



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 30, 2017

Ms. Leslie O. Haby
Assistant Criminal District Attorney
Civil Section
Bexar County
101 West Nueva Street, 7th Floor
San Antonio, Texas 78205

OR2017-03597

Dear Ms. Haby:

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# 646095 (BCDA File No. 5470).

The Bexar County Criminal District Attorney's Office (the "district attorney's office") received a request for all documents relating to specified complaints, allegations, or charges against a named individual during a specified time period. You argue some of the requested information does not consist of public information subject to the Act. You also claim the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.111, 552.130, 552.136, 552.137, and 552.147 of the Government Code. Additionally, you state the interests of the Texas Department of Insurance ("TDI"), the proprietary interests of Antonio Drywall Repair & Texture ("Antonio") and State Farm Lloyds ("State Farm"), and the privacy interests of the named individual may be implicated. Accordingly, you state, and provide documentation showing, you notified TDI, Antonio, State Farm, and the named individual of the request and of their rights to submit arguments to this office explaining why their information should not be released. *See* Gov't Code §§ 552.304, .305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have considered your arguments and reviewed the submitted information.

Initially, you argue some of the submitted information was obtained pursuant to grand jury subpoenas. The judiciary is expressly excluded from the requirements of the Act. Gov't Code § 552.003(1)(B). This office has determined for purposes of the Act, a grand jury 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 are also not subject to the Act. *See* Open Records Decisions Nos. 513 (1988), 411, 398 (1983). Thus, to the extent the district attorney's office holds the information at issue as an agent of the grand jury, such information consists of records of the judiciary that are not subject to disclosure under the Act and the district attorney's office is not required to release that information in response to the instant request. To the extent the district attorney's office does not hold the information at issue as an agent of the grand jury, we will address your arguments against its disclosure.

Next, you state some of the submitted information is not responsive to the request for information because it does not pertain to the named individual. This ruling does not address the public availability of any information that is not responsive to the request, and the district attorney's office is not required to release this information in response to this request.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Antonio or State Farm explaining why the submitted information should not be released. Therefore, we have no basis to conclude either of these third parties has a protected proprietary interest in the submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. We have also not received comments from TDI. Additionally, we have no basis to conclude any third party has a privacy interest in the submitted information. Accordingly, the district attorney's office may not withhold the submitted information on the basis of any proprietary or privacy interest the third parties may have in the 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. You raise section 552.101 in conjunction with the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") for a portion of the submitted information. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* HIPAA, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 ("Privacy

Rule”); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, excepted as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

This office has addressed the interplay of the Privacy Rule and the Act. Open Records Decision No. 681 (2004). In that decision, we noted section 164.512 of title 45 of the Code of Federal Regulations provides a covered entity may use or disclose protected health information to the extent such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted the Act “is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public.” *See* ORD 681 at 8; *see also* Gov’t Code §§ 552.002, .003, .021. We therefore held the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. *See Abbott v Tex. Dep’t of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App.—Austin 2006, no pet.); ORD 681 at 9; *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the district attorney’s office may not withhold any portion of the information at issue under section 552.101 in conjunction with HIPAA.

We understand you to contend some of the submitted information is excepted from disclosure under section 552.101 of the Government Code in conjunction with the federal Bank Secrecy Act (the “BSA”), subchapter II of chapter 53 of title 31 of the United States Code. *See* 31 U.S.C. §§ 5311, *et seq.* As noted above, section 552.101 encompasses information other statutes make confidential. Although you have marked some information as being subject to the BSA, you have not pointed to a specific provision of the BSA that makes the information at issue confidential or provided any arguments as to the applicability of such a confidentiality provision. Accordingly, no portion of the information at issue may be withheld under section 552.101 on that basis. *See* Gov’t Code § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested); ORD 478 at 2.

Section 552.101 encompasses the federal Driver’s Privacy Protection Act of 1994 (the “DPPA”), section 2721 of title 18 of the United States Code. Section 2721 provides, in part, the following:

- (a) In general — A State department of motor vehicles, and any officer, employee, or contractor thereof, shall not knowingly disclose or otherwise make available to any person or entity:

(1) personal information, as defined in 18 U.S.C. 2725(3), about any individual obtained by the department in connection with a motor vehicle record, except as provided in subsection (b) of this section; or

(2) highly restricted personal information, as defined in 18 U.S.C. 2725(4), about any individual obtained by the department in connection with a motor vehicle record, without the express consent of the person to whom such information applies, except uses permitted in subsections (b)(1), (b)(4), (b)(6), and (b)(9)[.]

(b) Permissible uses.—Personal information referred to in subsection (a) . . . and, subject to subsection (a)(2), may be disclosed as follows:

(1) For use by any government agency . . . in carrying out its functions.

...

(c) Resale or redisclosure.—An authorized recipient of personal information (except a recipient under subsection (b)(11) or (12)) may resell or redisclose the information only for a use permitted under subsection (b) (but not for uses under subsection (b)(11) or (12)). . . . Any authorized recipient (except a recipient under subsection (b)(11)) that resells or rediscloses personal information covered by this chapter must keep for a period of 5 years records identifying each person or entity that receives information and the permitted purpose for which the information will be used and must make such records available to the motor vehicle department upon request.

18 U.S.C. § 2721(a), (b)(1), (c). Section 2721(a) is applicable to state departments of motor vehicles. *See id.* § 2721(a). Pursuant to section 2721(b), personal information may be disclosed to certain entities by a state department of motor vehicles. *See id.* § 2721(b). However, we find the district attorney's office is not a state department of motor vehicles. Furthermore, we find you do not assert the district attorney's office received the information at issue from a state department of motor vehicles. Therefore, you have failed to demonstrate the information at issue is subject to section 2721(a) of the DPPA. Accordingly, the district attorney's office may not withhold the information at issue under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses the doctrine of constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education.

Id. The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490, 492 (5th Cir. 1985)). Upon our review, we find you have not demonstrated any of the information at issue falls within the zones of privacy or otherwise implicates an individual's privacy interests for the purposes of constitutional privacy. We therefore conclude the district attorney's office may not withhold the information at issue under section 552.101 in conjunction with constitutional privacy.

We note the requestor is an investigator with the Internal Revenue Service (the "IRS") and states she is requesting the information at issue pursuant to an ongoing investigation. Section 7602 of title 26 of the United States Code gives the IRS a special right of access to certain information. Specifically, pursuant to section 7602, the Secretary of the Treasury is authorized to "examine any books, papers, or other data which may be relevant or material" to a particular tax inquiry for the purpose of "inquiring into any offense connected with the administration or enforcement of the internal revenue laws." *See* 26 U.S.C. § 7602(a)(1), (b). Therefore, under federal law, the requestor has a right of access to the submitted responsive information.

You raise section 552.101 of the Government Code in conjunction with the Medical Practice Act (the "MPA") located within subtitle B of title 3 of the Occupations Code, section 730.004 of the Transportation Code, and the doctrine of common-law privacy, as well as sections 552.108, 552.111, 552.130, 552.136, 552.137, and 552.147 of the Government Code for the information at issue. However, as federal law, section 7602 of title 26 preempts any conflicting state laws, including the MPA, section 730.004 of the Transportation Code, common-law privacy, and the exceptions to disclosure listed above. *See English v. General Elec. Co.*, 496 U.S. 72, 79 (1990) (noting that state law is preempted to extent it actually conflicts with federal law); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986) (noting that federal agency acting within scope of its congressionally delegated authority may preempt state regulation); *see also* U.S. Const. art. VI, cl. 2 (Supremacy Clause); *Delta Airlines, Inc. v. Black*, 116 S.W.3d 745, 748 (Tex. 2003) (discussing federal preemption of state law). Therefore, the district attorney's office may not withhold the information at issue under section 552.101 in conjunction with the MPA, section 730.004 of the Transportation Code, or common-law privacy, or under sections 552.108, 552.111, 552.130, 552.136, 552.137, and 552.147. Thus, the district attorney's office must release the submitted information that is subject to the Act to the requestor pursuant to section 7602 of title 26 of the United States Code.

In summary, to the extent the district attorney's office holds the information at issue as an agent of the grand jury, such information consists of records of the judiciary that are not subject to disclosure under the Act and the district attorney's office is not required to release that information in response to the instant request. To the extent the district attorney's office

does not hold the information at issue as an agent of the grand jury, the district attorney's office must release the responsive information to the requestor pursuant to section 7602 of title 26 of the United States Code.¹

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,



Sidney M. Pounds
Assistant Attorney General
Open Records Division

SMP/sdk

Ref: ID# 646095

Enc. Submitted documents

c: Requestor
(w/o enclosures)

¹Because this requestor has a special right of access to information being released, in the event the district attorney's office receives another request for this information from someone without such a right of access, the district attorney's office must against ask this office for a ruling. See 26 U.S.C. § 7602(a)(1), (b).