



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 24, 2016

Mr. Ricardo Vela, Jr.
Assistant District Attorney
County of Dallas
133 North Riverfront Boulevard, LB-19
Dallas, Texas 75207-4399

OR2016-19110

Dear Mr. Vela:

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# 624018.

The Dallas County District Attorney's Office (the "district attorney's office") received a request for all probable cause affidavits and dismissal paperwork for specified types of cases that were no billed by a Dallas County grand jury during a specified time period. You state you do not have information responsive to the portion of the request seeking dismissal paperwork.¹ You argue the submitted information is not subject to the Act. In the alternative, you claim the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the submitted arguments and reviewed the submitted information.

Initially, you assert the submitted information consists of records held on behalf of a grand jury. The judiciary is expressly excluded from the requirements of the Act. *See* Gov't Code § 552.003(1)(B); *see also id.* § 552.0035 (access to judicial records is governed by Supreme Court of Texas or other applicable laws or rules). This office has determined a grand jury,

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when 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), 452 at 3 (1986), 362 at 2 (1983).

for purposes of the Act, is a part of the judiciary and therefore not subject to the Act. *See* Open Records Decision No. 411 (1984). Further, records kept by a governmental body that is acting as an agent for a grand jury are considered records in the constructive possession of the grand jury, and therefore are also not subject to the Act. *See* Open Records Decisions Nos. 513 (1988), 411, 398 (1983). However, the fact that information collected or prepared by another person or entity is submitted to the grand jury does not necessarily mean such information is in the grand jury's constructive possession when the same information is also held in the other person's or entity's own capacity. Such information, when not produced at the direction of the grand jury, may well be protected under one of the Act's specific exceptions to disclosure; but such information is not excluded from the reach of the Act by the judiciary exclusion. *See* ORD 513. Upon review, we find the district attorney's office has failed to demonstrate the submitted information consists of records of the judiciary. Further, we find the submitted information is held by the district attorney's office in its own capacity and, therefore, is subject to the Act. *See* Gov't Code § 552.002 (providing information collected, assembled, or maintained in connection with the transaction of official business by a governmental body is "public information"). Accordingly, we will address the applicability of the Act to the submitted information.

We must address the district attorney's office's procedural obligations under the Act. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(b), the governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See id.* § 552.301(a), (b). In this instance, you state, and submit documentation demonstrating, the district attorney's office received the request for information on June 2, 2016. You do not inform us the district attorney's office was closed for any business days between June 2, 2016 and June 16, 2016. Accordingly, the district attorney's office's ten-business-day deadline was June 16, 2016. However, the envelope in which you submitted the information under section 552.301(b) bears a post meter mark of June 17, 2016. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail). Accordingly, we find the district attorney's office failed to comply with section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). Generally, a governmental body may demonstrate a compelling reason to withhold information by showing the information is made confidential by another source of law or affects third-party interests. *See* ORD 630. The district attorney's office raises section 552.108 of the Government Code. However, section 552.108 is a discretionary

exception to disclosure and may be waived. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions), 177 (1977) (statutory predecessor to section 552.108 subject to waiver). Thus, because the district attorney's office has failed to comply with the procedural requirements of the Act, the district attorney's office has waived section 552.108. However, because sections 552.101 and 552.130 make information confidential, these sections can provide compelling reasons to overcome the presumption of openness.² Accordingly, we will address the applicability of sections 552.101 and 552.130 to the submitted information.

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 article 20.02(a) of the Code of Criminal Procedure, which provides "[t]he proceedings of the grand jury shall be secret." Crim. Proc. Code art. 20.02(a). Article 20.02, however, does not define "proceedings" for purposes of subsection (a). The Fourth Court of Appeals in *In re Reed* addressed the issue of what constitutes "proceedings" for purposes of article 20.02(a) and stated the term "proceedings" could "reasonably be understood as encompassing matters that take place before the grand jury, such as witness testimony and deliberations." *See In re Reed*, 227 S.W.3d 273, 276 (Tex. App.—San Antonio 2007, orig. proceeding).

Subsequent to the ruling in *Reed*, the 80th Legislature, modeling federal law, added subsection (h) to article 20.02. *See* Crim. Proc. Code art. 20.02; FED. R. CRIM. P. 6(e)(6) ("Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury."). Article 20.02(h) states "[a] subpoena or summons relating to a grand jury proceeding or investigation must be kept secret to the extent and for as long as necessary to prevent the unauthorized disclosure of a matter before the grand jury." Crim. Proc. Code art. 20.02(h). This provision, however, does not define or explain what factors to consider in making such a determination, and even if we considered article 20.02 to be a confidentiality provision, information withheld under this statute would be secret only "for as long as necessary to prevent the unauthorized disclosure of a matter before the grand jury." *Id.*

You seek to withhold the submitted information, which pertains to cases in which the grand jury has returned a no bill of indictment, under section 552.101 of the Government Code in conjunction with article 20.02 of the Criminal Code of Procedure. However, you have not submitted any arguments explaining how the matters upon which the submitted information were based are still "before the grand jury" to warrant keeping it secret. Therefore, upon

²The 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).

review of article 20.02 and related case law, it is not apparent, and you have not otherwise explained, how this provision makes the submitted information confidential. *See* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Consequently, the submitted information may not be withheld under section 552.101 of the Government Code in conjunction with article 20.02 of the Criminal Code of Procedure.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Under the common-law right of privacy, an individual has a right to be free from the publicizing of private affairs in which the public has no legitimate concern. *Id.* at 682. In considering whether a public citizen's date of birth is private, the Third Court of Appeals looked to the supreme court's rationale in *Texas Comptroller of Public Accounts v. Attorney General of Texas*, 354 S.W.3d 336 (Tex. 2010). *Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at *3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.). The supreme court concluded public employees' dates of birth are private under section 552.102 of the Government Code because the employees' privacy interest substantially outweighed the negligible public interest in disclosure.³ *Tex. Comptroller*, 354 S.W.3d at 347-48. Based on *Texas Comptroller*, the court of appeals concluded the privacy rights of public employees apply equally to public citizens, and thus, public citizens' dates of birth are also protected by common-law privacy pursuant to section 552.101. *City of Dallas*, 2015 WL 3394061, at *3. Because "the right of privacy is purely personal," that right "terminates upon the death of the person whose privacy is invaded." *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); *see also Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 147 (N.D. Tex. 1979) ("action for invasion of privacy can be maintained only by a living individual whose privacy is invaded" (quoting RESTATEMENT (SECOND) OF TORTS § 652I)); Attorney General Opinions JM-229 (1984) ("the right of privacy lapses upon death"), H-917 (1976) ("We are . . . of the opinion that the Texas courts would follow the almost uniform rule of other jurisdictions that the right of privacy lapses upon death."); Open Records Decision No. 272 (1981) ("the right of privacy is personal and lapses upon death"). Thus, the district attorney's office must withhold all living public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common law privacy.

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. *See* Gov't Code § 552.130(a). Accordingly, the district attorney's office must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

³Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a).

In summary, the district attorney's office must withhold all living public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common law privacy. The district attorney's office must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code. The district attorney's office must release the remaining information.

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 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 'Kenny Moreland', written over a horizontal line.

Kenny Moreland
Assistant Attorney General
Open Records Division

KJM/som

Ref: ID# 624018

Enc. Submitted documents

c: Requestor
(w/o enclosures)