



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 12, 2005

Mr. James M. Tirey  
County Attorney  
Hale County  
500 Broadway, Suite 80  
Plainview, Texas 79072

OR2005-09250

Dear Mr. Tirey:

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# 234155.

The Hale County Clerk (the "clerk") received a request for (1) "an electronic copy of any recorded real property documents and indexes that are maintained in digital form" in the official records of real property of Hale County, Texas; and (2) "a summary description of the county clerk's documents available on microfilm or microfiche or digital format." You state that the clerk has interpreted the request to include not only deeds and security instruments, but also the types of documents you submitted to this office for review: a child support lien, an abstract of judgment, a certified copy of probate papers, a certified copy of a final decree of divorce, and a power of attorney.<sup>1</sup> You also state that the submitted documents are a sample of the documents responsive to the request.<sup>2</sup> You claim that portions of the requested information are excepted from disclosure under section 552.101

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<sup>1</sup>The Act permits the clerk to seek clarification from a requestor if a request is unclear. *See* Gov't Code § 552.221(b).

<sup>2</sup>We 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.

of the Government Code.<sup>3</sup> You ask whether the Act requires the clerk to provide the information in the requested medium, and whether the clerk may require the requestor to sign a nondisclosure agreement as a condition of releasing the information.

Initially, we note that you did not submit information responsive to the portion of the request for “a summary description of the county clerk’s documents available on microfilm or microfiche or digital format” for our review. Further, you have not indicated that such information does not exist or that you wish to withhold any such information from disclosure. Therefore, to the extent information responsive to this aspect of the request exists, we assume that you have released it to the requestor. If you have not released any such information, you must release it to the requestor at this time. *See* Gov’t Code §§ 552.301(a), .302; Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible under circumstances).

Before we address the exception you claim, we consider the type of information you submitted in light of the wording of the request and the clerk’s recording duties. The county clerk of a county serves as the county recorder. *See* Local Gov’t Code § 191.001(a). Not every instrument a county clerk records is a real property record. The county clerk records each deed, mortgage, or other instrument that is required or permitted by law to be recorded. *See id.* § 192.001; Prop. Code § 11.04. In addition, a county clerk is the custodian of county court records in civil and criminal cases and in probate matters. *See* Local Gov’t Code § 192.006(a). The clerk also receives papers filed in guardianship and mental-health actions. The Act does not apply to records the clerk maintains on behalf of a court. *See* Gov’t Code § 552.003(B) (“Governmental body does not include judiciary.”). However, case-related documents placed among the real property records, such as probate court documents that affect the chain of title of real property, are not held on behalf of the court in the case and so, are subject to disclosure under the Act. Furthermore, because the requestor does not seek all of the clerk’s official public records, but only those that concern Hale County real property, the submitted records are responsive to the request only to the extent that they relate to Hale County real property and are maintained by the clerk in her capacity as the custodian of the county’s real property records.

We next address the fact that this office has previously ruled on the bulk of the requested information. A governmental body has the authority under section 552.301 to request an attorney general decision only when three conditions are met: (1) the governmental body

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<sup>3</sup>Although you raise section 552.141 of the Government Code as an exception to disclosure, you did not submit arguments in support of your claim. *See* Gov’t Code §§ 552.301, .302. Moreover, section 552.141 applies only to information in an application for a marriage license, and the submitted documents do not include an application for a marriage license. Therefore, we assume you no longer urge this exception.

wishes to withhold the information;<sup>4</sup> (2) the governmental body considers the information to fall within an exception to required disclosure; and (3) there has not been a previous determination about whether the information falls within one of the exceptions. *See Conely v. Peck*, 929 S.W.2d 630 at 632 (Tex. App.—Austin 1996, no writ) (requirement to request a decision applies only when governmental body receives a request for information it considers subject to an exception); Open Records Decision No. 665 at 2-3 (2000). Therefore, a governmental body that seeks a decision under section 552.301 must first determine that it in good faith reasonably believes the requested information to be within an exception to disclosure. A governmental body “considers [information] to be within one of the exceptions” when it in good faith believes there exist valid legal arguments to support the claimed exception to required disclosure. Gov’t Code § 552.301(a), ORD 665 at 3.

Section 552.301(f) provides that a governmental body “must release the requested information and is prohibited from asking for a decision from the attorney general” if there has been a prior determination that the identical information is required to be released. Gov’t Code § 552.301(f). A governmental body is not authorized under the Act to seek a decision pursuant to section 552.301 if the governmental body reasonably believes that the requested information is not within an exception to required public disclosure. When the only argument the governmental body has to make is identical to an argument repeatedly made by the governmental body and consistently dismissed by this office, the information at issue is substantially the same type of information the governmental body has consistently been directed to release, and there has been no change in facts or law suggesting that the governmental body’s arguments may be interpreted differently, the governmental body will not reasonably believe that information is protected from required disclosure. ORD 665 at 3-4; *see also Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475, 476 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive litigation exception by agreeing to produce documents and producing some; suggesting subsequent request for attorney general decision raising that exception inappropriate). When a governmental body reasonably believes that requested information is not subject to any of the Act’s exceptions, the governmental body must release the information “promptly” and “without delay.” Gov’t Code §§ 552.221(a), 552.228(a), 552.230(a); *see* Open Records Decision No. 664 (2000); *see also* Gov’t Code §§ 552.001(a), 552.353 (offense to fail to provide access to public information as required by Act).

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<sup>4</sup>A governmental body is not required to request a decision from the Attorney General if the only exceptions applicable to the information at issue are discretionary exceptions, and the governmental body wishes to waive the application of those exceptions and release the requested information. Gov’t Code § 552.007(a). Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)); 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding); 549 at 6 (1990) (governmental body may waive informer’s privilege); 522 at 4 (1989) (discretionary exceptions in general). *See also* Gov’t Code § 552.007(a); *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475, 476 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive litigation exception, section 552.103).

In this instance, the information at issue is substantially the same type of information that the clerk was directed to release by this office in Open Records Letter No. 2005-05351 (2005). Your arguments in this instance are also the same as your arguments in that prior ruling, and there has been no change in facts or law suggesting that this office would interpret the arguments differently. Thus, we find that the conditions of section 552.301 have not been met for the information that was the subject of Open Records Letter No. 2005-05351, and conclude that the information previously ruled upon must be released to the requestor promptly and without delay. However, because the current request encompasses information created after the date of the prior request, we will consider your arguments for that information.

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” We understand that your section 552.101 claim is in part based on several statutes but is also based on the common-law right to privacy.<sup>5</sup> We also note that the submitted records include Texas driver’s license numbers and social security numbers, which sections 552.130 and 552.147 of the Government Code except from public disclosure. *See* Gov’t Code §§ 552.130, .147. However, property records filed in the office of a county clerk are public records and are intended to put members of the public on notice of any party’s interest in the property. *See* Loc. Gov’t Code §§ 118.024 (county clerk’s authority to charge fees with respect to documents, including authority to charge fees for filing personal and real property records, does not limit person’s right to full and free access to such documents), 191.006 (“All records belonging to the office of the county clerk to which access is not otherwise restricted by law or by court order shall be open to the public at all reasonable times. A member of the public may make a copy of any of the records.”); Prop. Code §13.002 (Instrument that is properly recorded in the proper county is “notice to all persons of the existence of the instrument” and is “subject to inspection by the public”). As a general rule, information that is specifically made public by statute may not be withheld from the public under any of the exceptions to public disclosure under the Act. *See, e.g.*, Open Records Decision Nos. 675 (2001), 623 (1994), 544 (1990), 378 (1983), 161 (1977), 146 (1976). Therefore, we determine that the clerk may not withhold any information on privacy grounds or based on section 552.130 or 552.147. *See Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57 (Tex. 1992) (“The law cannot recall information once it is in the public domain.”).

However, as you argue that several laws specifically control the public disclosure of the social security numbers in the records at issue, we will address these claims. You assert that the following statutes prohibit the release of the social security numbers in the submitted records: the 1990 amendments to the Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I); section 11.008 of the Property Code; article 35.29 of the Code of Criminal Procedure; section 36(b) of the Probate Code; and section 35.38 of the Business and Commerce Code.

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<sup>5</sup>*See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). You express concern with regard to the public release of the birth dates and driver’s license numbers in the submitted records, as well as possible “financial account information” in other records you did not submit. However, you do not cite to any law that would make this information confidential.

The 1990 amendments to the Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), make confidential social security numbers and related records that are obtained or 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* 42 U.S.C. § 405(c)(2)(C)(viii)(I). You have cited no law, nor are we aware of any law enacted on or after October 1, 1990, that authorizes the clerk to obtain or maintain a social security number. Therefore, we have no basis for concluding that any of the social security numbers in the submitted records 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 any social security number information, you should ensure that no such information was obtained or is maintained by the clerk pursuant to any provision of law enacted on or after October 1, 1990.

Section 11.008 of the Property Code reads as follows:

- (a) In this section, “instrument” means a deed, mortgage, or deed of trust.
- (b) An instrument executed on or after January 1, 2004, transferring an interest in real property to or from an individual may not be recorded unless a notice appears on the first page of the instrument in 12-point boldfaced type or 12-point uppercase letters and reads substantially as follows:

NOTICE OF CONFIDENTIALITY RIGHTS: IF YOU ARE  
A NATURAL PERSON, YOU MAY REMOVE OR STRIKE  
ANY OF THE FOLLOWING INFORMATION FROM THIS  
INSTRUMENT BEFORE IT IS FILED FOR RECORD IN  
THE PUBLIC RECORDS: YOUR SOCIAL SECURITY  
NUMBER OR YOUR DRIVER’S LICENSE NUMBER.

- (c) The validity of an instrument as between the parties to the instrument and the notice provided by the instrument are not affected by a party’s failure to include the notice required under Subsection (b).
- (d) The county clerk may not reject an instrument presented for recording because the instrument contains or fails to contain a social security number or driver’s license number. If the county clerk accepts an instrument for recording, the recording of the instrument creates a conclusive presumption that the requirements of this section have been met.
- (e) The county clerk shall post a notice in the county clerk’s office stating that instruments recorded in the real property or official public records or the equivalent of the real property or official public records of the county and executed on or after January 1, 2004:

(1) are not required to contain a social security number or driver's license number; and

(2) are public records available for review by the public.

(f) All instruments recorded under this section are subject to inspection by the public.

(g) Unless this section is cited in a law enacted after September 1, 2003, this section is the exclusive law governing the confidentiality of personal information contained in the real property or official public records or the equivalent of the real property or official public records of a county.

(h) To the extent that federal law conflicts with this section, an instrument must contain the information required by and must be filed in a manner that complies with federal law.

Prop. Code § 11.008. This provision applies only to a deed, mortgage, or deed of trust executed on or after January 1, 2004. *See id.* § 11.008 historical and statutory note [Act of May 27, 2003, 78<sup>th</sup> Leg., R.S. ch 715, § 3, 2003 Tex. Gen. Laws 2141, 2142; Act of May 28, 2003, 78<sup>th</sup> Leg., R.S., ch. 960, § 3, 2003 Tex. Gen. Laws 2836, 2837]. The submitted documents do not include a deed, mortgage, or deed of trust executed on or after January 1, 2004. Furthermore, although section 11.008 allows a natural person to remove the person's social security number or driver's license number from an deed, mortgage, or deed of trust executed on or after January 1, 2004, the statute does not make confidential such numbers when they are included in a filed record. Moreover, subsection (f) states that "[a]ll instruments recorded under this section are subject to inspection by the public. *Id.* § 11.008(f). Thus, the Clerk may not withhold any information based on section 11.008.

Article 35.29 of the Code of Criminal Procedure concerns personal information about jurors and reads as follows:

Information collected by the court or by a prosecuting attorney during the jury selection process about a person who serves as a juror, including the juror's home address, home telephone number, social security number, driver's license number, and other personal information, is confidential and may not be disclosed by the court, the prosecuting attorney, the defense counsel, or any court personnel except on application by a party in the trial or on application by a bona fide member of the news media acting in such capacity to the court in which the person is serving or did serve as a juror. On a showing of good cause, the court shall permit disclosure of the information sought.

Code Crim Proc. art. 35.29. Thus, personal information concerning jurors serving in particular criminal proceedings is confidential pursuant to article 35.29 of the Code of

Criminal, and may not be disclosed by the district clerk absent an order from the trial court. *See id.* You have not, however, explained how the submitted information includes juror information and it does not appear to us that it does. Accordingly, the clerk may not withhold any information based on article 35.29.

Section 36 of the Probate Code concerns the duty and responsibility of the probate judge:

(a) It shall be the duty of each county and probate court to use reasonable diligence to see that personal representatives of estates being administered under orders of the court and other officers of the court perform the duty enjoined upon them by law pertaining to such estates. The judge shall annually, if in his opinion the same be necessary, examine the condition of each of said estates and the solvency of the bonds of personal representatives of estates. He shall, at any time he finds that the personal representative's bond is not sufficient to protect such estate, require such personal representatives to execute a new bond in accordance with law. In each case, he shall notify the personal representative, and the sureties on the bond, as provided by law; and should damage or loss result to estates through the gross neglect of the judge to use reasonable diligence in the performance of his duty, he shall be liable on his bond to those damaged by such neglect.

(b) The court may request an applicant or court-appointed fiduciary to produce other information identifying an applicant, decedent, or personal representative, including social security numbers, in addition to identifying information the applicant or fiduciary is required to produce under this code. The court shall maintain the information required under this subsection, and the information may not be filed with the clerk.

Prob. Code § 36. Although this provision permits a county or probate court to request from an applicant or court-appointed fiduciary certain identifying information about an applicant, decedent, or personal representative, including social security numbers, not only does the provision not make the information confidential, but it also states that the information may not be filed with the clerk. Thus, you have not explained the applicability of this provision to the submitted information. Consequently, the clerk may not withhold the information based on section 36.

Finally, you raise section 35.38 of the Business and Commerce Code. However, the Business and Commerce Code does not include a section 35.38. Thus, we determine that the information is not excepted from disclosure and must be released to the requestor.

Next, you ask whether under section 552.228, which concerns providing requested information that exists in an electronic medium, the clerk must provide the information. The requestor asks that the clerk provide the information in any type of electronic medium that is convenient to Hale County, including, but not limited to, zip disc, LTO cartridge, FTP transmission, dat tape, Jaz disc, CD-ROM or floppy disk.

Section 552.228 provides as follows:

- (a) It shall be a policy of a governmental body to provide a suitable copy of public information within a reasonable time after the date on which the copy is requested.
- (b) If public information exists in an electronic or magnetic medium, the requestor may request a copy either on paper or in an electronic medium, such as a diskette or on magnetic tape. A governmental body shall provide a copy in the requested medium if:
  - (1) the governmental body has the technological ability to produce a copy of the requested information in the requested medium;
  - (2) the governmental body is not required to purchase any software or hardware to accommodate the request; and
  - (3) provision of a copy of the information in the requested medium will not violate the terms of any copyright agreement between the governmental body and a third party.
- (c) If a governmental body is unable to comply with a request to produce a copy of information in a requested medium for any of the reasons described by this section, the governmental body shall provide a paper copy of the requested information or a copy in another medium that is acceptable to the requestor. A governmental body is not required to copy information onto a diskette or other material provided by the requestor but may use its own supplies.

Gov't Code § 552.228; *see also* 1 T.A.C. § 111.66. Thus, section 552.228 permits the requestor to seek access to and obtain information in an electronic medium, provided that the information exists in that medium and provided that the three conditions specified by section 552.228(b) are met. If the three conditions are not met, then the governmental body must provide a copy of the information on paper or in another medium that is acceptable to the requestor. *See* Gov't Code § 552.228(c).

We understand that, in this case, the requested information exists in an electronic medium. You state that the clerk cannot redact confidential information from the electronic image and that, consequently, the clerk would need to print the documents that contain confidential information, redact the confidential information, and then re-transform the redacted document into an electronic image. You assert that the Act does not require the clerk to comply with a request that is unduly burdensome and will interfere with the operation of her office.

A governmental body may not withhold requested information for the reason that fulfilling the request is burdensome and may interfere with the operation of the office. *See Indus. Found.*, 540 S.W.2d 668, 686-687. Furthermore, as we have determined that the clerk may not withhold any of the requested information, the clerk need not undertake the task of redacting the information. With regard to the first condition of section 552.228, you do not state that the clerk lacks the technological ability to produce the requested information in the requested medium. Nor have you stated that the clerk cannot meet the second and third conditions of section 552.228. Thus, section 552.228 requires the clerk to provide the information in the requested medium.

Finally, you ask if the clerk may require the requestor to sign a nondisclosure agreement as a condition of releasing the information. The motives of a requestor may not be considered in responding to a request made under the Act. *See Gov't Code* § 552.222(a). When a governmental body receives a request for information, it may not inquire into the purpose for which the information will be used. *Id.* While the Act prohibits a governmental body from making an inquiry of a requestor, it does not address the subsequent use of public information. *Cf. id.* § 552.204 (officer for public information is not responsible for requestor's use of information released under Act). However, a nondisclosure agreement may not be used to deny access to or copies of the information sought by the requestor under the Act. *Cf. Open Records Decision No. 660 (1999)* (Federal Copyright Act may not be used to deny access to or copies of public information under the Act). Thus, a governmental body may not restrict the requestor's subsequent use of information released under the Act, and the clerk may therefore not require the requestor to sign a nondisclosure agreement as a condition of releasing the information.

Accordingly, information responsive to the portion of the request for "a summary description of the county clerk's documents available on microfilm or microfiche or digital format" must be released to the extent it existed at the time the clerk received the request. The clerk must release information previously ruled upon in Open Records Letter No. 2005-05351. Responsive information created after the date of the receipt of the request in Open Records Letter No. 2005-05351 must also be released. The clerk must provide the information in the requested medium. The clerk may not require the requestor to sign a nondisclosure agreement as a condition of releasing the information.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/jpa

Ref: ID# 234155

Enc. Submitted documents

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