



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

February 22, 2017

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

OR2017-03953

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# 646655.

The Travis County District Attorney's Office (the "district attorney's office") received a request for specified information pertaining to a specified case number.<sup>1</sup> You state you are releasing some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code.

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<sup>1</sup>You state the district attorney's office sought and received clarification of the request for information. See Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed). You also state you sent the 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 December 8, 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).

We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

Section 552.108 of the Government Code states, in pertinent part, the following:

(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 required public disclosure] 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

(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 claiming an exception to disclosure under subsection 552.108(a)(4) or subsection 552.108(b)(3) must explain how and why this exception is applicable to the information at issue. *See id.* §§ 552.108, .301(e)(1)(A). You argue the information you have indicated consists of internal notations or records prepared by an attorney representing the state or consists of the mental

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<sup>2</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 that those records contain substantially different types of information than that submitted to this office.

impressions or legal reasoning of an attorney representing the state. Based on your representations and our review, we agree subsection 552.108(a)(4) and subsection 552.108(b)(3) are applicable to the information at issue. Accordingly, the district attorney's office may withhold the information we have marked under subsection 552.108(a)(4) and subsection 552.108(b)(3) of the Government Code.<sup>3</sup>

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section encompasses article 42.12 of the Code of Criminal Procedure. Section 9 of article 42.12 is applicable to pre-sentence investigation and post-sentence reports and provides, in part:

(j) The judge by order may direct that any information and records that are not privileged and that are relevant to a report required by Subsection (a) or Subsection (k) of this section be released to an officer conducting a presentence investigation under Subsection (i) of this section or a postsentence report under Subsection (k) of this section. The judge may also issue a subpoena to obtain that information. A report and all information obtained in connection with a presentence investigation or postsentence report are confidential and may be released only:

(1) to those persons and under those circumstances authorized under Subsections (d), (e), (f), (h), (k), and (1) of this section;

(2) pursuant to Section 614.017, Health and Safety Code; or

(3) as directed by the judge for the effective supervision of the defendant.

Crim. Proc. Code art. 42.12, § 9(j). You state the information you have indicated consists of a pre-sentence investigation report. Additionally, you state none of the release provisions in section 9(j) of article 42.12 are applicable. Accordingly, we conclude the district attorney's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 9(j) of article 42.12 of the Code of Criminal Procedure.

Section 552.101 of the Government Code also encompasses information protected by other statutes, such as laws that make criminal history record information ("CHRI") confidential. CHRI generated by the National Crime Information Center (the "NCIC") 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

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions.” Gov’t Code § 411.082(2). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI obtained from the NCIC 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 deems confidential CHRI the Texas Department of Public Safety (“DPS”) maintains, except DPS may disseminate this information as provided in chapter 411, subchapter E-1 or subchapter F 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 of the Government Code in conjunction with chapter 411, subchapter F. We note Federal Bureau of Investigation (“FBI”) numbers constitute CHRI generated by the FBI. You assert section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code for a portion of the remaining information. Upon review, we find the information we have marked consists of CHRI which the district attorney’s office must withhold under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code and federal law. However, we find none of the remaining information you have indicated consists of CHRI under chapter 411, and thus, the district attorney’s office may not withhold any of the remaining information at issue under section 552.101 of the Government Code on that basis.

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 have marked constitutes a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician. Accordingly, the district attorney's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the MPA.<sup>4</sup> However, we find none of the remaining information you indicated constitutes medical records subject to section 159.002. Accordingly, the district attorney's office may not withhold any of the remaining information at issue under section 552.101 of the Government Code on that basis.

Section 552.101 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 (5th Cir. 1985)).

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

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<sup>4</sup>This ruling does not affect an individual's right of access to a patient's medical records from the physician who provided treatment under the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code §§ 159.004-.006; *cf. Abbott v. Tex. State Bd. of Pharmacy*, 391 S.W.3d 253 (Tex. App.—Austin 2012, no pet.) (MPA does not provide patient general right of access to his or her medical records from governmental body responding to request for information under Public Information Act).

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. Thus, we find the district attorney's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with constitutional privacy.

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.<sup>5</sup> *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. However, we note the requestor has a right of access to her own date of birth and it may not be withheld from her on that basis. *See* Gov't Code § 552.023 ("person has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests"); *see* Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Accordingly, the district attorney's office must withhold the date of birth we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

In summary, the district attorney's office may withhold the information we have marked under subsection 552.108(a)(4) and subsection 552.108(b)(3) of the Government Code. The district attorney's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 9(j) of article 42.12 of the Code of Criminal Procedure. The district attorney's office must withhold the information

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<sup>5</sup>Section 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).

we have marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code and federal law. The district attorney's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the MPA. The district attorney's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with constitutional privacy. The district attorney's office must withhold the date of birth we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The district attorney's office must release the remaining information.<sup>6</sup>

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,



Sidney M. Pounds  
Assistant Attorney General  
Open Records Division

SMP/sdk

Ref: ID# 646655

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>6</sup>We note the requestor has a special right of access to some of the information being released in this instance. See Gov't Code § 552.023(a). Because such information is confidential with respect to the general public, if the district attorney's office receives another request for this information from a different requestor, the district attorney's office must again seek a ruling from this office. Additionally, we note the information being released contains a social security number. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. *Id.* § 552.147(b).