



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 17, 2004

Mr. C. Stephen Hughes
Assistant District Attorney
27th Judicial District Attorney's Office
P.O. Box 540
Belton, Texas 76513-0540

OR2004-9773

Dear Mr. Hughes:

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# 213228.

The District Attorney for the 27th Judicial District (the "district attorney") received a request for information relating to a particular arrest and investigation. You claim that some of the requested information is excepted from disclosure under sections 552.101, 552.130, and 552.1325 of the Government Code.¹ We have considered the exceptions you claim and have reviewed the information you submitted.

We first note that the submitted information includes an affidavit for an arrest warrant. As amended by the 78th Legislature, article 15.26 of the Code of Criminal Procedure provides:

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

¹We note that you also claim section 552.305 as an exception to disclosure. This section does not except information from public disclosure. Rather, section 552.305 permits a governmental body to decline to release information that may implicate a person's privacy or property interests for the purpose of requesting an attorney general decision. *See* Gov't Code § 552.305; Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

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. As a general rule, the exceptions to disclosure found in the Act do not apply to information that is made public by other statutes. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, if the affidavit that we have marked was presented to a magistrate in support of the issuance of an arrest warrant, then the affidavit must be released under article 15.26 of the Code of Criminal Procedure. If the affidavit was not so presented, then it must be disposed of in accordance with the rest of this ruling.

We also note that the submitted information includes complaints. Article 15.04 of the Code of Criminal Procedure provides that "[t]he *affidavit* made before the magistrate or district or county attorney is called a 'complaint' if it charges the commission of an offense" (emphasis added). Case law indicates that a complaint can support the issuance of an arrest warrant. *See Janecka v. State*, 739 S.W.2d 813, 822-23 (Tex. Crim. App. 1987); *Villegas v. State*, 791 S.W.2d 226, 235 (Tex. App.—Corpus Christi 1990, pet. ref'd); *Borsari v. State*, 919 S.W.2d 913, 918 (Tex. App.—Houston [14 Dist.] 1996, pet. ref'd) (discussing well-established principle that complaint in support of arrest warrant need not contain same particularity required of indictment). In this instance, we are unable to determine whether any of the complaints that we have marked was presented to a magistrate in support of the issuance of an arrest warrant. If any of the marked complaints was so presented, then any such complaint must be released under article 15.26 of the Code of Criminal Procedure. To the extent that the marked complaints were not so presented, they must be disposed of in accordance with the rest of this ruling.

Next, we address your claims under section 552.101 of the Government Code.² This exception incorporates statutory confidentiality provisions such as article 42.12 of the Code of Criminal Procedure. With regard to the submitted presentence investigation report, article 42.12 provides in part:

(j) The judge by order may direct that any information and records that are not privileged and that are relevant to a report required by Subsection (a) or Subsection (k) of this section be released to an officer conducting a presentence investigation under Subsection (i) of this section or a postsentence report under Subsection (k) of this section. The judge may also issue a subpoena to obtain that information. A report and all information obtained in connection with a presentence investigation or postsentence

²Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101.

report are confidential and may be released only to those persons and under those circumstances authorized under Subsections (d), (e), (f), (h), (k), and (l) of this section and as directed by the judge for the effective supervision of the defendant. Medical and psychiatric records obtained by court order shall be kept separate from the defendant's community supervision file and may be released only by order of the judge.

Crim. Proc. Code art. 42.12 § 9(j). None of the circumstances described in subsections (d), (e), (f), (h), (k), or (l) of section 9 appears to be present in this instance. Therefore, the district attorney must withhold the presentence investigation report, which we have marked, under section 552.101 of the Government Code in conjunction with section 9(j) of article 42.12 of the Code of Criminal Procedure.

Section 552.101 also encompasses 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, 560.003.³ There is no indication that the requestor has a right of access under section 560.002 to the fingerprint that we have marked. Therefore, the district attorney must withhold that information under sections 552.101 and 560.003 of the Government Code.

Criminal history record information ("CHRI") obtained from the National Crime Information Center or the Texas Crime Information Center is confidential under federal and state law. Federal law governs the dissemination of CHRI obtained from the National Crime Information Center 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; *see generally* Gov't Code ch. 411 subch. F. 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 or another criminal justice agency must be withheld from the public as provided by subchapter F of chapter 411 of the Government Code. Therefore, the district attorney must withhold any responsive CHRI under section 552.101 in conjunction with federal law and subchapter F of chapter 411 of the Government Code.

³These 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-eighth Legislature, effective September 1, 2003. *See* Act of May 20, 2003, 78th Leg., R.S., ch. 1275, § 2 (78), 2003 Tex. Gen. Laws 4140, 4144.

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").

A social security number is confidential under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act if it was obtained or is maintained by a governmental entity under any provision of law enacted on or after October 1, 1990. *See* 42 U.S.C. § 405(c)(2)(C)(viii)(I); Open Records Decision No. 622 at 2-4 (1994). It is not apparent to this office that the social security numbers contained in the submitted documents are 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 numbers in question here were obtained or are maintained under such a law and are 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 the social security numbers that we have marked, the district attorney should ensure that they were not obtained and are not maintained by the district attorney under any provision of law enacted on or after October 1, 1990.

Section 552.101 also incorporates the common-law right to privacy. Information must be withheld from the public under section 552.101 in conjunction with common-law privacy when the information is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, *and* (2) of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). When a governmental entity compiles criminal history information with regard to a particular individual as a possible criminal suspect, arrestee, or defendant, the compiled information takes on a character that implicates the individual's right to privacy 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). Thus, to the extent that the submitted information contains such a compilation of criminal history information, any such information is private under *Reporters Committee* and must be withheld from the requestor under section 552.101. *See also* Open Records Decision No. 616 at 2-3 (1993)

Section 552.130 excepts from public disclosure information that relates to "a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document." Gov't Code § 552.130(a)(3). We have marked a Texas personal identification number that the district attorney must withhold under section 552.130.

Lastly, we address your claim under section 552.1325.⁵ This exception provides as follows:

(a) In this section:

⁵We note that the district attorney failed to raise this exception within the ten-business-day period prescribed by section 552.301. *See* Gov't Code §§ 552.301(b), .302. Nevertheless, we will address section 552.1325, as it is a mandatory exception to public disclosure that a governmental body may not waive. *See id.* §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

(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. You state that some of the submitted information relates to a crime victim. You have not demonstrated, however, that the information in question relates to a "victim" as defined by article 56.32 of the Code of Criminal Procedure. *See id.* § 552.132,5(a)(1); Crim. Proc. Code art. 56.32(11). Likewise, you have not shown that any of the information in question is contained in a victim impact statement or was submitted for purposes of preparing a victim impact statement. *See* Gov't Code § 552.1325(b). We therefore conclude that the district attorney may not withhold any of the submitted information under section 552.1325. *See* Attorney General Opinion No. GA-0220 at 4 (by its terms, only specific crime victim information contained in victim impact statement is confidential under Gov't Code § 552.1325).

In summary: (1) the arrest warrant affidavit must be released under article 15.26 of the Code of Criminal Procedure if it was submitted to a magistrate in support of the issuance of an arrest warrant; (2) the complaints must be released under article 15.26 to the extent that they were submitted to a magistrate in support of the issuance of an arrest warrant; (3) the presentence investigation report must be withheld under section 552.101 in conjunction with section 9(j) of article 42.12 of the Code of Criminal Procedure; (4) the fingerprint must be withheld under section 552.101 in conjunction with section 560.003 of the Government Code; (5) any responsive CHRI must be withheld under section 552.101 in conjunction with federal law and subchapter F of chapter 411 of the Government Code; (6) the district attorney may be required to withhold the social security numbers under section 552.101 in conjunction with section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code; (7) any information compiled with regard to a particular individual as a possible criminal suspect, arrestee, or defendant must be withheld under section 552.101 in conjunction with common-law privacy under *Reporters Committee*; and (8) the Texas personal identification number must be withheld under section 552.130. The rest of the submitted 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,

A handwritten signature in black ink, appearing to read "J.W. Morris, III", with a horizontal line extending to the right from the end of the signature.

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

JWM/sdk

Ref: ID# 213228

Enc: Submitted documents

c: Mr. Walter M. Reaves, Jr.
P.O. Box 55
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(w/o enclosures)