



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

August 1, 2008

Ms. Katie Lentz
Williamson County Sheriff's Office
508 South Rock Street
Georgetown, Texas 78626

OR2008-10444

Dear Ms. Lentz:

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# 317775.

The Williamson County Sheriff's Office (the "sheriff") received a request for all documents regarding the investigation into a specified homicide. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.130, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information protected by other statutes. The public availability of fingerprints is governed by chapter 560 of the Government Code. *See id.* §§ 560.001(1) ("biometric identifier" means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry), 560.003 (biometric identifier in possession of governmental body is exempt from disclosure under Act). Section 560.002 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). Therefore, as the authorized representative of the individual whose fingerprints are contained in the submitted

¹We 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.

documents, the requestor has a right of access to that information under section 560.002(1)(A). *See* Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Therefore, the sheriff must release the submitted fingerprints, which we have marked, under section 560.002 of the Government Code.

Section 552.101 also encompasses information protected by the Medical Practices Act (the "MPA"). Access to medical records is governed by the MPA, chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

(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 concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Further, information that is subject to the MPA also includes information that was obtained from medical records. *See* Occ. Code. § 159.002(a), (b), (c); *see also* Open Records Decision No. 598 (1991).

Medical records must be released upon the governmental body's receipt of the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. *See* Open Records Decision No. 565 at 7 (1990). We have marked a medical record that is subject to the MPA. The sheriff may only disclose this record in accordance with the MPA.

Next, we note that portions of the remaining information are subject to section 552.022 of the Government Code, which provides that:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(1), (17). A portion of the submitted information constitutes a completed report made by the sheriff. A completed report must be released under section 552.022(a)(1) unless the information is excepted from disclosure under section 552.108 or expressly confidential under other law. The submitted information also contains court-filed documents which must be released unless this information is expressly confidential under other law. You claim the submitted information is subject to sections 552.103 and 552.108 of the Government Code. Section 552.103 is a discretionary exception and, thus, does not make information confidential. *See, e.g., 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 section 552.103); Open Records Decision Nos. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived), 522 at 4 (1989) (discretionary exceptions in general). Accordingly, the sheriff may not withhold any of the information that is subject to section 552.022 of the Government Code pursuant to section 552.103.

Section 552.108 of the Government Code is also a discretionary exception to disclosure under the Act and, as such, does not constitute "other law" for purposes of section 552.022(a)(17). *See* Open Records Decision Nos. 586 (1991) (governmental body may waive section 552.108), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). Accordingly, we conclude that the sheriff may not withhold the documents that are subject to section 552.022(a)(17) under section 552.108. However, because the sheriff claims that the documents that are subject to section 552.022(a)(1) are excepted from disclosure pursuant to section 552.108, we will address the sheriff's claim with respect to that information along with the remaining information that is not subject to section 552.022. Further, because sections 552.101, 552.130, and 552.136 are other laws for purposes of section 552.022, we will address the applicability of these exceptions to the submitted information.

Next, we will address the sheriff's claim under section 552.108 of the Government Code for the submitted information that is not subject to section 552.022(a)(17). Section 552.108 provides, in pertinent part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution[.]

Gov't Code § 552.108(a)(1), (b)(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 that the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). You acknowledge the submitted information relates to a criminal prosecution in which the defendant was convicted and sentenced to life in prison. You state, however, that the defendant is currently appealing his request for post-conviction DNA testing. You state that release of the information at issue would interfere with this appeal. We note that Texas courts have analogized a post-conviction DNA proceeding to that of a habeas corpus proceeding. *See Ex Parte Mines*, 26 S.W.3d 910 (Tex. Crim. App. 2000); *Cravin v. State*, 95 S.W.3d 506, 510 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd). In *Cravin*, the State argued that a post-conviction DNA proceeding makes a collateral attack into the validity of the conviction, and therefore, is unlike a criminal trial where the guilt of the defendant is at issue. *Cravin*, 95 S.W.3d at 510. The court agreed with the State and stated, "Unlike a criminal trial, consideration of a post-conviction DNA proceeding does not necessarily involve any witnesses or accusations against the appellant." *Id.* Thus, we find that a post-conviction DNA proceeding is not a criminal proceeding for section 552.108 purposes. Therefore, we conclude that you have failed to demonstrate how release of the submitted information would interfere with the detection, investigation, or prosecution of crime, and the sheriff may not withhold the information at issue under section 552.108(a)(1) or 552.108(b)(1) of the Government Code.

We now turn to your argument under section 552.103 for the information that is not subject to subsections 552.022(a)(1) and (a)(17). Section 552.103 provides in part:

(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.

...

(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), (c). A governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body receives the request for information, and (2) the information at issue is related to that litigation. *See Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). We also note that section 552.103(b) provides that “[f]or 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.”

The documents at issue relate to the prosecution of the named individual for murder, for which he was convicted. You inform us that there is currently ongoing litigation in the form of a request for post-conviction DNA testing, which is on appeal before the Third Court of Appeals. You do not inform us, however, that the sheriff either is or expects to become a party to the pending litigation. *See Gov't Code § 552.103(a)*; Open Records Decision No. 575 at 2 (1990). Under these circumstances, we require an affirmative representation from the prosecuting attorney representing, who is the party to the litigation, that the prosecutor wants the submitted information withheld from disclosure under section 552.103. You state that the Williamson County District Attorney's Office is a party to the litigation and has requested that the information be withheld pursuant to section 552.103. We note that the litigation was pending on the date the request was received. Based on your argument, we find that the information at issue relates to pending litigation for purposes of section 552.103. Therefore, you may withhold the information that is not subject to subsections 552.022(a)(1) and (a)(17) from disclosure under section 552.103(a).²

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation

²As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We now address your remaining arguments for the information that is subject to section 552.022. Section 552.101 also encompasses section 1703.306 of the Occupations Code, which provides as follows:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

(1) the examinee or any other person specifically designated in writing by the examinee;

(2) the person that requested the examination;

(3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;

(4) another polygraph examiner in private consultation; or

(5) any other person required by due process of law.

(b) The [Polygraph Examiners] Board or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Occ. Code § 1703.306. You indicate that the requestor does not fall into any of the categories of individuals authorized to receive the submitted polygraph information. Accordingly, the sheriff must withhold the information we have marked under section 552.101 in conjunction with section 1703.306 of the Occupations Code. You have not established, however, that the remaining information you have marked was acquired from a polygraph examination. Therefore, the remaining information you have marked may not be withheld under section 552.101 in conjunction with section 1703.306.

Section 552.101 also encompasses chapter 411 of the Government Code. Criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center is confidential. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to the CHRI it generates. *See id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See Gov't Code § 411.083.* Sections 411.083(b)(1) and 411.089(a) 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. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-.127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See ORD 565.* Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 in conjunction with chapter 411, subchapter F of the Government Code. We have marked the information that constitutes CHRI and is confidential under section 411.083. Therefore, the information we have marked must be withheld under section 552.101 of the Government Code.

Section 552.101 also encompasses common-law privacy. For information to be protected from public disclosure by the common-law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976). In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts, the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). A compilation of an individual's criminal history is also highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U.S. 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). Furthermore, we find that a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. This office has also found that personal financial information not related to a financial transaction between an individual and a governmental body is intimate and

embarrassing. *See* Open Records Decision Nos. 600 (1992) (public employee's withholding allowance certificate, designation of beneficiary of employee's retirement benefits, direct deposit authorization, and employee's decisions regarding voluntary benefits programs, among others, are protected under common-law privacy), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history protected under common-law privacy), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). Upon review, we find that portions of the remaining information are highly intimate or embarrassing and not of legitimate public interest. Thus, the sheriff must generally withhold this information under section 552.101 in conjunction with common-law privacy. We note that the requestor is the authorized representative of a parent of one of the individuals whose private information is at issue. Thus, the requestor may have a right of access to a portion of the marked information. Section 552.023(a) gives a person or a person's authorized representative 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 disclosure by laws intended to protect that person's privacy interests. *See* Gov't Code §552.023; Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual or authorized representative asks governmental body to provide information concerning that individual). Therefore, if the requestor has a right of access to the private information pertaining to his client's child, the sheriff may not withhold this information under section 552.101. If the requestor does not have a right of access to such information, the sheriff must withhold this information and the remaining information we have marked under section 552.101 in conjunction with common-law privacy. In either case, the sheriff must withhold the remaining information we have marked under section 552.101 in conjunction with common-law privacy.

Section 552.130 of the Government Code excepts from public disclosure information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. *See* Gov't Code § 552.130(a)(1)-(2). We note that this provision only applies to motor vehicle record information issued by the State of Texas, and not other states. The information you have marked contains license plate numbers issued by other states. We also note that section 552.130 protects personal privacy. The requestor is the authorized representative of one of the individuals to whom a portion of the marked Texas motor vehicle record information pertains. As such, the requestor has a right of access to his client's Texas motor vehicle record information under section 552.023 of the Government Code. *See id.* § 552.023(a); Open Records Decision No. 481 at 4 (1987). Therefore, the sheriff must withhold the Texas motor vehicle record information we have marked under section 552.130.

Section 552.136 of the Government Code states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't

Code § 552.136. An access device number is one that may be used to “(1) obtain money, goods, services, or another thing of value; or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.” *Id.* We note, however, that the purpose of section 552.136 is to protect the privacy interests of individuals, and because the right of privacy lapses at death, the credit card numbers of a deceased individual may not be withheld under section 552.136. *Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref’d n.r.e.) (Texas does not recognize relational or derivative right of privacy). We also note that the requestor has a right of access to some of the marked information. *See* Gov’t Code § 552.023. Therefore, if the marked account numbers pertain solely to the accounts of a deceased individual or the requestor’s client, they are not excepted from disclosure under section 552.136 and must be released. However, if the marked account numbers pertain to accounts in which a living person, who is not the requestor’s client, has an interest, they must be withheld under section 552.136 of the Government Code.

In summary, the marked medical record may only be released in accordance with the MPA. The sheriff may withhold the information that is not subject to subsections 552.022(a)(1) and (a)(17) under section 552.103. The sheriff must withhold the information we have marked under section 552.101 in conjunction with section 1703.306 of the Occupations Code and the criminal history record information we have marked under section 552.101 in conjunction with section 411.083 of the Government Code. If the requestor does not have a right of access to information pertaining to his client’s child, then the sheriff must withhold this information and the remaining information we have marked under section 552.101 in conjunction with common-law privacy. The sheriff also must withhold the Texas motor vehicle record information we have marked under section 552.130. If the marked account numbers pertain to accounts in which a living person, who is not the requestor’s client, has an interest, they must be withheld under section 552.136 of the Government Code. The remaining information must be released.³

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

³We note that the submitted information contains social security numbers. 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. The requestor has a right of access to his client’s 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).

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). If the governmental body does not file suit over 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).

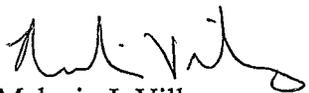
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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

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,


Melanie J. Villars
Assistant Attorney General
Open Records Division

MJV/ma

Ref: ID# 317775

Enc. Submitted documents

c: Mr. Christopher Lau
Innocence Project
100 Fifth Avenue, 3rd Floor
New York, New York 10011
(w/o enclosures)