



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 16, 2006

Ms. Mary J. Ibarra
Assistant Criminal District Attorney
Bexar County District Attorney's Office
300 Dolorosa, Suite 4049
San Antonio, Texas 78205-3030

OR2006-03949A

Dear Ms. Ibarra:

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# 246843.

You have submitted correspondence to this office that we interpret as a request to reconsider Open Records Letter No. 2006-3949 (2006). We note that a governmental body is prohibited from asking this office to reconsider a decision issued under section 552.306 of the Government Code. *See* Gov't Code § 552.301(f). Furthermore, you have not demonstrated that this office made any error in issuing the prior ruling. Nevertheless, we have determined that the prior ruling should be corrected, in part, for purposes of due process. *See id.* §§ 552.306, .352. Accordingly, we hereby withdraw the prior ruling. This decision is substituted for Open Records Letter No. 2006-3949 (2006) and serves as the correct ruling.

The Bexar County Sheriff's Office (the "sheriff") received three requests from two requestors for information relating to a named deputy. You claim that the requested information is excepted from disclosure under sections 552.103, 552.107, 552.108, 552.111, and 552.119 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.¹

¹This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the sheriff to withhold any information that is substantially different from the submitted information. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

We note that you did not comply with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(e) requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of its receipt of the request for information, (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the request for information; (3) a signed statement of the date on which the governmental body received the request or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples if the information is voluminous. *See Gov't Code § 552.301(e)(1)(A)-(D)*. If a governmental body fails to comply with section 552.301, the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *See id. § 552.302; Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ).

In this instance, you failed to submit the requests for information and the information that you seek to withhold within the fifteen-business-day period prescribed by section 552.301(e). Therefore, the submitted information is presumed to be public under section 552.302. This statutory presumption can generally be overcome when the information is confidential by law or third-party interests are at stake. *See Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982)*. Although you claim exceptions to disclosure under sections 552.103, 552.107, 552.108, and 552.111 of the Government Code, these sections are discretionary exceptions that protect a governmental body's interests and may be waived. *See Gov't Code § 552.007; Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); *Open Records Decision Nos. 677 at 10-11 (2002)* (attorney work-product privilege under Gov't Code § 552.111 may be waived), *676 at 10-11 (2002)* (attorney-client privilege under Gov't Code § 552.107(1) may be waived), *665 at 2 n.5* (discretionary exceptions generally), *663 at 5 (1999)* (waiver of discretionary exceptions), *177 at 3 (1977)* (statutory predecessor to Gov't Code § 552.108 subject to waiver). Your claims under sections 552.103, 552.107, 552.108, and 552.111 are not compelling reasons for non-disclosure under section 552.302. In failing to comply with section 552.301, you have waived these exceptions. Therefore, you may not withhold any of the submitted information under sections 552.103, 552.107, 552.108, or 552.111 of the Government Code.

However, we will address section 552.119 of the Government Code, as your claim under this exception can provide a compelling reason for non-disclosure. Section 552.119 provides as follows:

- (a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, the release of which would endanger the life or

physical safety of the officer, is excepted from [required public disclosure] unless:

- (1) the officer is under indictment or charged with an offense by information;
- (2) the officer is a party in a civil service hearing or a case in arbitration; or
- (3) the photograph is introduced as evidence in a judicial proceeding.

(b) A photograph excepted from disclosure under Subsection (a) may be made public only if the peace officer gives written consent to the disclosure.

Gov't Code § 552.119. Under section 552.119, a governmental body must demonstrate, if the information does not demonstrate on its face, that release of the photograph in question would endanger the life or physical safety of a peace officer. A photograph of a peace officer may not be withheld under section 552.119 if (1) the officer is under indictment or charged with an offense by information; (2) the officer is a party in a civil service hearing or a case in arbitration; (3) the photograph is introduced as evidence in a judicial proceeding; or (4) the officer gives written consent to the disclosure. Although you seek to withhold the deputy's photograph under section 552.119, you do not argue that release of the photograph at issue would endanger the deputy's life or physical safety. We therefore conclude that you may not withhold any of the submitted information under section 552.119.

We note, however, that section 552.101 of the Government Code is applicable to some of the submitted information.² Section 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. This exception encompasses information that another statute makes confidential. 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. CHRI means "information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions."³ Gov't Code § 411.082(2). Federal law governs the dissemination of CHRI obtained from the

²Unlike other exceptions to disclosure, this office will raise section 552.101 on behalf of a governmental body, because the Act prescribes criminal penalties for the release of confidential information. See Gov't Code §§ 552.007, .352; Open Records Decision No. 325 at 2 (1982).

³We note that the statutory definition of CHRI does not encompass driving record information maintained by the Texas Department of Public Safety under subchapter C of chapter 521 of the Transportation Code. See Gov't Code § 411.082(2).

National Crime Information Center network. Federal regulations prohibit the release to the general public of CHRI 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”). The federal regulations allow each state to follow its own individual law with respect to CHRI that it generates. *See* Open Records Decision No. 565 at 10-12 (1990); *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). We have marked CHRI that you must withhold under section 552.101 of the Government Code in conjunction with federal law and subchapter F of chapter 411 of the Government Code.

Section 552.101 also encompasses the doctrine of common law privacy, which 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. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. A compilation of an individual’s criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 485 U.S. 749, 764 (1989) (when considering prong regarding individual’s privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one’s criminal history). Furthermore, we find that a compilation of a private citizen’s criminal history is generally not of legitimate concern to the public. We have marked compilations of information that depict private citizens as a suspect, arrestee, or criminal defendant. You must withhold that information under section 552.101 in conjunction with common law privacy.

Common law privacy also protects the specific types of information that are held to be intimate or embarrassing in *Industrial Foundation*. *See* 540 S.W.2d at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has determined that other types of information also are private under section 552.101. *See generally* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private). We have marked other private information that you must also withhold under section 552.101.

We next note that section 552.117 of the Government Code is applicable to some of the submitted information.⁴ Section 552.117(a)(2) excepts from public disclosure the home address, home telephone number, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 or 552.1175. Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. We have marked the information that you must withhold under section 552.117(a)(2).

We also note that section 552.130 of the Government Code is applicable to some of the submitted information.⁵ Section 552.130 excepts from public disclosure information that relates to

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state;
- (2) a motor vehicle title or registration issued by an agency of this state; or
- (3) 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). We have marked Texas driver's license, motor vehicle, and personal identification information that you must withhold under section 552.130.

Lastly, we note that the submitted information includes social security numbers. Section 552.147 of the Government Code provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act.⁶ We have marked social security numbers that you must withhold under section 552.147.

In summary: (1) you must withhold the marked CHRI under section 552.101 of the Government Code in conjunction with federal law and subchapter F of chapter 411 of the Government Code; (2) you must withhold the marked compilations of information that depict private citizens as a suspect, arrestee, or criminal defendant under section 552.101 in conjunction with common law privacy; (3) you must withhold the other marked information

⁴Unlike other exceptions to disclosure, this office will raise section 552.117 on behalf of a governmental body, as this exception is mandatory and may not be waived. See Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

⁵Section 552.130 also is a mandatory exception and may not be waived. Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001).

⁶We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

that is protected by common law privacy under section 552.101; (4) you must withhold the information that we have marked under section 552.117(a)(2) of the Government Code; (5) you must withhold the marked Texas driver's license, motor vehicle, and personal identification information under section 552.130 of the Government Code; and (6) you must withhold the marked social security numbers under section 552.147 of the Government Code. You must release the rest of the submitted 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).

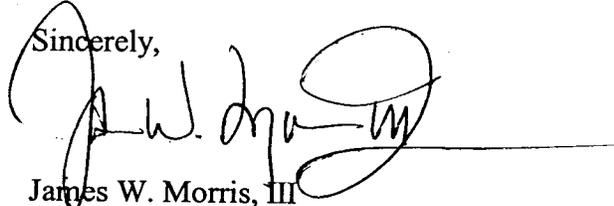
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,

A handwritten signature in black ink, appearing to read 'James W. Morris, III', written over a horizontal line.

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

JWM/sdk

Ref: ID# 246843

Enc. Submitted documents

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