



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

October 10, 2017

Mr. Douglas Manning  
Assistant County Attorney  
Orange County District Attorney's Office  
801 Division  
Orange, Texas 77630

OR2017-23066

Dear Mr. Manning:

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# 678869 (ORR# 66029530).

The Orange County District Attorney's Office (the "district attorney's office") received a request for thirty categories of information pertaining to a specified incident involving a named individual and any related incidents. The district attorney's office states it has released some of the requested information. The district attorney's office claims the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.111, 552.117, 552.130, and 552.147 of the Government Code.<sup>1</sup> We have considered the exceptions the district attorney's office claims and reviewed the submitted information.

Initially, we note the requestor seeks personal property and medications belonging to the named individual. This office has ruled that tangible physical items are not "information" as that term is contemplated under the Act. *See, e.g.*, Open Records Decision No. 581

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<sup>1</sup>Although the district attorney's office does not raise section 552.130 or section 552.147 of the Government Code in its brief, we understand the district attorney's office to raise these exceptions based on its markings. Further, although we understand the district attorney's office claims the attorney-client privilege of section 552.107 of the Government Code, the district attorney's office does not claim this exception is applicable to any of the submitted information. Therefore, we assume the district attorney's office has withdrawn its claim this section applies to the submitted information. *See Gov't Code §§ 552.301, .302.*

is not public information as that term is defined in section 552.002 of the Government Code. Accordingly, the Act does not require the district attorney's office to make personal property and medications available to the requestor. *See* Gov't Code § 552.021.

Next, we note the district attorney's office has redacted portions of the submitted information. We understand the district attorney's office has redacted drivers' license numbers of living individuals pursuant to section 552.130(c) of the Government Code.<sup>2</sup> We also understand the district attorney's office has redacted social security numbers of living individuals pursuant to section 552.147(b) of the Government Code.<sup>3</sup> However, the district attorney's office has also redacted drivers' license numbers of deceased individuals from the submitted documents. The district attorney's office does not assert, nor does our review of the records indicate, it has been authorized to withhold this information without seeking a ruling from this office. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 (2001). Therefore, information must be submitted in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. In this instance, we can discern the nature of the redacted information; thus, being deprived of this information does not inhibit our ability to make a ruling. In the future, however, the district attorney's office should refrain from redacting any information it is not authorized to withhold in seeking an open records ruling. Failure to do so may result in the presumption the redacted information is public. *See* Gov't Code § 552.302.

Next, we note some of the submitted information may have been the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2017-11348 (2017). In that ruling, we noted the district attorney's office had released some of the requested information to the requestor, and determined the district attorney's office must withhold the marked mental health records under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code and must release the remaining information. We note the Act does not permit the selective disclosure of information. Section 552.007 provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential by law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the

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<sup>2</sup>Section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsection 552.130(a) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e).

<sup>3</sup>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. *See id.* § 552.147(b).

Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the district attorney's office may not now withhold the information that was previously released unless its release is expressly prohibited by law or the information is confidential by law. The district attorney's office now claims sections 552.103, 552.108, and 552.111 for the information at issue. These exceptions do not prohibit the release of information or make information confidential. *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. 677 (2002) (governmental body may waive attorney work product privilege under section 552.111), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). Thus, to the extent the information responsive to the instant request was previously released to the prior requestor, the district attorney's office may not now withhold the information under section 552.103, 552.108, or section 552.111 of the Government Code, and must also release it to the instant requestor.

Next, we note some of the remaining information is subject to section 552.022 of the Government Code. 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:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The submitted information includes completed investigations that are subject to section 552.022(a)(1). The district attorney's office must release the completed investigations pursuant to section 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or are made confidential under the Act or other law. *See id.* § 552.022(a)(1). The district attorney's office seeks to withhold the information subject to section 552.022 under sections 552.103 and 552.111 of the Government Code. However, sections 552.103 and 552.111 are discretionary in nature and do not make information confidential under the Act. *See Dallas Area Rapid Transit*, 4 S.W.3d at 475-76; *see also* ORDs 677, 665 at 2 n.5, 470 at 7. Therefore, the district attorney's office may not withhold the information subject to section 552.022 under section 552.103 or section 552.111 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider the district attorney's office's assertion of the attorney work product privilege under rule 192.5 of the Texas Rules of Civil Procedure. Further, as

sections 552.101, 552.117, and 552.130 of the Government Code make information confidential, we will consider the applicability of these exceptions to the information at issue. We will also consider the district attorney's office's remaining arguments against release of the remaining information.

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. This section encompasses the constitutional right to privacy. Constitutional privacy protects two kinds of interests. See *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). 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 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 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." ORD 185. 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 correspond with inmates have a First Amendment right to do so that would be threatened if their names were released. ORDs 428 and 430. We have determined the same principles apply to an inmate's recorded conversations from a telephone at a jail. Further, we recognized that inmates had a constitutional right to visit with outsiders and could also be threatened if their names were released. See also ORD 185. The rights of those individuals to anonymity was found to outweigh the public's interest in this information. *Id.*; see ORD 430 (list of inmate visitors protected by constitutional privacy of both inmate and

visitors). In this instance, the information includes audio recordings of inmate telephone conversations. Upon review, we find this information is confidential under constitutional privacy. Accordingly, the district attorney's office must withhold the submitted audio recordings of inmate telephone calls in their entirety under section 552.101 of the Government Code in conjunction with the constitutional right to privacy.

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. The Third 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.).

Generally, only highly intimate information that implicates the privacy of an individual is withheld. However, in certain instances, where it is demonstrated the requestor knows the identity of the individual involved as well as the nature of certain incidents, the entire report must be withheld to protect the individual's privacy. A portion of the submitted information pertains to an incident involving attempted suicide. In this instance, the requestor knows both the identity of the individual involved and the nature of the incident at issue. Therefore, withholding only the individual's identity or certain details of the incident from the requestor would not preserve the subject individual's common-law right to privacy. Accordingly, to protect the privacy of the individual to whom the information relates, the district attorney's office must withhold the entirety of the information at issue, which we have noted, under section 552.101 of the Government Code in conjunction with common-law privacy. Upon review, we find some of the remaining information, which we have marked, satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, the district attorney's office must also withhold the additional information we marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.108(b)(1) of the Government Code excepts from disclosure the internal records and notations of law enforcement agencies and prosecutors when their release would interfere with law enforcement and crime prevention. Gov't Code § 552.108(b)(1); *see also* Open Records Decision No. 531 at 2 (1989) (quoting *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977)). A governmental body claiming section 552.108(b)(1) must explain how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706. Section 552.108(b)(1) 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.” See *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.). This office has concluded section 552.108(b)(1) excepts from public disclosure information relating to the security or operation of a law enforcement agency. See, e.g., Open Records Decision Nos. 531 (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (section 552.108 of the Government Code is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). Section 552.108(b)(1) is not applicable, however, to generally known policies and procedures. See, e.g., Open Records Decision Nos. 531 at 2–3 (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

The district attorney’s office states release of the submitted security camera video recordings would interfere with law enforcement or prosecution of crime. The district attorney’s office argues “circulation of [this] evidence thwarts the ability of the correctional facility to discover and prosecute inmates or corrections officers who engage in illegal activity.” Based on these representations and our review, we agree the release of the security camera video recordings would interfere with law enforcement. Accordingly, the district attorney’s office may withhold the submitted security camera video recordings, which we noted, under section 552.108(b)(1) of the Government Code.<sup>4</sup>

Texas Rule of Civil Procedure 192.5 encompasses the attorney work product privilege. For purposes of section 552.022 of the Government Code, information is confidential under rule 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. See ORD 677 at 9-10. Rule 192.5 defines core work product as the work product of an attorney or an attorney’s representative, developed in anticipation of litigation or for trial, that contains the mental impressions, opinions, conclusions, or legal theories of the attorney or the attorney’s representative. See TEX. R. CIV. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under rule 192.5, a governmental body must demonstrate the material was (1) created for trial or in anticipation of litigation and (2) consists of the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney’s representative. *Id.*

The first prong of the work product test, which requires a governmental body to show the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation there was a substantial chance litigation

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<sup>4</sup>As our ruling is dispositive for this information, we need not address the remaining arguments against its disclosure.

would ensue, and (2) the party resisting discovery believed in good faith there was a substantial chance litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See Nat'l Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204. The second part of the work product test requires the governmental body to show the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney’s representative. *See* TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both parts of the work product test is confidential under rule 192.5, provided the information does not fall within the scope of the exceptions to the privilege enumerated in rule 192.5(c). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).

The district attorney’s office claims the remaining information consists of work product that is protected by rule 192.5 of the Texas Rules of Civil Procedure. The district attorney’s office states the information was “generated by agency personnel to detail the facts and circumstances surrounding the incident.” We note the information at issue consists of incident reports created by employees of the Orange County Sheriff’s Office (the “sheriff’s office”) pertaining to incidents that occurred in the jail. Although the district attorney’s office informs us the information at issue “is commonly assembled for use by legal counsel representing Orange county and [the sheriff’s office] in defending the governmental entity from litigation,” the district attorney’s office has failed to demonstrate the information was created by or at the direction of an attorney for the district attorney’s office or the attorney’s representative. We therefore conclude the district attorney’s office may not withhold the remaining information under Texas Rule of Civil Procedure 192.5.

Section 552.117(a)(13) of the Government Code exempts from public disclosure the home address, home telephone number, emergency contact information, social security number, and family member information of a current or former employee of a district attorney, criminal district attorney, or county or municipal attorney whose jurisdiction includes any criminal law or child protective services matters regardless of whether the current or former employee complies with sections 552.024 and 552.1175 of the Government Code. *See* Act of May 30, 2017, 85th Leg., R.S., H.B. 1278, § 1 (to be codified as an amendment to Gov’t Code § 552.117(a)). Upon review, however, we find no portion of the remaining information consists of the home address, telephone number, emergency contact information, social security number, or family member information of a person to whom section 552.117(a)(13) applies, and the district attorney’s office may not withhold any of the remaining information on that basis.

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 under section 552.130 of the Government Code. We note the purpose of section 552.130 is to protect privacy. Because the right of privacy lapses at death, motor vehicle record information that pertains solely to deceased individuals may not be withheld under section 552.130. *See Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ ref'd n.r.e.); *see also* Attorney General Opinions JM-229 (1984); H-917 (1976); Open Records Decision No. 272 (1981) (“the right of privacy is personal and lapses upon death”). Accordingly, the district attorney's office may not withhold the motor vehicle record information pertaining to deceased individuals under section 552.130 of the Government Code.

Section 552.147(a) of the Government Code excepts the social security number of a living individual from public disclosure. Gov't Code § 552.147(a). We note the purpose of section 552.147 is to protect privacy. Because the right of privacy lapses at death, social security numbers of deceased individuals may not be withheld under section 552.147. *See Moore*, 589 S.W.2d at 491; *see also* Attorney General Opinions JM-229, H-917; ORD 272. Accordingly, the district attorney's office may not withhold the social security numbers of deceased individuals under section 552.147 of the Government Code.

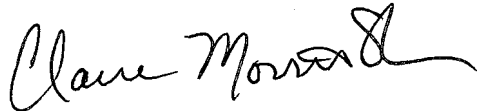
In summary, to the extent the information responsive to the instant request was previously released pursuant to Open Records Letter No. 2017-11348, the district attorney's office must also release it to the instant requestor. The district attorney's office must withhold the submitted audio recordings of inmate telephone calls in their entirety under section 552.101 of the Government Code in conjunction with the constitutional right to privacy. The district attorney's office must withhold the entirety of the information we noted under section 552.101 of the Government Code in conjunction with common-law privacy. The district attorney's office must also withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The district attorney's office may withhold the submitted security camera video recordings, which we noted, under section 552.108(b)(1) of the Government Code. The district attorney's office must withhold the motor vehicle record information we marked under section 552.130 of the Government Code. The district attorney's office must release the remaining information.

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,

A handwritten signature in black ink, appearing to read "Claire Morris Sloan". The signature is fluid and cursive, with a large initial "C" and "M".

Claire V. Morris Sloan  
Assistant Attorney General  
Open Records Division

CVMS/tdw

Ref: ID# 678869

Enc. Submitted documents

c: Requestor  
(w/o enclosures)