



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 7, 2007

Mr. Richard L. Bilbie
Assistant District Attorney
Cameron County District Attorney's Office
974 East Harrison Street
Brownsville, Texas 78520

OR2007-05353

Dear Mr. Bilbie:

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# 277809.

The Cameron County District Attorney's Office (the "district attorney") received two requests for several categories of information pertaining to the pretrial diversion programs in Cameron and Willacy Counties. You state that the district attorney does not collect or maintain information for the Willacy County pretrial diversion program. You also state that the district attorney does not have any documents responsive to some of the categories of information pertaining to the Cameron County pretrial diversion program.¹ You also state that the district attorney has released some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.²

¹We note that the Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. See *Econ. Opportunities Dev. Corp v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App. -San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

²We 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.

Initially, we address your claim that the Act does not apply to the submitted information. This office has concluded that specific records held by a community supervision and corrections department regarding individuals on probation and subject to the direct supervision of a court are not subject to the Act because such records are held on behalf of the judiciary. *See* Open Records Decision No. 646 (1996); *see also* Gov't Code § 552.003(1)(B) (definition of governmental body does not include judiciary). You argue that if documents in the hands of a community supervision and corrections department are not subject to the Act, then the same documents are also not subject to the Act in the hands of the district attorney. You state that the information at issue “center[s] around the production from the [district attorney’s] files of information about individual participants in the Pretrial Diversion Program[.]” Therefore, this information is held by the district attorney, not by a community supervision and corrections department. Accordingly, we find that the submitted information is subject to the Act and must be released unless it comes within the scope of an exception to disclosure under the Act. Thus, we will address the arguments you have raised under the Act.

We note that you inform this office that the district attorney provided some of the submitted information to one of the requestors. Information that a governmental body has previously released to the public may not be withheld by the governmental body unless it is able to demonstrate that the information is confidential by law. Gov't Code § 552.007. Although you assert that this information is protected under section 552.108 of the Government Code, this exception is discretionary and may be waived. As such, section 552.108 does not make information confidential for purposes of section 552.007. *See id.* (prohibiting selective disclosure of information that governmental body has voluntarily made available to any member of the public); Open Records Decision No. 177 (1977) (governmental body may waive statutory predecessor to section 552.108); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law); *but see* Open Records Decision Nos. 579 (1990) (exchange of information among litigants in “informal” discovery is not “voluntary” release of information for purposes of statutory predecessor to Gov't Code § 552.007), 454 at 2 (1986) (governmental body that disclosed information because it reasonably concluded that it had constitutional obligation to do so could still invoke statutory predecessor to Gov't Code § 552.108). Thus, to the extent that the information at issue has been voluntarily released to a member of the public, the district attorney may not now withhold any such information under section 552.108 of the Government Code. To the extent this information has not been voluntarily released, we will address your argument under section 552.108 for this information, as well as for the remaining submitted information. Furthermore, because section 552.101 of the Government Code protects information that is confidential by law, we will address your arguments with regard to that exception for all of the submitted information.

You claim that the submitted information is excepted from disclosure under section 552.101 of the Government Code. Section 552.101 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 the common law right of privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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. Upon review, we find that none of the submitted information is protected under common law privacy. Accordingly, none of this information may be withheld under section 552.101 on that basis.

We now turn to your argument under section 552.108 of the Government Code. Section 552.108(a) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime.” Generally, 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). You state that pretrial diversion is a matter of prosecutorial discretion. We understand you to claim that the defendants are subject to ongoing prosecution until they complete the pretrial diversion program successfully. Based upon these representations, we conclude that the release of the submitted information would interfere with the detection, investigation, or prosecution of crime. *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). Therefore, you may withhold the submitted information under section 552.108(a)(1) of the Government Code.³

³The district attorney asserts that one of the requestors has a right of access under section 552.023 of the Government Code to some of the submitted information. We note that under section 552.023, a person has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect the person’s privacy interests. Gov’t Code § 552.023(a). However, a requestor does not have a right of access under section 552.023 to information that is protected from public disclosure by a law that is not based exclusively on the requestor’s privacy interests. *See, e.g., Open Records Decision Nos. 603 at 2-3 (1992) (no section 552.023 right of access to information encompassed by Health & Safety Code § 142.009, which protects integrity of investigatory process as well as individual’s privacy interests), 587 at 3-4 (1990) (no right of access to information protected by former Fam. Code § 34.08, which protected law enforcement interests).* Section 552.108 of the Government Code protects law enforcement interests, rather than privacy rights; therefore, section 552.023 does not provide the requestor at issue a special right of access to the information at issue.

We note that if section 552.108 does not apply to some of the submitted information, then the district attorney must withhold a portion of this information under section 552.130 of the Government Code.⁴ Section 552.130 provides that information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1), (2). The district attorney must withhold the Texas driver's license number that we have marked under section 552.130; however, the requestor whose driver's license number is at issue has a special right of access to this information. See Gov't Code § 552.023.

In summary, to the extent the submitted information has not been voluntarily released, the district attorney may withhold this information under section 552.108 of the Government Code. To the extent that any of the submitted information has been voluntarily released to a member of the public, the district attorney may not withhold any such information under section 552.108 of the Government Code. However, the district attorney must withhold the Texas driver's license number that we have marked in such information under section 552.130 of the Government Code from one of the requestors, but must release this driver's license number to the requestor to whom it belongs.⁵

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).

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁵We note that this information contains a social security number. 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. A requestor has a right, however, to his own social security number. See generally Gov't Code § 552.023(b) (governmental body may not deny access to person to whom information relates, or that person's representative, solely on grounds that information is considered confidential by privacy principles).

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,



M. Alan Akin
Assistant Attorney General
Open Records Division

AA/eb

Ref: ID# 277809

Enc. Submitted documents

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Mr. Richard L. Bilbie- Page 6

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