



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 29, 2015

Mr. Steven Arellano
Assistant County Attorney
County of El Paso
500 East San Antonio, Room 503
El Paso, Texas 79901

OR2015-15492

Dear Mr. Arellano:

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# 573350 (File No. OP-15-236).

The El Paso County Public Defender's Office (the "public defender's office") received a request for the complete case file for two specified case numbers. You state the public defender's office will release some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.111 of the Government Code.¹ We have considered the submitted arguments and reviewed the

¹Although you also raise section 552.101 of the Government Code in conjunction with Texas Rule of Civil Procedure 192.5, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Although you raise Texas Rule of Civil Procedure 192.5, we note the proper exception to raise when asserting the attorney work product privilege in this instance is section 552.111 of the Government Code. *See* Open Records Decision Nos. 677 (2002).

submitted information, a portion of which consists of a representative sample of information.²

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 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 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.” *Id.* § 411.082(2). Part 20 of title 28 of the Code of Federal Regulations governs the release of CHRI obtained from the National Crime Information Center network or other states. *See* 28 C.F.R. § 20.21. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. Open Records Decision No. 565 at 7 (1990). Section 411.083 of the Government Code makes CHRI the Texas Department of Public Safety (“DPS”) maintains confidential, except DPS may disseminate this information as provided in subchapter F of chapter 411 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 only release CHRI to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Thus, CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with subchapter F of chapter 411 of the Government Code. The information in Exhibit D contains a Federal Bureau of Investigation (“FBI”) number that constitutes CHRI generated by the FBI. Therefore, the public defender’s office must withhold this information, which we have marked, under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code.³ However, we find the public defender’s office has failed to demonstrate how any portion of the remaining information at issue constitutes CHRI for purposes of chapter 411 or federal law. Therefore, the public defender’s office may not withhold any of the remaining information at issue under section 552.101 of the Government Code on this basis.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of

²We assume that the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

³As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683.

The doctrine of common-law privacy protects a compilation of an individual's criminal history, which is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *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 individual has significant privacy interest in compilation of one's criminal history). Furthermore, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. We note records relating to routine traffic violations are not considered criminal history information. *Cf. Gov't Code* § 411.082(2)(B) (criminal history record information does not include driving record information). Further, active warrant information or other information relating to an individual's current involvement in the criminal justice system does not constitute criminal history information for the purposes of section 552.101. *See id.* § 411.081(b) (police department allowed to disclose information pertaining to person's current involvement in the criminal justice system).

Upon review, we find the information we have marked in Exhibit D satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the public defender's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find you have not demonstrated how any of the remaining information at issue is highly intimate or embarrassing and not of legitimate public concern. Thus, the public defender's office may not withhold any portion of the remaining information under section 552.101 in conjunction with common-law privacy.

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. *Gov't Code* § 552.108(a)(2). 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. *See id.* § 552.301(e) (governmental body must provide comments explaining why exceptions raised should apply to information requested). By its terms, section 552.108 applies only to a law enforcement agency or a prosecutor. You state the information in Exhibits E and F relates to an investigation with the El Paso Police Department that did not result in a conviction or deferred adjudication. Section 552.108 may be invoked by the proper custodian of information relating to an investigation or prosecution of criminal conduct. *See Open Records Decision Nos. 474 at 4-5 (1987), 372 (1983)*. Where an

agency is in the custody of information that would otherwise qualify for exception under section 552.108 as information relating to the case of a different law enforcement agency, the custodian of the records may withhold the information only if it provides this office with (1) a demonstration that the information relates to the case, and (2) a representation from the entity with the law enforcement interest stating that entity wishes to withhold the information. In this instance, you have not provided our office with any representation to indicate the El Paso Police Department wishes to have the information at issue withheld. Accordingly, the public defender's office has failed to demonstrate section 552.108(a)(2) of the Government Code is applicable to the information at issue and the public defender's office may not withhold the information in Exhibits E and F on that basis.

Section 552.111 of the Government Code excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” Gov’t Code § 552.111. Section 552.111 encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. Open Records Decision No. 677 at 4-8 (2002); *see City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 377 (Tex. 2000). Rule 192.5 defines work product as

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a)(1)-(2). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party’s representative. *Id.*; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that

- a) a reasonable person would have concluded from the totality of the circumstances . . . that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat’l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204; ORD 677 at 7.

The public defender's office claims the attorney work product privilege of section 552.111 of the Government Code for the information in Exhibit C. The public defender's office states the information at issue consists of materials prepared by an attorney for the public defender's office in anticipation of litigation. Upon review, we find the public defender's office has demonstrated the information at issue was prepared in anticipation of litigation. Therefore, the public defender's office may withhold the information in Exhibit C under section 552.111 of the Government Code as attorney work product.⁴

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release.⁵ See Gov't Code § 552.130(a). The public defender's office must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

In summary, the public defender'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 and common-law privacy. The public defender's office may withhold the information in Exhibit C under section 552.111 of the Government Code as attorney work product. The public defender's office must withhold the information we have marked under section 552.130 of the Government Code. The public defender's office must release the remaining information.⁶

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for

⁴As our ruling for this information is dispositive, we need not address your remaining argument against its disclosure.

⁵The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁶The information being released includes a social security number. Section 552.147(b) of the Government Code authorizes a governmental body to redact the social security number of a living person without the necessity of requesting a decision from this office under the Act. See Gov't Code § 552.147(b).

providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Kristi L. Godden". The signature is fluid and cursive, with the first name "Kristi" being the most prominent.

Kristi L. Godden
Assistant Attorney General
Open Records Division

KLK/cz

Ref: ID# 573350

Enc. Submitted documents

c: Requestor
(w/o enclosures)