



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 28, 2012

Mr. Michael M. Kelly
Assistant Criminal District Attorney
Victoria County Criminal District Attorney's Office
205 North Bridge Street, Suite 301
Victoria, Texas 77901

OR2012-03062

Dear Mr. Kelly:

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# 447075.

The Victoria County Criminal District Attorney's Office (the "district attorney's office") received a request for all discoverable material from the district attorney's file regarding the requestor's client. You claim 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 representative sample of information.¹

Initially, we note the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides in part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are

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.

public information and not excepted from required disclosure unless made confidential under this chapter or 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[.]

Gov't Code § 552.022(a)(1). The submitted information consists of a completed investigation. A completed investigation may only be withheld if it is excepted from disclosure under section 552.108 of the Government Code or made confidential under the Act or other law. You claim a portion of the submitted information is excepted from public disclosure pursuant to a court order, which you did not provide to this office. *See id.* § 552.107(2) (information is excepted from release if court by order has prohibited disclosure). However, section 552.022(b) provides that a court may not order a governmental body to withhold any category of public information subject to section 552.022(a) unless the information is confidential under the Act or other law. *See id.* § 552.022(b). You raise section 552.108 as an exception to disclosure of the information subject to section 552.022. Accordingly, we will consider your claim under section 552.108 of the Government Code, pursuant to section 552.022(a)(1). You raise section 552.101 of the Government Code, which protects information made confidential under other law. Accordingly, we will consider your claim under section 552.101. We also understand you to raise rule 192.5 of the Texas Rules of Civil Procedure because you seek to withhold the information pursuant to the holding in *In re Bexar County Criminal District Attorney's Office*, 224 S.W.3d 182 (Tex. 2007), which addressed the applicability of rule 192.5. The Texas Supreme Court has held the Texas Rules of Civil Procedure are other law within the meaning of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). However, rule 192.5 is only applicable to civil litigation, not criminal prosecutions. Thus, the district attorney's office may not withhold the information at issue under rule 192.5 and the holding in *Bexar County*. You also claim a portion of the submitted information is excepted by section 552.101 of the Government Code in conjunction with the common-law informer's privilege, which is "other law" that makes information confidential for purposes of section 552.022. *Tex. Comm'n on Envtl. Quality v. Abbott*, No. GV-300417 (126th Dist. Ct., Travis County, Tex.). Therefore, we will address the applicability of your claim under the informer's privilege for the submitted information. Further, we note portions of the submitted information are subject to sections 552.130 and 552.137 of the Government Code which make information confidential under the Act.² Accordingly, we will also consider the applicability of these sections to the submitted information.

²The 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).

Section 552.108(a)(1) 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.” Gov’t Code § 552.108(a)(1). Section 552.108(a)(2) excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. *Id.* § 552.108(a)(2). Generally, a governmental body claiming section 552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See Id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. In this instance you have not explained how release of the information interferes with law enforcement or that it relates to either open cases or cases that concluded in a result other than conviction or deferred adjudication. Rather, the submitted information relates to a concluded case that resulted in a conviction. Accordingly, section 552.108(a)(1) and (a)(2) are not applicable to the information and no portion of the information may be withheld on that basis.

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 statutes, including laws that make criminal history record information (“CHRI”) confidential. 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 CHRI it generates. *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 Open Records Decision No. 565 (1990)*. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. We note section 411.083 does not apply to active warrant information or other information relating to an individual’s current involvement with the

criminal justice system. Gov't Code § 411.081(b) (police department allowed to disclose information pertaining to person's current involvement with the criminal justice system). Further, CHRI does not include driving record information. *Id.* § 411.082(2)(B). Upon review, we find the information we have marked constitutes confidential CHRI. Accordingly, the district attorney's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code.

Section 552.101 of the Government Code also encompasses article 42.12 of the Code of Criminal Procedure. Section 9 of article 42.12 is applicable to pre-sentence investigation and post-sentence reports and provides in part:

(j) The judge by order may direct that any information and records that are not privileged and that are relevant to a report required by Subsection (a) or Subsection (k) of this section be released to an officer conducting a presentence investigation under Subsection (i) of this section or a postsentence report under Subsection (k) of this section. The judge may also issue a subpoena to obtain that information. A report and all information obtained in connection with a presentence investigation or postsentence report are confidential and may be released only:

- (1) to those persons and under those circumstances authorized under Subsections (d), (e), (f), (h), (k), and (l) of this section;
- (2) pursuant to Section 614.017, Health and Safety Code; or
- (3) as directed by the judge for the effective supervision of the defendant.

Crim. Proc. Code art. 42.12, § 9(j). Accordingly, the district attorney's office must withhold the "pen packet" information we have marked under section 552.101 in conjunction with section 9(j) of article 42.12 of the Code of Criminal Procedure.

Section 552.101 also encompasses information protected by the common-law informer's privilege, which has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The informer's privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law enforcement authority, provided the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law

enforcement within their particular spheres.” See Open Records Decision No. 279 at 2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 2374, at 767 (J. McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. See Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5. However, individuals who provide information in the course of an investigation but do not make the initial report of the violation are not informants for the purposes of claiming the informer’s privilege. The privilege excepts the informer’s statement only to the extent necessary to protect the informer’s identity. See Open Records Decision No. 549 at 5 (1990).

You have marked information relating to three individuals under the common-law informer’s privilege. Upon review, we find two of the individuals whose information you have marked under the informer’s privilege did not make the initial report of a possible violation of the law to the Victoria County Sheriff’s Office. Accordingly, the common-law informer’s privilege is not applicable to their information. However, the common-law informer’s privilege is applicable to information related to the individual who did make the initial report of a possible violation of the law to the Victoria County Sheriff’s Office. Accordingly, the district attorney’s office may withhold the identifying information of the individual whose affidavit we have marked under section 552.101 of the Government Code in conjunction with the common-law informer’s privilege.

We also understand you to assert the common-law physical safety exception that the Texas Supreme Court recognized in *Texas Department of Public Safety v. Cox Texas Newspapers, L.P. & Hearst Newspapers, L.L.C.*, 343 S.W.3d 112, 117 (Tex. 2011) (“freedom from physical harm is an independent interest protected under law, untethered to the right of privacy”), for the names of informants and other citizens. In the *Cox* decision, the supreme court recognized, for the first time, a common-law physical safety exception to required disclosure. *Cox*, 343 S.W.3d at 118. Pursuant to this common-law physical safety exception, the court determined “information may be withheld [from public release] if disclosure would create a substantial threat of physical harm.” *Id.* In applying this new standard, the court noted “deference must be afforded” law enforcement experts regarding the probability of harm, but further cautioned “vague assertions of risk will not carry the day.” *Id.* at 119. Upon review, we find you have failed to demonstrate that release of the information you have marked would create a substantial threat of physical harm to the individuals who supplied the information. Accordingly, no portion of the submitted information may be withheld on the basis of the common-law physical safety exception.

Section 552.101 also encompasses the doctrine of common-law privacy. Common-law privacy 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. *Indus Found. v. Tex Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type 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. 540 S.W.2d at 683. 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. 343 (1982) (references in emergency medical records to drug overdoses, acute alcohol intoxication, obstetrical or gynecological operations or illnesses, convulsions or seizures, and emotional or mental distress), 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure). You seek to withhold marked portions of the submitted information under section 552.101 in conjunction with common-law privacy. Upon review, we find you have failed to demonstrate this information is highly intimate or embarrassing and of no legitimate public concern. Accordingly, the district attorney's office may not withhold any of the submitted information on the basis of section 552.101 in conjunction with common-law privacy.

The submitted information contains information subject to section 552.130 of the Government Code. Section 552.130 of the Government Code provides that information related to a motor vehicle operator's license or driver's license, title, or registration issued by a Texas agency, or an agency of another state or country, is excepted from public release. Gov't Code § 552.130(a)(1), (2). Accordingly, the district attorney's office must withhold the driver's license information we have marked under section 552.130. We note the requestor has a right of access to motor vehicle record information relating to his client because section 552.130 protects personal privacy. *See id.* § 552.023(a) (person's authorized representative has a right of access, beyond that of the general public, to information that relates to the person and is protected from disclosure by laws intended to protect that person's privacy interests). Therefore, the district attorney's office must withhold the vehicle registration information we have marked under section 552.130 to the extent that the vehicles to which the information relates are not owned by the requestor's client.

Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the owner of the e-mail address consents to its release or the e-mail address falls within the scope of section 552.137(c). *See id.* § 552.137(a)-(c). We have marked e-mail addresses of members of the public in the submitted information. The district attorney's office must withhold the information we have marked under section 552.137 of the Government code unless it receives consent from the owners of the e-mail addresses for their release.

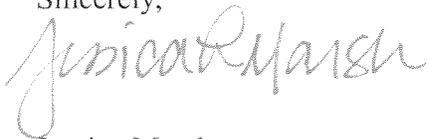
In summary, the district attorney's office must withhold the criminal history record information we have marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code. The district attorney's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 9(j) of article 42.12 of the Code of Criminal Procedure. The district

attorney's office may withhold identifying information of the individual whose affidavit we have marked under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. The district attorney's office must withhold the information we have marked under section 552.130 of the Government Code so long as the information does not relate to the requestor's client. The district attorney's office must withhold the e-mail addresses we have marked under section 552.137 of the Government Code. The remaining information must be released.³

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 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,



Jessica Marsh
Assistant Attorney General
Open Records Division

JM/em

Ref: ID# 447075

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³We note the information being released in this instance contains confidential information to which the requestor has a right of access as his client's authorized representative. *See* Gov't Code § 552.023(a). Because this information would be confidential with respect to the public, if the district attorney's office again receives a request for this information from a different requestor, the district attorney's office should again seek a ruling from this office.