



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 12, 2008

Ms. Ashley D. Fourt
Assistant District Attorney
Tarrant County Criminal District Attorney's Office
401 West Belknap
Fort Worth, Texas 76196-0201

OR2008-06442

Dear Ms. Fourt:

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# 309716.

The Tarrant County Sheriff's Office (the "sheriff") received two requests from the same requestor for information relating to two named individuals and the investigation of the murder of another named individual. You state that the sheriff did not investigate the murder and has no information relating to the victim's death.¹ You seek to withhold information relating to the other two named individuals under sections 552.101, 552.103, 552.108, 552.130, and 552.147 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.²

¹We note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. 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), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

²We note that some of the submitted documents and portions of the submitted videos do not concern either of the other two named individuals and are therefore not responsive to this request for information. This decision does not address the public availability of the non-responsive information, and the sheriff need not release that information to the requestor.

We first note that some of the submitted information falls within the scope of section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[,]" unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). Section 552.022(a)(17) provides for required public disclosure of "information that is also contained in a public court record[,]" unless the information is expressly confidential under other law. *Id.* § 552.022(a)(17). We have marked completed reports that are subject to section 552.022(a)(1) and court records that are subject to section 552.022(a)(17). Section 552.103 of the Government Code is not other law that makes information expressly confidential for the purposes of section 552.022(a)(1) and section 552.022(a)(17). *See id.* § 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 No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Likewise, section 552.108 is not other law that makes information confidential for the purposes of section 552.022(a)(17). *See* Open Records Decision No. 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). Therefore, the marked reports and court records may not be withheld under section 552.103, and the court records may not be withheld under section 552.108. Although you also raise sections 552.101 and 552.130 of the Government Code, which are confidentiality provisions for the purposes of section 552.022, none of the information in the reports or the court records is protected by either of those exceptions. Therefore, the marked court records must be released. However, we will consider the sheriff's claim under section 552.108 with respect to the completed reports and the submitted information that is not subject to section 552.022. We also will consider the sheriff's claim under section 552.103 with respect to the information that is not subject to section 552.022(a)(1) or section 552.022(a)(17). Additionally, we will consider the sheriff's other exceptions to the disclosure of the submitted information.

Section 552.103 of the Government Code provides as follows:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.
- (b) For purposes of this section, the state or a political subdivision is considered to be a party to litigation of a criminal nature until the applicable statute of limitations has expired or until the defendant has exhausted all appellate and postconviction remedies in state and federal court.

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103. A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990)*. The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See Open Records Decision No. 452 at 4 (1986)*. To establish that litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.*

You seek to withhold jail records relating to the incarceration of two individuals who have been convicted of murder. You indicate that one of the named individuals had a postconviction application for a writ of habeas corpus pending when the sheriff received these requests for information. You also state that an application for a postconviction writ of habeas corpus had been and/or was due to be filed by the other named individual when the sheriff received these requests. You do not inform us, however, that the sheriff is or will be a party to any of the applications for writs. *See Open Records Decision No. 392 at 3 (1983)* (statutory predecessor applicable only where litigation involves or is expected to involve governmental body that claims exception). Moreover, you have not explained how or why the named individuals' jail records are related to any of their writs. *See Open Records Decision Nos. 551 at 5 (1990)* (attorney general will determine whether governmental body has reasonably established that information at issue is related to litigation), 511 at 2 (1988) (information “relates” to litigation under statutory predecessor if its release would impair governmental body's litigation interests). We therefore conclude that the sheriff may not withhold any of the submitted information under section 552.103 of the Government Code.

Section 552.108 of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov't Code § 552.108(a)(1). 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 at issue. *See id.*

§ 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). We note that the named individuals' applications for writs of habeas corpus do not establish ongoing prosecutions for the purposes of section 552.108(a)(1). You also inform us, however, that one of the individuals has filed a direct appeal from his conviction. You state that the appeal was pending when the sheriff received these requests for information. You contend that the submitted information pertains to the subject matter of the appeal. We note, however, that the information at issue does not consist of records of the investigation of the crimes of which the named individuals were convicted. Rather, the information consists of their jail records. You have not explained how or why the submitted jail records are related to the pending appeal or otherwise demonstrated that release of the jail records would interfere with the appellate proceedings. We therefore conclude that the sheriff may not withhold any of the submitted information under section 552.108 of the Government Code.

Next, we address your other claimed exceptions to disclosure. Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make 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 *Id.* § 411.082(2). 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 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. Although sections 411.083(b)(1) and 411.089(a) of the Government Code authorize a criminal justice agency to obtain CHRI, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *See id.* § 411.089(b). However, section 411.081(b) of the Government Code allows a criminal justice agency to disclose to the public CHRI "that is related to the offense for which a person is involved in the criminal justice system." *Id.* § 411.081(b). We have marked CHRI that the sheriff 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.

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).

Section 552.101 also encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Medical records are confidential under the MPA, which provides in part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b)-(c). This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of the Act. *See* Open Records Decision No. 598 (1991). Medical records must be released on the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) the reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). We have marked information that must be withheld under the MPA, unless the sheriff receives written consent for release of that information that complies with sections 159.004 and 159.005 of the MPA.

Mental health records are confidential under section 611.002 of the Health and Safety Code, which provides in part:

(a) Communications 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.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b); *see also id.* § 611.001 (defining "patient" and "professional"). Sections 611.004 and 611.0045 of the Health and Safety Code provide for access to information that section 611.002 makes confidential only by certain individuals. *See id.* §§ 611.004, 611.0045; Open Records Decision No. 565 (1990). We have marked the information that the sheriff must withhold under section 611.002, unless the requestor is authorized to obtain any of the information under sections 611.004 and 611.0045.

We note that the submitted documents also contain the fingerprints of both of the named individuals. Section 560.003 of the Government Code provides that “[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act].” Gov’t Code § 560.003; *see id.* § 560.001(1) (“biometric identifier” means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry). Section 560.002 of the Government Code provides, however, that “[a] governmental body that possesses a biometric identifier of an individual . . . may not sell, lease, or otherwise disclose the biometric identifier to another person unless . . . the individual consents to the disclosure[.]” *Id.* § 560.002(1)(A). Thus, the requestor has a right of access to her client’s fingerprints under section 560.002(1)(A), and that information must be released. *See* Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). The other individual’s fingerprints, which we have marked, must be withheld from the requestor under section 560.003.

Section 552.101 also encompasses constitutional and common-law privacy. Constitutional privacy protects two kinds of interests. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first is the interest in independence in making certain important decisions related to the “zones of privacy,” pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. *See Fado v. Coon*, 633 F.2d 1172 (5th Cir. 1981); ORD 455 at 3-7. The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. *See Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual’s privacy interest against the public’s interest in disclosure of the information. *See* ORD 455 at 7. Constitutional privacy under section 552.101 is reserved for “the most intimate aspects of human affairs.” *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492).

Common-law privacy protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy encompasses the specific types of information that are held to be intimate or embarrassing in *Industrial Foundation*. *See id.* 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 also have concluded that a compilation of a private individual’s criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person, and is generally not of legitimate concern to the public. *Cf. United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 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). We note that the requestor has a special right of access under section 552.023 of the Government Code to information that implicates her client's privacy interests, and such information may not be withheld from this requestor on privacy grounds under section 552.101. *See* Gov't Code § 552.023(a); ORD 481 at 4.⁴ We have marked medical information relating to the other named individual and other inmates that the sheriff must withhold under section 552.101 in conjunction with common-law privacy. We also note that information relating to an offense for which an individual is currently involved in the criminal justice system does not implicate privacy concerns. *Cf.* Gov't Code § 411.081(b). However, to the extent that the sheriff maintains any information relating to the other individual's involvement as a suspect, arrestee, or defendant in criminal offenses other than the ones that resulted in her current incarceration, any such information also must be withheld from the requestor under section 552.101 in conjunction with common-law privacy.

This office also has applied privacy to protect certain information related to incarcerated individuals and their correspondents and visitors. *See* Open Records Decision Nos. 430 (1985), 428 (1985), 185 (1978). Citing *State v. Ellefson*, 224 S.E.2d 666 (S.C. 1976), we held that those individuals who correspond with inmates possess a "first amendment right . . . to maintain communication with [the inmate] free of the threat of public exposure" and that this right would be violated by the release of information that identifies those correspondents, because such a release would discourage correspondence. *See* ORD 185. Implicit in this holding is the fact that an individual's association with an inmate may be intimate or embarrassing. The information at issue in Open Records Decision No. 185 consisted of the identities of individuals who had corresponded with inmates. The rights of those individuals to anonymity was found to outweigh the public's interest in the information. *Id.*; *see also* ORD 430 (list of inmate visitors protected by constitutional privacy of both inmate and visitors). Thus, although the requestor has a right of access to private information relating to her client, the client's correspondents and visitors also have privacy rights with respect to their correspondence and visitation with him. Therefore, the sheriff must withhold the correspondent and visitor information relating to both of the named individuals that we have marked under section 552.101.

You also raise section 552.130 of the Government Code, which excepts from disclosure information relating to a motor vehicle operator's or driver's license or permit issued by an agency of this state. *See* Gov't Code § 552.130(a)(1). Because this exception protects personal privacy, the requestor also has a right of access to her client's Texas driver's license

⁴Section 552.023(a) provides that "[a] person or a person's authorized representative 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 that person's privacy interests." Gov't Code § 552.023(a).

information, and the sheriff may not withhold that information in this instance. *See id.* § 552.023(a); ORD 481 at 4. However, the other named individual's Texas driver's license information, which we have marked, must be withheld under section 552.130.

In addition to section 552.130, you also cite to section 521.052 of the Transportation Code, which states that "[e]xcept as provided by Sections 521.045, 521.046, 521.049(c), 521.050, and 601.022, and by Chapter 730 [of the Transportation Code], the [Texas Department of Public Safety (the "DPS")] may not disclose information from the department's files that relates to personal information, as that term is defined by Section 730.003 [of the Transportation Code]." Transp. Code § 521.052. Thus, section 521.052 specifically regulates the disclosure of information by the DPS. Therefore, because the submitted Texas driver's license information is maintained by the sheriff, and not the DPS, section 521.052 is not applicable in this instance.

Lastly, we address section 552.147 of the Government Code, which provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act.⁵ Gov't Code § 552.147(a). We note that the requestor has a right to her client's social security number. *See generally id.* § 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). However, the sheriff may withhold the other individual's social security number under section 552.147.⁶

In summary: (1) the sheriff 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) the marked medical records must be withheld under the MPA, unless the sheriff receives written consent for release of that information that complies with sections 159.004 and 159.005 of the MPA; (3) the marked mental health records must be withheld under section 552.101 in conjunction with section 611.002 of the Health and Safety Code, unless the requestor is authorized to obtain any of the information under sections 611.004 and 611.0045 of the Health and Safety Code; (4) the sheriff must release the requestor's client's fingerprints under section 560.002 of the Government Code and withhold the other individual's fingerprints under section 552.101 in conjunction with section 560.003; (5) the sheriff must withhold the marked medical information relating to the individual who is not the requestor's client and other inmates under section 552.101 in conjunction with common-law privacy; (6) to the extent that the sheriff maintains any information relating to the involvement of the individual who is not the requestor's client as

⁵We 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.

⁶As we are able to make these determinations, we need not address your claim concerning social security numbers under section 552.101.

a suspect, arrestee, or defendant in criminal offenses other than the ones that resulted in her current incarceration, any such information also must be withheld under section 552.101 in conjunction with common-law privacy; (7) the sheriff also must withhold the marked correspondent and visitor information on privacy grounds under section 552.101; (8) the marked Texas driver's license information must be withheld under section 552.130 of the Government Code; and (9) the social security number of the individual who is not the requestor's client may be withheld under section 552.147 of the Government Code. The rest of the submitted information must be released.⁷

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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).

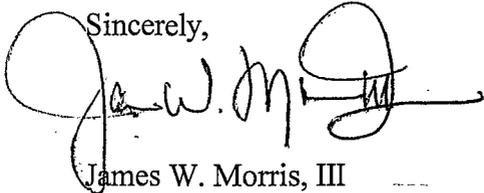
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

⁷We note that the sheriff would be required to withhold some of the remaining information from the public to protect the privacy of the requestor's client. Should the sheriff receive another request for these same records from a person who would not have a right of access to the client's private information, the sheriff should resubmit these records and request another ruling. *See* Gov't Code §§ 552.301(a), .302.

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". The signature is fluid and cursive, with a large initial "J" and "M".

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

JWM/ma

Ref: ID# 309716

Enc: Submitted information

c: Ms. Alma Lagarda
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(w/o enclosures)