



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 18, 2019

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

OR2019-16484

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# 771308.

The Travis County District Attorney's Office (the "district attorney's office") received a request for information pertaining to a specified case involving named individuals.¹ You state the district attorney's office will release some information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.1085, and

¹You state the district attorney's office 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 April 1, 2019. *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).

552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note the submitted information includes information obtained through grand jury subpoenas. The judiciary is expressly excluded from the requirements of the Act. Gov't Code § 552.003(1)(B). This office has determined for purposes of the Act, a grand jury is a part of the judiciary and therefore not subject to the Act. *See* Open Records Decision No. 411 (1984). Further, records kept by a governmental body that is acting as an agent for a grand jury are considered records in the constructive possession of the grand jury, and are also not subject to the Act. *See* Open Records Decisions Nos. 513 (1988), 411, 398 (1983). The fact that information collected or prepared by another person or entity is submitted to the grand jury does not necessarily mean such information is in the grand jury's constructive possession when the same information also is held in the other person's or entity's own capacity. Information held by another person or entity but not produced at the direction of the grand jury may well be protected under one of the Act's specific exceptions to disclosure, but such information is not excluded from the reach of the Act by the judiciary exclusion. *See* ORD 513. Thus, to the extent the district attorney's office holds the information at issue solely as an agent of the grand jury, such information consists of records of the judiciary that are not subject to disclosure under the Act, and the district attorney's office is not required to release that information in response to the instant request. To the extent the district attorney's office holds the information at issue in its own capacity and not solely as an agent of the grand jury, the information is subject to the Act and must be released unless it falls within an exception to disclosure.

Section 552.108 of the Government Code provides, in 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

²We 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 those records contain substantially different types of information than that submitted to this office.

(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.

Id. § 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 indicated consists of internal notations or records prepared by an attorney representing the state or consists of the mental impressions or legal reasoning of an attorney representing the state. Based upon your representations and our review, we agree subsections 552.108(a)(4) and 552.108(b)(3) are applicable to the information at issue. Accordingly, the district attorney's office may withhold the information you indicated under sections 552.108(a)(4) and 552.108(b)(3) of the Government Code.

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that did not result in conviction or deferred adjudication. *Id.* § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A); Open Records Decision No. 434 (1986). You state the information you indicated relates to a criminal investigation that did not result in conviction or deferred adjudication. Based on this representation, we agree section 552.108(a)(2) is applicable to the information at issue.

However, section 552.108 does not except from disclosure "basic information about an arrested person, an arrest, or a crime." Gov't Code § 552.108(c). Section 552.108(c) refers to the basic information held to be public in *Houston Chronicle*. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Accordingly, with the exception of basic

information, the district attorney's office may withhold the information you indicated under section 552.108(a)(2) of the Government Code.

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 No. 252 (1980) (section 552.108 of the Government Code is designed to protect investigative techniques and procedures used in law enforcement). 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).

You state portions of the remaining information, if released, would interfere with law enforcement or prosecution of crime. You assert the information at issue reveals certain techniques used by law enforcement that would jeopardize officer safety and undermine law enforcement personnel's ability to perform their duties. Based on these representations and our review, we agree the release of some of the information at issue, which we indicated, would interfere with law enforcement. Accordingly, the district attorney's office may withhold the information we indicated under section 552.108(b)(1) of the Government Code. However, we find you have not demonstrated release of any of the remaining information at issue would interfere with law enforcement or crime prevention. Accordingly, the district attorney's office may not withhold any of the remaining information at issue under section 552.108(b)(1) of the Government Code.

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. This section encompasses section 411.083 of the Government Code, which pertains to criminal history record information ("CHRI"). CHRI generated by the National Crime Information Center 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 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 federal government or other states. *See* Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual laws with respect to CHRI it generates. *See id.* 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(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 in conjunction with chapter 411, subchapter F, of the Government Code. Upon review, we agree the information you indicated consists of CHRI that is confidential under section 411.083. Accordingly, the district attorney’s office must withhold the information you indicated under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code.

Section 552.101 of the Government Code also encompasses section 11(a) of article 49.25 of the Code of Criminal Procedure, which reads as follows:

The medical examiner shall keep full and complete records properly indexed, giving the name if known of every person whose death is investigated, the place where the body was found, the date, the cause and manner of death, and shall issue a death certificate. . . . The records may not be withheld, subject to a discretionary exception under [the Act], except that a photograph or x-ray of a body taken during an autopsy is excepted from required public disclosure in accordance with [the Act], but is subject to disclosure:

- (1) under a subpoena or authority of other law; or
- (2) if the photograph or x-ray is of the body of a person who died while in the custody of law enforcement.

Crim. Proc. Code art. 49.25, § 11(a). You assert the photographs you indicated are confidential under section 11(a) of article 49.25 of the Code of Criminal Procedure. Upon review, we find some of the information at issue consists of a photograph of a body taken during an autopsy. The autopsy photographs at issue are confidential pursuant to section 11 of article 49.25. You do not indicate either of the statutory exceptions to confidentiality is applicable in this instance. Accordingly, we find the district attorney’s office must withhold the information we marked and indicated under section 552.101 of the Government Code in conjunction with section 11 of article 49.25 of the Code of Criminal Procedure. However, we find none of the remaining photographs you indicated are subject to section 11 of article

49.25, and the district attorney's office may not withhold any of the remaining information at issue on this basis.

Section 552.1085 of the Government Code provides, in relevant part, the following:

(c) A sensitive crime scene image in the custody of a governmental body is confidential and excepted from the requirements of Section 552.021 and a governmental body may not permit a person to view or copy the image except as provided by this section. This section applies to any sensitive crime scene image regardless of the date that the image was taken or recorded.

(d) Notwithstanding Subsection (c) and subject to Subsection (e), the following persons may view or copy information that constitutes a sensitive crime scene image from a governmental body:

...

(4) a person who establishes to the governmental body an interest in a sensitive crime scene image that is based on, connected with, or in support of the creation, in any medium, of an expressive work[.]

Gov't Code § 552.1085(c), (d)(4). For purposes of section 552.1085, "sensitive crime scene image" means "a photograph or video recording taken at a crime scene, contained in or part of a closed criminal case, that depicts a deceased person in a state of dismemberment, decapitation, or similar mutilation or that depicts the deceased person's genitalia." *See id.* § 552.1085(a)(6). You argue some of the remaining photographs consist of sensitive crime scene images. We understand the information at issue relates to a criminal case that is now closed. Upon review, we agree the information we indicated consists of sensitive crime scene images for the purposes of section 552.1085. Accordingly, the district attorney's office must generally withhold the information we indicated under section 552.1085(c) of the Government Code.

However, in this instance, the requestor is a member of the media and may be seeking the information in connection with or in support of the creation of an expressive work.³ *See id.* § 552.1085(a)(3)(B) (defining "expressive work" to include "a work the primary function of which is the delivery of news, information, current events, or other matters of public interest or concern"); *see also id.* § 552.1085(b) ("an Internet website, the primary function of which is not the delivery of news, information, current events, or other matters of public interest or concern, is not an expressive work"). Section 552.1085(d)(4) provides that if the requestor

³We note, and you acknowledge, section 552.1085(f) provides that a governmental body that receives a request for a sensitive crime scene image from a person described by section 552.1085(d)(4) must notify the deceased person's next of kin in writing at the next of kin's last known address within ten business days of receiving the request. *See id.* § 552.1085(f).

establishes to the district attorney's office she has an interest in the crime scene images that is based on, connected with, or in support of the creation, in any medium, of an expressive work, the district attorney's office may not use section 552.1085(c) to withhold the information at issue from this requestor. *See id.* § 552.1085(d)(4). Accordingly, if the requestor does not establish her interest in the information at issue in accordance with section 552.1085(d)(4), then the district attorney's office must withhold the information we indicated under section 552.1085(c). If, however, the requestor does establish her interest in the information at issue in accordance with section 552.1085(d)(4), the district attorney's office may not use section 552.1085(c) to withhold the information at issue from this requestor. However, in either event, we find no portion of the remaining information consists of sensitive crime scene images and the district attorney's office may not withhold any portion of the remaining information at issue on that basis.

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. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). This office has also found personal financial information not relating to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. *See* Open Records Decision Nos. 600 (1992) (personal financial information includes choice of a particular insurance carrier), 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). 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.). We note, however, because the common-law right to privacy is a personal right that lapses at death, common-law privacy does not protect 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), H-917 (1976); Open Records Decision No. 272 at 1 (1981).

Upon review, we conclude the information we marked meets the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the district attorney's office must withhold the information we marked and all living public citizens' dates of birth under

section 552.101 of the Government Code in conjunction with common-law privacy.⁴ 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.

Section 552.101 of the Government Code 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 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). After review of the remaining information, we find you have failed to demonstrate how any portion of the information at issue falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the district attorney's office may not withhold any of the remaining information under section 552.101 on the basis of constitutional privacy.

Section 552.101 of the Government Code also 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.

(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

⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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 you have not demonstrated any of the remaining information constitutes a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that was created or is maintained by a physician or someone under the supervision of a physician. Thus, we find none of the remaining information constitutes medical records subject to section 159.002. Accordingly, the district attorney's office may not withhold any of the remaining information under section 552.101 of the Government Code 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 marked under section 552.130 of the Government Code. However, we find you have failed to demonstrate any of the remaining information at issue is subject to section 552.130. Thus, the district attorney's office may not withhold any of the remaining information at issue under section 552.130 of the Government Code.

In summary, to the extent the district attorney's office holds the information obtained through grand jury subpoenas solely as an agent of the grand jury, such information consists of records of the judiciary that are not subject to disclosure under the Act, and the district attorney's office is not required to release that information in response to the instant request. The district attorney's office may withhold the information you indicated under sections 552.108(a)(4) and 552.108(b)(3) of the Government Code. With the exception of basic information, which must be released, the district attorney's office may withhold the information you indicated under section 552.108(a)(2) of the Government Code. The district attorney's office may withhold the information we indicated under section 552.108(b)(1) of the Government Code. The district attorney's office must withhold the information you indicated under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code. The district attorney's office must withhold the information we marked and indicated under section 552.101 of the Government Code in conjunction with section 11 of article 49.25 of the Code of Criminal Procedure. If the requestor does not establish her interest in the information at issue in accordance with section 552.1085(d)(4), then the district attorney's office must withhold the information we indicated under section 552.1085(c). The district attorney's office must withhold the information we marked and all living public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy. 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.⁵

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,



Kieran Hillis
Assistant Attorney General
Open Records Division

KH/gw

Ref: ID# 771308

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁵We note the information being released includes 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. Gov't Code § 552.147(b).