



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 13, 2011

Ms. Paula M. Rosales
Assistant District Attorney
Dallas County District Attorney's Office
133 North Riverfront Boulevard, LB-19
Dallas, Texas 75207

OR2011-05136

Dear Ms. Rosales:

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# 414460.

The Dallas County District Attorney's Office (the "district attorney") received a request for six categories of information pertaining to a specified incident. You state you do not maintain information responsive to portions of the request.¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.130, and 552.147 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the submitted information includes a court-filed document. Section 552.022(a)(17) of the Government Code provides for required public disclosure of "information that is also contained in a public court record," unless the information is

¹In responding to a request for information under the Act, a governmental body is not required to disclose information that did not exist at the time the request was received. *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), 563 at 8 (1990), 555 at 1-2 (1990).

²Although you raise section 552.101 of the Government Code in conjunction with sections 552.108, 552.130, and 552.147 of the Government code, we note section 552.101 does not encompass other exceptions in the Act.

expressly confidential under other law, Gov't Code § 552.022(a)(17). We have marked the document subject to section 552.022(a)(17). Although you seek to withhold this document under section 552.108 of the Government Code, that section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). As such, section 552.108 is not other law that makes information expressly confidential for the purposes of section 552.022(a)(17). Therefore, the district attorney may not withhold the court-filed document under section 552.108 of the Government Code. As you raise no further exceptions against disclosure, the district attorney must release this information.

Next, we turn to your arguments under section 552.108 of the Government Code, as they are potentially the most encompassing. Section 552.108 provides in 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;

[or]

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(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:

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a)(1), (a)(4), (b)(3). A governmental body claiming section 552.108 must reasonably explain how and why this exception is applicable to the information at issue. *See id.* §§ 552.108, 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You have not stated the information at issue pertains to an ongoing criminal investigation or prosecution, nor have you explained how its release would interfere in some way with the detection, investigation, or prosecution of crime. Thus, you have not met your burden under section 552.108(a)(1). Sections 552.108(a)(4) and 552.108(b)(3) are applicable to information that was prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation or that reflects the mental impressions or legal reasoning of an attorney representing the state. Gov't Code § 552.108(a)(4), (b)(3). The information at issue consists of police department records pertaining to the incident at issue. You state “[s]ome of the information in the requested file is *likely* prosecutorial work product[.]” (emphasis added). However, you do not specify which portions of this information, if any, were actually “prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation.” *See id.* § 552.108(a)(4)(A), (b)(3)(A). Likewise, you have not demonstrated that any of the submitted information “represents the mental impressions or legal reasoning of an attorney representing the state.” *Id.* § 552.108(a)(4)(B), (b)(3)(B). Thus, we find you have not shown how any of this information actually consists of prosecutorial work product. *See id.* § 552.301(e)(1)(A), (e)(2) (governmental body must label copy of requested information to indicate which exceptions apply to which parts of the copy). Therefore, as you have not established that the information at issue falls within the scope of section 552.108(a)(1), section 552.108(a)(4), or section 552.108(b)(3), we conclude that the district attorney may not withhold any of this information under section 552.108 of the Government Code.

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. This exception encompasses information that other statutes make confidential. Section 724.018 of the Transportation Code provides that “[o]n the request of a person who has given a specimen at the request of a peace officer, full information concerning the analysis of the specimen shall be made available to the person or the person's attorney.” Transp. Code § 724.018. Where a statute provides an individual with a special right of access to information, that information may not be withheld from that individual. *See Open Records Decision Nos. 613 (1993), 623 (1994)*. You contend that because the requestor is neither the person whose blood specimen was analyzed nor that person's

attorney, the submitted intoxilyzer results should not be released. Thus, you appear to argue that release of this information would be a violation of section 724.018.³

In Open Records Decision No. 478 (1987), this office interpreted the predecessor statute, section 3(e) of article 6701 1-5 of Vernon's Texas Civil Statutes, as creating a special right of access for the person supplying the specimen; we concluded that the statute did not constitute a grant of confidentiality with regard to other persons. ORD 478 at 2-3; *see also* Open Records Decision Nos. 658 (1998) (statutory confidentiality provision must be express), 465 (1987) (confidentiality requirement not to be implied from statutory structure). Therefore, the district attorney may not withhold the submitted intoxilyzer results under section 552.101 of the Government Code in conjunction with section 724.018 of the Transportation Code.

Section 552.101 also encompasses the doctrines of common-law and constitutional privacy. Common-law privacy protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). The types of information considered intimate or 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. *See id.* at 683.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. *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 type protects an individual's autonomy within "zones of privacy," which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. ORD 455 at 4. The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* at 7. The scope of information protected is narrower than that under the common-law doctrine of privacy; constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985)).

³We note that although the district attorney states the requestor does not seek "field sobriety test results," category number five of the request lists "all alcohol/drug analysis or results of testing performed" during the incident at issue. Thus, we find submitted intoxilyzer results to be responsive to the instant request for information. Accordingly, we will consider your arguments against release of this information under section 552.101 of the Government Code.

Upon review, we find that none of the submitted information is highly intimate or embarrassing and not of legitimate public interest. Thus, the district attorney may not withhold any of the information at issue under section 552.101 in conjunction with common-law privacy. Additionally, you have not provided any arguments explaining how any portion of the submitted information falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the district attorney may not withhold any of the information at issue under section 552.101 on the basis of constitutional privacy.

You also claim the submitted information contains Texas motor vehicle record information that is excepted from disclosure under section 552.130 of the Government Code. Section 552.130 of the Government Code excepts from 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." Gov't Code § 552.130(a). The district attorney must, therefore, withhold the Texas motor vehicle record information we have marked in under section 552.130 of the Government Code.⁴

Finally, you assert the remaining information contains social security numbers. Section 552.147 governs the release of social security numbers under the Act and provides "[t]he social security number of a living person is excepted from" required public disclosure under the Act. *Id.* § 552.147. Although you raise section 552.147, we note the submitted information does not contain any social security numbers. Therefore, none of the remaining information may be withheld under section 552.147 of the Government Code.

In summary, the district attorney must withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public

⁴We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas driver's license and license plate numbers under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision. *See* ORD 684.

information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read 'VB', with a long horizontal flourish extending to the right.

Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/em

Ref: ID# 414460

Enc. Submitted documents

c: Requestor
(w/o enclosures)

