



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

This ruling has been modified by court action.
The ruling and judgment can be viewed in PDF
format below.



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ATTORNEY GENERAL OF TEXAS

February 5, 2018

The ruling you have requested has been amended as a result of litigation and has been attached to this document.

Mr. Mark C. Kratovil
Assistant Criminal District Attorney
Tarrant County
401 West Belknap, 9th Floor
Fort Worth, Texas 76196-0201

OR2018-02529

Dear Mr. Kratovil:

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# 692458.

The Tarrant County Criminal District Attorney's Office (the "district attorney's office") received a request for the names and demographic information of grand jurors who served in a specified case and any information concerning the grand jury hearing for a specified case involving a named individual. The district attorney's office states it does not have information responsive to some categories of the request.¹ The district attorney's office claims it is not required to respond to the request for information pursuant to section 552.028 of the Government Code, and in the alternative, claims some of the submitted information is excepted from disclosure under section 552.101 of the Government Code.² We have considered submitted arguments and reviewed the submitted information.

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

²We note the district attorney's office did not comply with the requirements of section 552.301 of the Government Code. *See Gov't Code* § 552.301(b), (e). Nevertheless, because section 552.101 of the Government Code can provide a compelling reason to overcome the presumption of openness caused by a failure to comply with section 552.301, we will consider the claim of the district attorney's office under that section.

Section 552.028 of the Government Code provides, in relevant part, the following:

(a) A governmental body is not required to accept or comply with a request for information from:

(1) an individual who is imprisoned or confined in a correctional facility; or

(2) an agent of that individual, other than that individual's attorney when the attorney is requesting information that is subject to disclosure under this chapter.

(b) This section does not prohibit a governmental body from disclosing to an individual described by Subsection (a)(1), or that individual's agent, information held by the governmental body pertaining to that individual.

Gov't Code § 552.028(a)-(b). The district attorney's office asserts the requestor is the agent of an incarcerated individual because the requestor is on the incarcerated individual's visitor list. Further, the district attorney's office asserts the request is similar to other requests received by agents of incarcerated individuals at a specified prison. However, upon review, we find the district attorney's office did not establish the requestor is requesting information on behalf of the named inmate. Thus, we find the district attorney's office failed to demonstrate the request for information was submitted by an agent of an individual who is imprisoned or confined in a correctional facility. Accordingly, we conclude section 552.028 of the Government Code does not permit the district attorney's office to decline to comply with this request.

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 exception encompasses article 19.42 of the Code of Criminal Procedure, which provides as follows:

(a) Except as provided by Subsection (b), information collected by the court, court personnel, or prosecuting attorney during the grand jury selection process about a person who serves as a grand juror, including the person's home address, home telephone number, social security number, driver's license number, and other personal information, is confidential and may not be disclosed by the court, court personnel, or prosecuting attorney.

(b) On a showing of good cause, the court shall permit disclosure of the information sought to a party to the proceeding.

Crim. Proc. Code art. 19.42. Article 19.42 makes confidential certain "personal information" pertaining to individuals who served on grand juries. We note, however, article 19.42 applies only to grand juror selections made on or after September 1, 1999. *See* Act of

May 30, 1999, 76th Leg., R.S., ch. 1777, § 4, 1999 Tex. Sess. Law Serv. 1777. Upon review, we find the information at issue pertains to grand jurors selected before September 1, 1999. Thus, the information at issue is not confidential under article 19.42, and the district attorney's office may not withhold any portion of the information at issue under section 552.101 on this ground.

Section 552.101 of the Government Code also encompasses the common-law physical safety exception. The Texas Supreme Court has recognized a separate common-law physical safety exception to required disclosure. *Tex. Dep't of Pub. Safety v. Cox Tex. Newspapers, L.P. & Hearst Newspapers, L.L.C.*, 343 S.W.3d 112, 118 (Tex. 2011). Pursuant to this common-law physical safety exception, "information may be withheld [from public release] if disclosure would create a substantial threat of physical harm." *Id.* In applying this new standard, the court noted "deference must be afforded" law enforcement experts regarding the probability of harm, but further cautioned, "vague assertions of risk will not carry the day." *Id.* at 119.

The district attorney's office argues the submitted information is excepted under section 552.101 of the Government Code in conjunction with the common-law physical safety exception. Upon review, we conclude the district attorney's office made only vague assertions of risk of harm that could result from the disclosure of any of the information at issue. Thus, the district attorney's office failed to demonstrate release of any of the information at issue would subject anyone to a specific risk of harm. Accordingly, the district attorney's office may not withhold any portion of the information at issue under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.

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 court of appeals has concluded public citizens' dates of birth are protected by common-law privacy pursuant to section 552.101. *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.). 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

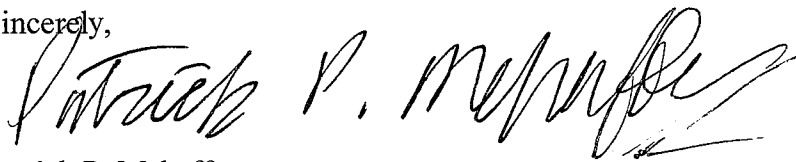
personal and lapses upon death”). Accordingly, information pertaining to a deceased individual may not be withheld on common-law privacy grounds. Upon review, we conclude some of the submitted information meets the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the district attorney’s office must withhold all living public citizens’ dates of birth and the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find no portion of the remaining information is highly intimate or embarrassing and of no legitimate public concern, and the district attorney’s office may not withhold any of the remaining information under section 552.101 of the Government Code on the basis of common-law privacy.

In summary, the district attorney’s office must withhold all public citizens’ dates of birth and the information we 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.

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,



Patrick P. Mehaffy
Attorney
Open Records Division

PPM/tdw

Ref: ID# 692458

Enc. Submitted documents

c: Requestor
(w/o enclosures)

SEP 25 2019 25

At 8:57 A.M.
Velva L. Price, District Clerk

CAUSE NO. D-1-GN-18-001148

SHAREN WILSON, TARRANT
COUNTY CRIMINAL DISTRICT
ATTORNEY,
Plaintiff,

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IN THE DISTRICT COURT OF

v.

TRAVIS COUNTY, TEXAS

KEN PAXTON, ATTORNEY GENERAL
OF THE STATE OF TEXAS,
Defendant.

201st JUDICIAL DISTRICT

AGREED FINAL JUDGMENT

On this date, Plaintiff Sharen Wilson, Tarrant County Criminal District Attorney (Tarrant County DA), and Defendant Ken Paxton, Attorney General of Texas (the Attorney General), appeared by and through their respective attorneys and announced to the Court that all matters of fact and things in controversy between them had been fully and finally resolved.

This is an action brought by Plaintiff Tarrant County DA to challenge Letter Ruling OR2018-02529. The Tarrant County DA received a request for information pursuant to the Public Information Act (PIA), Tex. Gov't Code ch. 552, for minutes and transcripts of a grand jury proceeding as well as personal identifying information about the grand jurors. The Tarrant County DA requested a ruling from the Open Records Division of the Office of the Attorney General (ORD), arguing that the requestor was an agent of an incarcerated individual, so Texas Government Code section 552.028 excepted the Tarrant County DA from being required to respond to the request. The Open Records Division of the Attorney General's Office subsequently issued Letter Ruling OR2018-02529, determining that the Tarrant County DA had failed to establish the applicability of section 552.028.

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The Attorney General is now satisfied that the applicability of section 552.028 has been established by the Tarrant County DA. The Attorney General agrees to the settlement.

All matters in controversy between Plaintiff, the Tarrant County DA, and Defendant, the Attorney General, have been resolved, and the parties agree to the entry and filing of an Agreed Final Judgment.

Texas Government Code section 552.325(d) requires the Court to allow a requestor a reasonable period of time to intervene after notice is attempted by the Attorney General. The Attorney General represents to the Court that, in compliance with Tex. Gov't Code § 552.325(c), the Attorney General sent a certified letter to the requestor, Ms. Beverly Sweat, on September 4, 2019, informing her of the setting of this matter on the uncontested docket on this date. The requestor was informed of the parties' agreement that the Tarrant County DA was not required to respond to the request. The requestor was also informed of her right to intervene in the suit to contest this determination. Verification of the delivery of this letter is attached to this motion as Exhibit "A". The requestor has not filed a motion to intervene.

After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.


IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED THAT:

1. The parties have agreed that in accordance with the PIA and under the facts presented, Texas Government Code section 552.028 applies to the request at issue, and the Tarrant County DA is not required to comply with the request for information that

forms the basis of this case. Letter Ruling OR2018-02529 should not be relied upon as a prior determination.

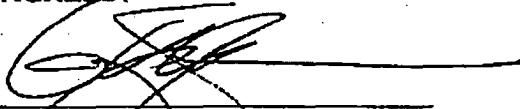
2. All court cost and attorney fees are taxed against the parties incurring the same;
3. All relief not expressly granted is denied; and
4. This Agreed Final Judgment finally disposes of all claims that are the subject of this lawsuit between the Tarrant County DA and the Attorney General and is a final judgment.

SIGNED the 25th day of September, 2019.



PRESIDING JUDGE

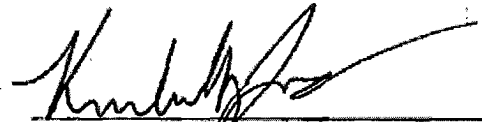
AGREED:



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