



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 1, 2019

Mr. Sterling Harmon
Assistant Criminal District Attorney
McLennan County
219 North 6th Street, Suite 200
Waco, Texas 76701

OR2019-05801

Dear Mr. Harmon:

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# 752844.

The McLennan County Criminal District Attorney's Office (the "district attorney's office") received five requests from three requestors for information pertaining to a specified case. The third requestor also seeks information pertaining to two additional cases. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, you state the district attorney's office sought clarification from the third requestor for portions of the fifth request for information. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an

¹We 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.

unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). We have no indication the district attorney's office received a response from the requestor for these portions of the request. Thus, for the portions of the request for which you have sought but not received clarification, we find the district attorney's office is not required to release information in response to this portion of the request. However, if the requestor clarifies this portion of the request for information, the district attorney's office must seek a ruling from this office before withholding any responsive information from the requestor. See Gov't Code 552.222; *City of Dallas*, 304 S.W.3d at 387. We note a governmental body has a duty to make a good-faith effort to relate a request for information to information the governmental body holds. Open Records Decision No. 561 (1990).

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. Section 552.101 encompasses common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is 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). Further, 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, the entire report must be withheld to protect the individual's privacy. Although you assert the submitted information is confidential in its entirety pursuant to common-law privacy, we find this is not a situation where all of this information must be withheld to protect any individual's privacy interest. However, upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. We note one of the dates of birth pertains to an individual who will be de-identified; thus, this individual's privacy interest will be protected. Therefore, the district attorney's office may not withhold the date of birth pertaining to the de-identified individual under section 552.101 on this basis. Nevertheless, the district attorney's office must withhold all remaining dates of birth pertaining to identified individuals, as well as the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy.² We find you have failed to

²As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

demonstrate the remaining information is highly intimate or embarrassing and not of legitimate public concern. Consequently, the district attorney's office may not withhold this information under section 552.101 on that basis.

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

(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). Sections 552.108(a)(4) and (b)(3) protect information that was prepared by an attorney for the state for litigation or that reflects an attorney's legal reasoning. A governmental body claiming an exception to disclosure under section 552.108 must explain how and why this exception is applicable to the information the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d at 710. You state some of the submitted information reflects the mental impressions or legal reasoning of attorneys representing the state. Upon review, we agree some of the

information at issue reflects the mental processes or legal reasoning of an attorney representing the state and thus subject to sections 552.108(a)(4) and (b)(3) of the Government Code. Accordingly, the district attorney's office may withhold the information we marked under sections 552.108(a)(4) and (b)(3) of the Government Code. However, upon review, we find you have failed to demonstrate the remaining information was prepared by the district attorney's office in anticipation of or in the course of preparing for criminal litigation or represents the mental impression or legal reasoning of an attorney representing the state. Thus, the district attorney's office may not withhold the remaining information under section 552.108(a)(4) or section 552.108(b)(3) of the Government Code.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's or driver's license or permit, a motor vehicle title or registration, or a personal identification document issued by an agency of Texas or another state or country is excepted from public release.³ Gov't Code § 552.130(a). We conclude the district attorney's office must withhold the information we marked under section 552.130 of the Government Code.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *Id.* § 552.137(a)-(c). The e-mail addresses we marked are not of the types specifically excluded by section 552.137(c). *See id.* § 552.137(c). Accordingly, the district attorney's office must withhold the e-mail addresses we marked under section 552.137 of the Government Code unless the owners of the addresses affirmatively consent to their release.

In summary, the district attorney's office must withhold all dates of birth pertaining to identified individuals, as well as 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 information we marked under sections 552.108(a)(4) and (b)(3) of the Government Code. The district attorney's office must withhold the information we marked under section 552.130 of the Government Code. The district attorney's office must withhold the e-mail addresses we marked under section 552.137 of the Government Code unless the owners of the addresses affirmatively consent to their release. 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.

³The 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).

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,



Matthew Taylor
Assistant Attorney General
Open Records Division

MHT/gw

Ref: ID# 752844

Enc. Submitted documents

c: 3 Requestors
(w/o enclosures)