KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 10, 2017

Mr. Mark LaForge
Assistant District Attorney
Fort Bend County
301 Jackson, Room 101
Richmond, Texas 77469

OR2017-07547

Dear Mr. LaForge:

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# 650419.

The Fort Bend County District Attorney's Office (the "district attorney's office") received two requests for video recordings and documents pertaining to the investigation of the death of a named individual. Although the district attorney's office takes no position as to the disclosure of the submitted information, you state that release of this information may implicate the interests of another entity. Accordingly, you state you have notified the City of Rosenberg (the "city") of the request for information and of its right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received comments from the city. We have considered the submitted arguments and reviewed the submitted representative sample of information.[1]

[1]We assume that 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.

Initially, the city claims some of the information submitted by the district attorney's office is not responsive to the instant request. A governmental body must make a good-faith effort to relate to a request to information that is within its possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). In this instance, the district attorney's office has reviewed its records and determined the documents it has submitted are responsive to the request. Thus, we find the district attorney's office has made a good-faith effort to relate the request to information within its possession or control. Accordingly, we find the information at issue is responsive to the request and will determine whether the district attorney's office must release the information at issue to the requestor under the Act.

Additionally, we note the city objects to disclosure of information the district attorney's office has not submitted to this office for review. This ruling does not address information that was not submitted by the district attorney's office and is limited to the information the district attorney's office has submitted for our review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

Next, we note the submitted information is subject to section 552.022(a)(1). Section 552.022(a) provides, in relevant part:

> (a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:
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> > (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Id. § 552.022(a)(1). The submitted information pertains to a completed investigation that is subject to section 552.022(a)(1). A completed investigation must be released under section 552.022(a)(1) unless the information is excepted from disclosure under section 552.108 of the Government Code or made confidential under the Act or other law. The city seeks to withhold the information subject to section 552.022(a)(1) under section 552.103 of the Government Code. However, section 552.103 is discretionary in nature and does not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the submitted information may not be withheld under section 552.103 of the Government Code. However, we will consider the city's argument to withhold this information under section 552.108 of the Government Code. *See* Gov't Code § 552.022(a)(1). Additionally, the submitted information contains information subject

to sections 552.101, 552.1175, and 552.130 of the Government Code.[2] Because sections 552.101, 552.1175, and 552.130 make information confidential under the Act, we will address the applicability of these sections to the submitted information.

Section 552.108(a) of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime." Gov't Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108(a)(1) must explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). The city states the submitted information relates to a criminal investigation by the Texas Rangers that was pending at the time the district attorney's office received the request. However, the city has not provided our office with a representation from the Texas Rangers, which is the entity with the pertinent law enforcement interest, objecting to the release of the information at issue. *See* Open Records Decision Nos. 586 (1991), 474 (1987). Further, the city and the district attorney's office inform us the Texas Rangers have now completed their investigation into the case. Therefore, the district attorney's office may not withhold the submitted information under section 552.108(a)(1) of the Government Code.

Section 552.101 of the Government Code excepts "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.
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> (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

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[2]The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

> 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 submitted information contains a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician or that was created or is maintained by someone under the supervision of a physician. Accordingly, the district attorney's office must withhold the marked information under section 552.101 of the Government Code in conjunction with the MPA.

Section 552.101 also encompasses information protected by section 411.083 of the Government Code, which pertains to criminal history record information ("CHRI"). CHRI generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential under federal and state law. CHRI means "information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions." *Id.* § 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); *see generally* Gov't Code ch. 411 subch. F. 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 F, or subchapter E-1, of the Government Code. *See* Gov't Code § 411.083. 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). 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 Government Code chapter 411. Upon review, we find the information we have marked consists of CHRI the district attorney's office must withhold under section 552.101 in conjunction with section 411.083 of the Government Code and federal law.

Section 552.101 of the Government Code also encompasses section 773.091 of the Health and Safety Code, which provides, in relevant part:

> (b) Records of the identity, evaluation or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or

> maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.
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> . . .
>
> (g) The privilege of confidentiality under this section does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services.

Health & Safety Code § 773.091(b), (g). Except for the information specified in section 773.091(g), emergency medical services ("EMS") records are deemed confidential under section 773.091. Upon review, we find the marked information constitutes records of the identity, evaluation, or treatment of a patient by EMS personnel. Thus, except for the information subject to section 773.091(g), the district attorney's office must withhold the marked information under section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code.

Additionally, section 552.101 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. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). However, the right to privacy is a personal right that lapses at death and the common-law right to privacy does not encompass information that relates only to a deceased individual. *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 (1977))); 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"). Accordingly, information pertaining to a deceased individual may not be withheld on common-law privacy grounds. The court of appeals has concluded public citizens' dates of birth are protected by common-law privacy pursuant to section 552.101. *See 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.). Upon review, we find the information we have marked in the submitted documents and indicated in the submitted photographs, which does not pertain to a deceased

individual, satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the district attorney's office must withhold the information we have marked and indicated under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.1175 of the Government Code protects the home address, home telephone number, emergency contact information, date of birth, social security number, and family member information of certain individuals when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential. Gov't Code § 552.1175. Section 552.1175 applies, in part, to "peace officers as defined by Article 2.12, Code of Criminal Procedure[.]" *Id.* § 552.1175(a)(1). Some of the remaining information pertains to individuals who were licensed peace officers of another law enforcement agency. Thus, to the extent the information we marked pertains to currently licensed peace officers and the officers elect to restrict access to their information in accordance with section 552.1175(b), the district attorney's office must withhold the information we marked under section 552.1175 of the Government Code. If the individuals whose information we marked are no longer licensed peace officers or no election is made, the district attorney's office may not withhold this information under section 552.1175 of the Government Code.

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. Accordingly, the district attorney's office must withhold the motor vehicle record information we have marked in the submitted documents and indicated in the submitted video recordings, under section 552.130 of the Government Code.

In summary, the district attorney's office must withhold the marked information under section 552.101 of the Government Code in conjunction with the MPA. Except for the information subject to section 773.091(g), the district attorney's office must withhold the marked information under section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code. The district attorney's office must withhold the information we have marked and indicated under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the information we marked pertains to currently licensed peace officers and the officers elect to restrict access to their information in accordance with section 552.1175(b), the district attorney's office must withhold the information we marked under section 552.1175 of the Government Code. The district attorney's office must withhold the motor vehicle record information we have marked and indicated under section 552.130 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, 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,

Emily Kunst
Assistant Attorney General
Open Records Division

EK/eb

Ref: ID# 650419

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)