachitano Rawls
Assistant City Attorney
City of Beaumont
P.O. Box 3827
Beaumont, Texas 77704

OR2004-5338

Dear Ms. Rawls:

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# 204304.

The Beaumont Police Department (the "department") received a request for all files and records prepared and/or maintained by the department in relation to the death of a named individual. You state that some responsive information will be released to the requestor. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.108, 552.117, 552.130, 552.132, and 552.1325 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you state that some of the submitted documents were produced in response to a grand jury subpoena. This office has concluded that grand juries are not governmental bodies that are subject to chapter 552 of the Government Code, so that records that are within the actual or constructive possession of a grand jury are not subject to disclosure under chapter 552. See Open Records Decision No. 513 (1988). 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. *Id.* at 3. Information that is not so held or maintained is subject to chapter 552 and may be withheld only if a specific exception to disclosure is applicable. *Id.* Based on your representation that some of the submitted information, which you have marked, is in the custody of the

department as agent of the grand jury, we find that such information is not subject to disclosure under chapter 552. *Id.* at 4.

Next, we note that the submitted information includes arrest warrant affidavits. 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.

Crim Proc. Code art. 15.26. This provision makes the submitted arrest warrant affidavits that were presented to the magistrate expressly public. The exceptions found in the Act do not, as a general rule, apply to information that is made public by other statutes. Open Records Decision No. 525 (1989) (statutory predecessor). Therefore, if the submitted arrest warrant affidavits were presented to a magistrate in support of the issuance of an arrest warrant, the department must release the supporting affidavits in their entirety, with no redactions, to the requestor pursuant to article 15.26 of the Code of Criminal Procedure. If they were not so presented, then they must be disposed of in accordance with the remainder of this ruling.

The remaining submitted information consists of a completed investigation made of, for, or by the department. Section 552.022(a)(1) of the Government Code provides that this information is not excepted from required disclosure under the Act, except as provided by section 552.108, or unless the information is expressly confidential under other law. You claim that a portion of the submitted information is protected under the attorney work product privilege, which is found in Rule 192.5 of the Texas Rules of Civil Procedure. The Texas Rules of Civil Procedure are "other law" for purposes of section 552.022(a)(1). *In re Georgetown*, 53 S.W.3d 328 (Tex. 2001). However, the Texas Rules of Civil Procedure only apply to "actions of a civil nature." Tex. R. Civ. P. 2. Accordingly, the attorney work product privilege found in Rule 192.5 does not apply to the criminal information at issue here.

You also claim that a portion of the submitted information is excepted from disclosure under the informer's privilege. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The informer's privilege, incorporated into the Act by section 552.101, has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928); *see also Roviario v. United States*, 353 U.S. 53, 59 (1957). The informer's privilege under *Roviario* exists to protect a

governmental body's interest. Therefore, the informer's privilege under *Roviaro* may be waived by a governmental body and is not "other law" that makes the information subject to section 552.022 confidential. Open Records Decision No. 549 at 6 (1990). However, the informer's privilege is also found in Rule 508 of the Texas Rules of Evidence. The Texas Supreme Court has also determined that the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *In re City of Georgetown*, 53 S.W.3d at 336. Thus, we will determine whether some of the submitted information is protected under Rule 508. Furthermore, we will address your arguments under sections 552.101, 552.108, 552.117, 552.130, 552.132, and 552.1325 of the Government Code.

We first address your contention that the submitted information is excepted from disclosure under section 552.108 of the Government Code. Section 552.108 provides in part:

(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:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

....

(b) An 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 [required public disclosure] if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

Gov't Code § 552.108(a)(1), (b)(1). A governmental body claiming section 552.108 must reasonably explain 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). Section 552.108(a)(1) generally excepts from disclosure information pertaining to a pending criminal investigation or prosecution. *See Houston Chronicle Publ'g 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) (court delineates law enforcement interests that are present in active cases). Section 552.108(b)(1) encompasses internal law enforcement and prosecution records, the release of which would interfere with on-going law enforcement and prosecution efforts in general. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.) (exception intended to protect information that if released would reveal weaknesses of law enforcement agency or jeopardize officer safety); *see, e.g.*, Open Records Decision Nos. 531 (1989) (detailed guidelines regarding a police department's use of force policy

excepted under section 552.108), 508 (1988) (release of dates of prison transfer could impair security), 413 (1984) (sketch showing security measures for execution excepted under §552.108).

You state that the submitted information pertains to an inactive homicide case. Furthermore, the submitted information reflects that the two suspects at issue in this investigation were both convicted, and you have not informed us that either conviction is the subject of a pending appeal. Thus, you have not demonstrated how this information relates to a pending criminal investigation or prosecution. You also state that release of the submitted information would “reveal the departments [sic] methods and investigative techniques and procedures used in the investigation of a homicide.” However, upon review, we find that you have not explained how and why the release of the information would interfere with law enforcement. Consequently, you have failed to establish that section 552.108 is applicable to any of the submitted information. *See* Open Records Decision No. 508 at 4 (1988) (governmental body must demonstrate how release of particular information at issue would interfere with law enforcement). We therefore determine that the department may not withhold any portion of the submitted information under section 552.108(a)(1) or section 552.108(b)(1) of the Government Code.

Next, we address whether a portion of the submitted information is protected under Rule 508 of the Texas Rules of Evidence. Rule 508 provides, in relevant part:

(a) Rule of Privilege. The United States or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(b) Who May Claim. The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished, except the privilege shall not be allowed in criminal cases if the state objects.

Tex. R. Evid. 508(a),(b). Thus, an informer’s identity is confidential under Rule 508 if a governmental body demonstrates that an individual has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation and the information does not fall within the purview of the exceptions to the privilege enumerated in Rule 508(c). Although you contend that some of the submitted information is excepted from disclosure under the informer’s privilege, you do not specifically identify any informers in the submitted information. Consequently, you have not demonstrated that any of the submitted information is excepted from disclosure under Texas Rule of Evidence 508.

Section 552.101 also encompasses information other statutes make confidential. The submitted documents contain fingerprint information that is subject to sections 560.001, 560.002, and 560.003 of the Government Code. They 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. There is no indication that the requestor has a right of access to this information under section 560.002. Therefore, the department must

withhold the fingerprint information that we have marked under section 552.101 in conjunction with section 560.003 of the Government Code.¹

Next, you note that criminal history record information (“CHRI”) is confidential and not subject to disclosure. CHRI obtained from the National Crime Information Center or the Texas Crime Information Center is confidential under federal and state law. 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. *See* Open Records Decision No. 565 (1990). 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).² 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 (the “DPS”) or another criminal justice agency must be withheld from the public as provided by subchapter F of chapter 411 of the Government Code. However, we note that neither the federal government nor chapter 411 of the Government Code includes mug shots in the definition of criminal history record information and both specifically exclude “identification information.” *See* 28 C.F.R. § 20.3(b); Gov’t Code § 411.082(2)(A). We also note that section 411.083 does not distinguish between the CHRI of a person who is living and one who has died. Therefore, to the extent that the submitted documents contain any CHRI that is confidential under federal law or subchapter F of chapter 411 of the Government Code, the department must withhold any such information under section 552.101 of the Government Code.

¹ We note that section 560.003 protects privacy interests. Because the privacy rights of an individual lapse upon death, section 560.003 is not applicable to the fingerprints of a deceased individual. *See Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.-Texarkana 1979, writ ref’d n.r.e.); *see also Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-47 (N.D. Tex. 1979) (protection afforded by provision enacted to protect privacy of an individual extinguishes upon individual’s death).

² We note that the statutory definition of CHRI does not encompass driving record information maintained by the DPS under subchapter C of chapter 521 of the Transportation Code. *See* Gov’t Code § 411.082(2) (defining “criminal history record information”).

The remaining submitted information contains social security numbers that 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.* Because this federal provision is intended to protect the privacy interests of individuals, this provision does not encompass the social security number of a deceased individual. *See* Attorney General Opinion H-917 at 3-4 (1976); Open Records Decision No. 272 at 1 (1981). However, the remaining 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, which we have marked, 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 Act imposes criminal penalties for the release of confidential information. Prior to releasing these social security numbers, the department should ensure that no such information was obtained or is maintained by it pursuant to any provision of law, enacted on or after October 1, 1990.

Section 552.101 also encompasses the doctrine of 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 at 685. 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 addition, this office has found that the following types of information are excepted from required public disclosure under common-law privacy: personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 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). Upon review of the submitted information, we find that a portion of the information is protected by common law privacy. We have marked the information that must be withheld under section 552.101 in conjunction with common law privacy.

You claim that a portion of the remaining submitted information was obtained through an inter-agency transfer. You contend that "confidential information obtained through inter-agency transfer remains confidential." Records that are confidential in the hands of the originating governmental body remain confidential when transferred to another governmental

body. *See* Open Records Decision Nos. 674 at 4 (2001), 667 at 4 (2000); *see also* Attorney General Opinion H-836 (1976) (governmental bodies have need to maintain unrestricted flow of information, to effectuate state policy that governmental bodies cooperate in the efficient and economical administration of statutory duties); *but see* Attorney General Opinions DM-353 at 4 n. 6 (1995) (interagency transfer prohibited where confidentiality statute enumerates specific entities to which release of confidential information is authorized and where receiving agency is not among statute's enumerated entities), JM-590 (1986) (same); Open Records Decision No. 655 (1997) (same), 650 (1996) (transfer of confidential information to federal agency impermissible unless federal law requires its disclosure). However, you have not established that the transferred information is confidential, and none of it may be withheld on this basis.

You also contend that portions of the submitted information must be withheld under section 552.117 of the Government Code. We note, however, that the protections of section 552.117 only apply to information that a governmental body holds in its capacity as an employer. *See* Gov't Code § 552.117 (providing that employees of governmental entities may protect certain personal information in the hands of their employer); *see also* Gov't Code § 552.024 (establishing election process for section 552.117). The submitted information consists of law enforcement records of a criminal investigation. Because the department holds this information in its capacity as a law enforcement agency rather than as an employer, none of it may be withheld on the basis of section 552.117.

We note however that section 552.1175 of the Government Code may apply. This section provides in part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure;

....

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(b). Thus, to the extent the submitted records contain any of the listed information regarding a peace officer who elects to restrict access to this information under section 552.1175, the department must withhold such information.

The remaining submitted information contains Texas driver's license and motor vehicle information. 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 department must withhold the information 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 Texas driver's license and motor vehicle information of an individual who is deceased. *See Moore*, 589 S.W.2d at 491; Open Records Decision No. 272 at 1 (1981).

You also claim that a portion of the remaining submitted information is excepted from disclosure under sections 552.132 and 552.1325 of the Government Code. Section 552.132 provides in pertinent part as follows:

(a) Except as provided by Subsection F, in this section, "crime victim" means a victim under Subchapter B, Chapter 56, Code of Criminal Procedure, who has filed an application for compensation under that subchapter.

(b) A crime victim may elect whether to allow public access to information held by the crime victim's compensation division of the attorney general's office that relates to:

(1) the name, social security number, address, or telephone number of the crime victim; or

(2) any other information the disclosure of which would identify or tend to identify the crime victim.

....

(f) An employee of a governmental body who is also a crime victim under Subchapter B, Chapter 56, Code of Criminal Procedure, regardless of whether the employee has filed an application for compensation under that subchapter, may elect whether to allow public access to information held by the attorney general's office or other governmental body that would identify or tend to identify the crime victim, including a photograph or other visual representation of the victim.

Gov't Code § 552.132(a), (b), (f). In this instance, however, the information is not held by the crime victim's compensation division of the Attorney General's Office. Therefore,

section 552.132(b) does not apply. Likewise, you do not indicate and the documents do not reflect that the crime victim at issue is an employee of a governmental body. Thus, you have failed to demonstrate the applicability of section 552.132(f) of the Government Code to the submitted information. Consequently, the submitted information may not be withheld on the basis of section 552.132.

Section 552.1325 provides:

(a) In this section:

(1) "Crime victim" means a person who is a victim as defined by Article 56.32, Code of Criminal Procedure.

(2) "Victim impact statement" means a victim impact statement under Article 56.03, Code of Criminal Procedure.

(b) The following information that is held by a governmental body or filed with a court and that is contained in a victim impact statement or was submitted for purposes of preparing a victim impact statement is confidential:

(1) the name, social security number, address, and telephone number of a crime victim; and

(2) any other information the disclosure of which would identify or tend to identify the crime victim.

Gov't Code § 552.1325. We note that you have not submitted a victim impact statement for our review. Thus, section 552.1325 is not applicable to the submitted information.

Finally, the remaining submitted information contains information that is subject to section 552.136 of the Government Code. Section 552.136 provides:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. The department must withhold the information we have marked pursuant to section 552.136.

In summary, the information held by the department as an agent of the grand jury is not subject to disclosure under chapter 552. Arrest warrant affidavits presented to a magistrate in support of the issuance of an arrest warrant must be released to the requestor pursuant to article 15.26 of the Code of Criminal Procedure. To the extent that the submitted documents contain CHRI that was obtained pursuant to state and federal regulations, it must be withheld under section 552.101 as information made confidential by law. The department must withhold the information we have marked under section 552.101 in conjunction section 560.003 of the Government Code and common law privacy. The department must also withhold the information we have marked pursuant to sections 552.130 and 552.136. If the submitted information contains the home phone number, home address and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, and the peace officer elects to restrict access to this information, the department must withhold this information under section 552.1175. The social security numbers that are contained in the remaining information and relate to living individuals may be confidential under federal law. 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,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/seg

Ref: ID# 204304

Enc. Submitted documents

c: Ms. Laura Rogers
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(w/o enclosures)