



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 27, 2017

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

OR2017-01933

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# 643494.

The Travis County District Attorney's Office (the "district attorney's office") received two requests from different requestors for all documents pertaining to two specified cases.¹ You state the district attorney's office does not have information responsive to a portion of the

¹The district attorney's office states it sought and received clarification of the first request. *See* Gov't Code § 552.222(b) (providing that if request for information is unclear, governmental body may ask requestor to clarify the request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). You also state you sent the first requestor an estimate of charges pursuant to section 552.2615 of the Government Code. *See* Gov't Code § 552.2615. The estimate of charges required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.263(a). You inform us the district attorney's office received the required deposit on November 1, 2016. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date governmental body receives bond or deposit).

second request.² You state you will release some of the requested information to the second requestor. You claim some of 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.³

Section 552.108 of the Government Code provides in relevant 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:

...

(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 the requirements of Section 552.021 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

²The 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).

³We 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.

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

Gov't Code § 552.108(a)(4), (b)(3). A governmental body must explain how and why section 552.108 is applicable to the information at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state the information you marked was prepared by district attorney's office prosecutors and staff in preparation for trial. Thus, you assert this information reflects the mental impressions or legal reasoning of attorneys representing the state. Based upon these representations, we conclude sections 552.108(a)(4) and 552.108(b)(3) of the Government Code are applicable to the information at issue. Therefore, the district attorney's office may withhold the information you marked under sections 552.108(a)(4) and 552.108(b)(3) of the Government Code.⁴

Section 552.108(b) of the Government Code excepts from disclosure “[a]n 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 . . . if (1) release of the internal record or notation would interfere with law enforcement or prosecution[.]” Gov't Code § 552.108(b)(1). This section is intended to protect “information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State.” *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.). This office has concluded this provision protects certain kinds of information, the disclosure of which might compromise the security or operations of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 at 3-4 (1989) (detailed guidelines regarding police department's use of force policy), 508 at 3-4 (1988) (information relating to future transfers of prisoners), 413 (1984) (sketch showing security measures for forthcoming execution). However, to claim this aspect of section 552.108 protection a governmental body must meet its burden of explaining how and why release of the information at issue would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). Further, commonly known policies and techniques may not be withheld under section 552.108. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (former section 552.108 does not protect Penal Code provisions, common-law rules, and constitutional limitations on use of force), 252 at 3 (1980) (governmental body did not meet burden because it did not indicate why investigative procedures and techniques submitted were any different from those commonly known with law enforcement and crime prevention). To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a law-enforcement agency must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. The determination of whether the release of particular records would interfere with law enforcement is made on a case-by-case basis. Open Records Decision No. 409 at 2 (1984).

⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

The district attorney's office states portions of the submitted information reveal a "secured facility's layout and safety mechanisms such as restraints used on prisoners, as well as the security-related capabilities of law enforcement officers with respect to the jail/booking area and the individuals present and confined in these areas." The district attorney's office asserts release of the information would jeopardize officer safety, could be used in preparing for an escape or other criminal activity, and would undermine law enforcement personnel's ability to perform their duties. Thus, the district attorney's office claims release of this information would hinder law enforcement and put the public at risk. Based on these representations and our review, we find release of the information at issue would interfere with law enforcement. Accordingly, the district attorney's office may withhold the information we have marked under section 552.108(b)(1) of the Government Code.⁵ However, we find you have failed to demonstrate the release of the remaining information you marked would interfere with law enforcement or prosecution. Accordingly, the district attorney's office may not withhold the remaining information you marked under section 552.108(b)(1).

Section 552.101 of the Government Code excepts from public 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 other statutes, such as chapter 611 of the Health and Safety Code. Section 611.002 pertains to mental health records and provides, in pertinent part,

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b); *see id.* § 611.001 (defining "patient" and "professional"). Section 611.001 defines a "professional" as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See id.* § 611.001(2). Upon review, we find a portion of the submitted information, which we marked, consists of mental health records that are subject to chapter 611 of the Health and Safety Code. Accordingly, the district attorney's office must withhold the mental health records we marked under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code.⁶

⁵As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

⁶As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

Section 552.101 of the Government Code also encompasses 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).* Upon review, we find the information we marked constitutes a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that was created or is maintained by a physician. Accordingly, the district attorney’s office must withhold the information we marked under section 552.101 of the Government Code in conjunction with the MPA.

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. This office has also concluded some kinds of medical information are generally highly intimate or embarrassing. *See Open Records Decision No. 455 (1987).* 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.⁷ *Texas 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.

Upon review, we find some of the submitted information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. However, we note the second requestor submitted a Durable Power of Attorney form, executed by one of the individuals whose private information is at issue. Section 552.023(a) of the Government Code states that a person or a person's authorized representative has a special right of access to information that is excepted from public disclosure under laws intended to protect that person's privacy interest. *See* Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself). Accordingly, the second requestor has a right of access to some of the private information we marked under section 552.023 of the Government Code. Therefore, the district attorney's office may not withhold from the second requestor the information that pertains to her daughter under common-law privacy. Accordingly, the district attorney's office must generally withhold the information we have marked, along with all identifiable public citizens' dates of birth, under section 552.101 of the Government Code in conjunction with common-law privacy; however, the district attorney's office may not withhold from the second requestor her daughter's private information under section 552.101 on that basis. Further, as you have not demonstrated any portion of the remaining information is highly intimate or embarrassing and of no legitimate public interest, the district attorney's office may not withhold any portion of the remaining information under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses constitutional privacy, which protects two kinds of interests. *See* Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987); *see also Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). The first is the interest in independence in making certain important decisions related to the "zones of privacy" pertaining to marriage, procreation, contraception, family relationships, and child rearing and education that have been recognized by the United States Supreme Court. *See Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981); ORD 455 at 3-7. The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. *See Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual's privacy interest against the public's interest in the information. *See* ORD 455 at 7. Constitutional privacy under

⁷Section 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).

section 552.101 is reserved for “the most intimate aspects of human affairs.” *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492).

This office has applied constitutional privacy to protect certain information about incarcerated individuals. *See* Open Records Decision Nos. 430 (1985), 428 (1985), 185 (1978). Citing *State v. Ellefson*, 224 S.E.2d 666 (S.C. 1976) as authority, this office held that those individuals who correspond with inmates possess a “first amendment right . . . to maintain communication with [the inmate] free of the threat of public exposure” and that this right would be violated by the release of information that identifies those correspondents, because such a release would discourage correspondence. ORD 185. The information at issue in Open Records Decision No. 185 was the identities of individuals who had corresponded with inmates, and our office found that “the public’s right to obtain an inmate’s correspondence list is not sufficient to overcome the first amendment right of the inmate’s correspondents to maintain communication with him free of the threat of public exposure.” *Id.* Implicit in this holding is the fact that an individual’s association with an inmate may be intimate or embarrassing. In Open Records Decision Nos. 428 and 430, our office determined that inmate visitor and mail logs which identify inmates and those who choose to visit or correspond with inmates are protected by constitutional privacy because people who visit or correspond with inmates have a First Amendment right to do so that would be threatened if their names were released. *See* ORDs 428 and 430. The rights of those individuals to anonymity was found to outweigh the public’s interest in this information. *See* ORDs 185, 428, 430. Further, we recognized inmates had a constitutional right to correspond and visit with outsiders, and that right could also be threatened if those individuals’ names were released. *See* ORDs 428, 430 (list of inmate visitors protected by constitutional privacy of both inmate and visitors). We have determined the same principles apply to an inmate’s recorded conversations from a telephone at a jail.

You seek to withhold the submitted audio recordings under section 552.101 of the Government Code in conjunction with constitutional privacy. However, upon review, we find you have failed to demonstrate any portion of the information at issue falls within the zones of privacy or implicates an individual’s privacy interests for purposes of constitutional privacy. Therefore, the district attorney’s office may not withhold any of the information you have marked under section 552.101 on the basis of constitutional privacy.

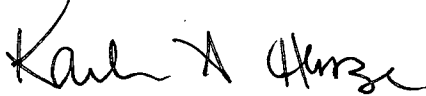
In summary, the district attorney’s office may withhold the information you marked under sections 552.108(a)(4) and 552.108(b)(3) of the Government Code. The district attorney’s office may withhold the information we marked under section 552.108(b)(1) of the Government Code. The district attorney’s office must withhold the mental health records we marked under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code. The district attorney’s office must withhold the information we marked under section 552.101 of the Government Code in conjunction with the MPA. The district attorney’s office must generally withhold the information we marked, along with all identifiable public citizens’ dates of birth, under section 552.101 of

the Government Code in conjunction with common-law privacy; however, the district attorney's office may not withhold from the second requestor her daughter's private information under section 552.101 on that basis. 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, 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,



Kaelan A. Henze
Assistant Attorney General
Open Records Division

KAH/eb

Ref: ID# 643494

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)