



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 12, 2004

Ms. Marisa Elmore
Assistant District Attorney
Frank Crowley Courts Bldg.
133 North Industrial Blvd., LB-19
Dallas Texas 75207- 4399

OR2004-9640

Dear Ms. Elmore:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 213337.

The Dallas County District Attorney's Office (the "DA") received a request for ten categories of information related to the arrest, investigation, and prosecution of a named individual. In the first five items of the request, the requestor seeks offense reports generated by five named police officers. In the sixth and seventh items of the request, the requestor seeks certain medical reports. In item eight, the requestor seeks specified witness statements, item nine, all criminal history records of the witnesses making the requested statements, and item ten, "any and all evidence which [is] exculpatory in nature" regarding the arrest, investigation, and prosecution of the named individual. You state that you have provided the requestor with one of the requested offense reports, but that you do not possess any other responsive offense reports.¹ You also state that the tenth item of the request requires the DA to conduct legal research.² You claim that the submitted information is excepted from disclosure under

¹We note that the Public Information Act (the "Act") does not require a governmental body to answer factual questions, conduct legal research, release information that does not exist, or create responsive information. See *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990). Likewise, the Act does not require a governmental body to take affirmative steps to create or obtain information that is not in its possession, so long as no other individual or entity holds that information on behalf of the governmental body that received the request for it. See Open Records Decision Nos. 534 at 2-3 (1989), 518 at 3 (1989).

²See *id.*

sections 552.101 and 552.108 of the Government Code. We have considered the exception you claim and reviewed the submitted information, some of which consists of a representative sample.³

Section 552.101 of the Government Code excepts from 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. Criminal history record information ("CHRI") obtained from the National Crime Information Center ("NCIC") or the Texas Crime Information Center 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).⁴ 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. Furthermore, when a law enforcement agency compiles information that identifies a particular individual as a criminal suspect, arrested person, or defendant, the compilation of criminal history information takes on a character that implicates the individual's common-law privacy interests in a manner that the same information in an uncompiled state does not. *See U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); Open Records Decision No. 616 at 2-3 (1993). Therefore, to the extent that the submitted information contains any CHRI that is confidential under federal law or subchapter F of chapter 411 of the Government Code, or a compilation of criminal history

³We assume that the representative 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.

⁴We 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").

information that is private under *Reporters Committee*, the DA must withhold any such information under section 552.101 of the Government Code.

The submitted information also contains mental health records. Section 611.002 of the Health and Safety Code provides that “[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, are confidential.” *See also* Health & Safety Code § 611.001 (defining “patient” and “professional”). We have marked mental health records that are within the scope of section 611.002 and may not be released except in accordance with sections 611.004 and 611.0045 of the Health and Safety Code.⁵ Health & Safety Code § 611.002(b); *see id.* §§ 611.004, 611.0045.

Finally, you assert that the submitted witness statements are subject to section 552.108 of the Government Code. Section 552.108 provides in relevant 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:

...

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

(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:

...

(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

⁵Because our ruling on this information is dispositive, we need not address your other argument for this information.

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

Gov't Code § 552.108(a)(4), (b)(3). Sections 552.108(a)(4) and 552.108(b)(3) are applicable to information that was prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation or that reflects the mental impressions or legal reasoning of an attorney representing the state. A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information that the governmental body seeks to withhold. See Gov't Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). You state that "[t]he prosecutor's gathering of information about witnesses and the collecting of witness statements in preparation for trial exemplifies strategic work done by the State in preparation for litigation" as part of the case in *The State of Texas v. Lonnie Bernard Runnels*, Cause Nos. F93-66194-M and F94-02243-M. We therefore conclude that the witness statements may be withheld under subsections 552.108(a)(4)(A) and (b)(3)(A) of the Government Code.

In summary, we conclude (1) to the extent that the submitted information contains any CHRI that is confidential under federal law or subchapter F of chapter 411 of the Government Code, or a compilation of criminal history information that is private under *Reporters Committee*, the DA must withhold any such information under section 552.101 of the Government Code; (2) the marked mental health records may not be released except in accordance with sections 611.004 and 611.0045 of the Health and Safety Code; and (3) the witness statements may be withheld under subsections 552.108(a)(4)(A) and (b)(3)(A) of the Government Code.

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,



Sarah I. Swanson
Assistant Attorney General
Open Records Division

SIS/krl

Ref: ID# 213337

Enc. Submitted documents

c: Mr. Tinaka C. Bell
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(w/o enclosures)