



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

This ruling has been modified by court action.  
The ruling and judgment can be viewed in PDF  
format below.



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

September 7, 2016

**The ruling you have requested has been amended as a result of litigation and has been attached to this document.**

Ms. Ann-Marie Sheely  
Assistant County Attorney  
County of Travis  
P.O. Box 1748  
Austin, Texas 78767-1748

OR2016-20142

Dear Ms. Sheely:

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# 625486.

The Travis County Sheriff's Office (the "sheriff's office") received a request for information pertaining to four specified individuals. You state you have released some information to the requestor. You claim portions of the submitted information are 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 information, portions of which constitute representative samples.<sup>1</sup>

Initially, we note the sheriff's office received the initial request for information on May 24, 2016. The sheriff's office informed the requestor on June 17, 2016, that it would not be responding to her request for information because the Act does not require a governmental body to respond to questions. We agree the Act does not require a governmental body to answer factual questions, conduct legal research, or create new information in responding to a request. *See* Gov't Code § 552.002(a); Open Records

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<sup>1</sup>We assume 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 those records contain substantially different types of information than that submitted to this office.

Decision Nos. 534 at 2-3 (1989), 518 at 3 (1989). Nevertheless, a governmental body must make a good-faith effort to relate a request to any responsive information that is within its possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). In this instance, we find the May 24, 2016, request was sufficiently specific to enable the sheriff's office to identify any responsive information in its possession. Accordingly, we conclude the sheriff's office may not refuse to comply with the requestor's May 24, 2016 request.

Accordingly, we must address the sheriff's office's obligations under section 552.301 of the Government Code, which prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. *See* Gov't Code § 552.301. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See id.* § 552.301(b). Further, pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). We note the sheriff's office was closed on May 30, 2016, for Memorial Day. This office does not count the date the request was received or holidays for purposes of calculating a governmental body's deadlines under the Act. Accordingly, you were required to provide the information required by section 552.301(b) by June 8, 2016. Moreover, you were required to provide the information required by section 552.301(e) by June 15, 2016. However, the envelope in which the sheriff's office provided the information required by section 552.301(b) was hand-delivered July 5, 2016 and the information required by section 552.301(e) was hand-delivered July 11, 2016. *See id.* § 552.308(a)(1) (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Consequently, we conclude the sheriff's office failed to comply with the procedural requirements mandated by 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 that 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 that the information is made confidential by another source of law or affects third-party interests. *See* ORD 630. The sheriff's office claims section 552.108 of the Government Code for a portion of the submitted information. However, this exception is discretionary in nature. It serves to protect a governmental body's

interests and may be waived; as such, it does not constitute a compelling reason to withhold information. *See* Gov't Code § 552.007; Open Records Decision No. 177 (1977) (governmental body may waive statutory predecessor to section 552.108); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Accordingly, no portion of the submitted information may be withheld under section 552.108 of the Government Code. However, as section 552.101 of the Government Code makes information confidential and, thus, is a compelling reason to overcome the presumption of openness, we will address the applicability of section 552.101 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 information made confidential by statute, such as the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code, which governs release of medical records. Section 159.002 of the MPA provides, in relevant part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(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(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004. This office has concluded 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). We have further found when a file is created as a result of a hospital stay, all the documents in the file referring to diagnosis and treatment constitute physician-patient communications or "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." Open Records Decision No. 546 (1990). Upon review, we find the information you marked, constitutes records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that were created or are maintained by a physician.

Accordingly, the sheriff's office must withhold the medical records you marked under section 552.101 of the Government Code in conjunction with the MPA.

Section 552.101 of the Government Code also encompasses chapter 411 of the Government Code, which pertains to criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center. 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 laws 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, or subchapter E-1 of the Government Code. *See Gov't Code* § 411.083(a). 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 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. Additionally, because the laws governing the dissemination of information obtained from the NCIC or TCIC are based on both law enforcement and privacy interests, the CHRI of a deceased individual that is obtained from the DPS or another criminal justice agency may be disseminated only as permitted by subchapter F of chapter 411 of the Government Code. *See* Open Records Decision No. 565 at 10-12 (1990). We note Federal Bureau of Investigation ("FBI") numbers constitute CHRI generated by the FBI. Upon review, we find some of the submitted information, which we have marked, consists of CHRI that is confidential under section 411.083. Accordingly, the sheriff's office must withhold the information we have marked under section 552.101 in conjunction with section 411.083 of the Government Code.

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 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. However, because privacy is a personal right that lapses at death, the common-law right to privacy does not encompass information that relates only to a deceased individual. Accordingly, information pertaining to a deceased individual may not be withheld on common-law privacy grounds. *See 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*

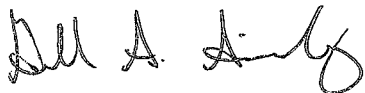
Open Records Decision No. 272 at 1 (1981) (privacy rights lapse upon death). Although the sheriff's office argues portions of the remaining information must be withheld on the basis of common-law privacy, we find the persons whose privacy interests are at issue are deceased. Therefore, none of the remaining information may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

In summary, the sheriff's office must withhold the medical records you marked under section 552.101 of the Government Code in conjunction with the MPA. The sheriff's office must withhold the information we have marked under section 552.101 in conjunction with section 411.083 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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](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,



Gerald A. Arismendez  
Assistant Attorney General  
Open Records Division

GAA/dls

Ref: ID# 625486

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

JUL 31 2018

CAUSE NO. D-1-GN-16-004654

At 1:50 P.M.  
Velva L. Price, District Clerk

SALLY HERNANDEZ, TRAVIS  
COUNTY SHERIFF,  
*Plaintiff,*

§  
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§  
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§  
§

IN THE DISTRICT COURT OF

v.

201st JUDICIAL DISTRICT

KEN PAXTON, STATE OF TEXAS  
ATTORNEY GENERAL,  
*Defendant.*

TRAVIS COUNTY, TEXAS

**AGREED FINAL JUDGMENT**

This is an open records lawsuit brought under the Texas Public Information Act (PIA), Texas Government Code chapter 552. All matters in controversy between Plaintiff Sally Hernandez, Travis County Sheriff (the Sheriff) and Defendant Ken Paxton, Attorney General of Texas (the Attorney General) have been resolved, and the Parties agree to the entry and filing of an agreed final judgment. See Exhibit A (Settlement Agreement).

Pursuant to Tex. Gov't Code § 552.325(d), the Court shall allow the requestor a reasonable period of time to intervene after the Attorney General attempts to notify the requestor of the proposed settlement. The Attorney General represents to the Court and the Court hereby takes judicial notice that, in compliance with Tex. Gov't Code § 552.325(c), the Attorney General sent notice by certified mail the requestor's last known address on June 22, 2018, providing reasonable notice of this setting and of the requestor's right to intervene in the suit. See Ex. B (proof of mailing). The requestor was informed of the proposed Settlement Agreement under which the Sheriff may withhold portions of the information at issue in this lawsuit, as agreed upon by the Parties. The requestor was also informed of the right to intervene in this lawsuit to contest the



withholding of the information. The requestor has not informed the Attorney General of an intention to intervene and no plea in intervention has been filed.

After considering the agreement of the Parties and the law, the Court is of the opinion that entry of this Agreed Final Judgment is appropriate, disposing of all claims between the Parties in this suit.

THE COURT THEREFORE FINDS AND ORDERS THAT:

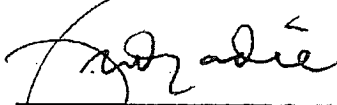
1. The Sheriff and the Attorney General have agreed that, in accordance with the PIA and under the facts presented, portions of the information at issue in this suit are confidential and excepted from disclosure pursuant to Texas Government Code section 418.176 (the Excepted Information);
2. The Sheriff must withhold the Excepted Information described in Paragraph 1 and must release any remaining requested information not determined to be excepted from required disclosure by Open Records Letter Ruling OR2016-20142;
3. All court cost and attorney fees are taxed against the parties incurring the same;
4. All relief not expressly granted is denied; and
5. This Agreed Final Judgment finally disposes of all claims between the Sheriff and the Attorney General in this cause and is a final judgment.

Signed this 31<sup>st</sup> day of JULY, 2018.

\_\_\_\_\_  
JUDGE PRESIDING

**KARIN CRUMP**

AGREED:



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TIM LABADIE

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ATTORNEY FOR SALLY HERNANDEZ, TRAVIS  
COUNTY SHERIFF



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MATTHEW R. ENTSMINGER

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Administrative Law Division  
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ATTORNEY FOR KEN PAXTON, STATE OF  
TEXAS ATTORNEY GENERAL



CAUSE NO. D-1-GN-16-004654

SALLY HERNANDEZ, TRAVIS COUNTY SHERIFF, <i>Plaintiff,</i>	§	IN THE DISTRICT COURT OF
	§	
	§	
	§	
v.	§	201st JUDICIAL DISTRICT
	§	
KEN PAXTON, STATE OF TEXAS ATTORNEY GENERAL, <i>Defendant.</i>	§	
	§	
	§	TRAVIS COUNTY, TEXAS

**SETTLEMENT AGREEMENT**

This Settlement Agreement (Agreement) is made by and between Plaintiff Sally Hernandez, Travis County Sheriff (the Sheriff), and Defendant Ken Paxton, Attorney General of Texas. This Agreement is made on the terms set forth below.

**BACKGROUND**

The Sheriff received a written request for information pursuant to the Texas Public Information Act (PIA). The request sought several categories of information concerning four incidents of deaths in custody, including jail protocols for observing and monitoring inmates. The Sheriff sought an open records ruling from the Attorney General pursuant to Texas Government Code section 552.301. The Attorney General issued Open Records Letter Ruling OR2016-20142 (the Letter Ruling) in response to the Sheriff's request. The ruling concluded, in part relevant to this lawsuit, that a portion of the requested records was not excepted from required disclosure and must be released to the requestor (information at issue).

The Sheriff disputed the Attorney General's determination and filed suit to challenge the Letter Ruling pursuant to Texas Government Code section 552.324. Texas Government Code section 552.325(c) allows the Attorney General to enter into settlement

under which portions of the information at issue may be withheld. The parties wish to resolve this matter without further litigation.

### TERMS

For good and sufficient consideration, the receipt of which is acknowledged, the parties to this settlement agreement (“Agreement”) agree and stipulate that:

1. Portions of the information at issue, as marked on a copy provided by the Sheriff to the Attorney General on March 8, 2018, relate to the staffing requirements of the Sheriff, a law enforcement agency, and are in part maintained for the purpose preventing, detecting, responding to, or investigating act of terrorism or related criminal activity (the Excepted Information). Accordingly, the Excepted Information is confidential under section 418.176 of the Texas Government Code.
2. The Sheriff may withhold the Excepted Information from the Requestor, and must release the remaining portion of the information at issue.
3. The Sheriff and the Attorney General agree to the entry of an agreed final judgment, the form of which has been approved by each party’s attorney. The agreed final judgment will be presented to the Court for approval, on the uncontested docket, with at least 21 days’ prior notice to the requestor. This Agreement will be attached to the agreed final judgment as “Exhibit A.”
4. Pursuant to Tex. Government Code section 552.325(c), the Attorney General will notify the requestor of this Agreement and of the requestor’s right to intervene to contest this Agreement and the Court’s entry of any agreed final judgment in the case.
5. If the requestor intervenes to contest this Agreement, a final judgment entered in this lawsuit will prevail over the Agreement, to the extent of any conflict.
6. Each party to this Agreement will bear its own costs, including attorneys’ fees relating to this litigation.
7. The terms of this Agreement are contractual and not mere recitals, and the agreements contained herein and the mutual consideration transferred is to compromise disputed claims fully, and nothing in this Agreement shall be construed as an admission of fault or liability, all fault and liability being expressly denied by all parties to the Agreement.
8. The Sheriff warrants that her undersigned representative is duly authorized to execute this Agreement on her behalf and that her representative has read this Agreement and fully understands it to be a compromise and settlement

and release of all claims that the Sheriff has against the Attorney General arising out of the matters described herein.

9. The Attorney General warrants that his undersigned representative is duly authorized to execute this Agreement on behalf of the Attorney General and his representative has read this Agreement and fully understands it to be a compromise and settlement and release of all claims that the Attorney General has against the Sheriff arising out of the matters described in this Agreement.
10. This Agreement shall become effective, and be deemed to have been executed, on the date on which the last of the undersigned parties sign this Agreement.

SALLY HERNANDEZ, TRAVIS COUNTY  
SHERIFF

By: 

TIM LABADIE

State Bar No. 11784853  
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Date: 20 March 2018

KEN PAXTON, STATE OF TEXAS ATTORNEY  
GENERAL

By: 

MATTHEW R. ENTSMINGER

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Date: 4-10-18