



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 23, 2019

Mr. Andrew Heston
Assistant District Attorney
Brazoria County
111 East Locust, Suite 408A
Angleton, Texas 77515

OR2019-23635

Dear Mr. Heston:

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# 782211.

The Brazoria County District Attorney's Office (the "district attorney's office") received a request for information pertaining to two specified cause numbers. You state the district attorney's office will redact certain information pursuant to sections 552.130(c) and 552.147(b) of the Government Code.¹ You claim some of the submitted information is exempted from disclosure under sections 552.101, 552.111, and 552.1175 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the submitted information consists of a completed investigation that is subject to section 552.022(a)(1) of the Government Code, which reads as follows:

¹Section 552.130(c) of the Government Code allows a governmental body to redact the information described in section 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). 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).

² Although you raise section 552.117 of the Government Code, we note section 552.1175 of the Government Code is the proper exception to raise for information not held in an employment context.

(a) Without limiting the amount or kind of information that is public information under this chapter, the 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). Although you seek to withhold some of the information at issue under the attorney work-product privilege encompassed by section 552.111 of the Government Code, this exception is discretionary and does not make information confidential under the Act. *See* Open Records Decision No. 677 (2002) (governmental body may waive attorney work product privilege under section 552.111); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the district attorney's office may not withhold any of the information at issue under section 552.111. The Texas Supreme Court has held the Texas Rules of Civil Procedure are "other law" that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We note the attorney work-product privilege is found at rule 192.5 of the Texas Rules of Civil Procedure. However, the Texas Rules of Civil Procedure apply only to "actions of a civil nature." *See* TEX. R. CIV. P. 2. Thus, because the district attorney's office informs us it prepared the information at issue in connection with criminal prosecutions, the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure does not apply to this information and the district attorney's office may not withhold it on that basis. Nevertheless, because sections 552.101, 552.102, 552.1175, and 552.137 apply to confidential information, we will address their applicability to the submitted information.³

Next, we note the submitted information includes a CR-3 accident report that is subject to chapter 550 of the Transportation Code. Section 550.065 applies only to a written report of an accident required under section 550.061, 550.062, or 601.004. *See* Transp. Code § 550.065(a)(1). Chapter 550 requires the creation of a written report when the accident resulted in injury to or the death of a person or damage to the property of any person to the apparent extent of \$1,000 or more. *Id.* §§ 550.061 (operator's accident report), .062 (officer's accident report). An accident report is privileged and for the confidential use of the Texas Department of Transportation or a local governmental agency of Texas that has use for the information for accident prevention purposes. *Id.* § 550.065(b). However, a governmental entity shall release an accident report in accordance with subsections (c) and (c-1). *Id.* § 550.065(c), (c-1). Section 550.065(c) provides a governmental entity shall release an accident report to a person or entity listed under this subsection. *Id.* § 550.065(c).

³ 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).

Here, the requestor is a person listed under section 550.065(c). Although you raise section 552.101 of the Government Code in conjunction with common-law privacy, we note a statutory right of access prevails over the Act's general exceptions to public disclosure. *See Center Point Energy Houston Elec. LLC v. Harris County Toll Rd. Auth.*, 436 F.3d 541, 544 (5th Cir. 2006) (common law controls only where there is no conflicting or controlling statutory law); *Collins v. Tex Mall, L.P.*, 297 S.W.3d 409, 415 (Tex. App.— Fort Worth 2009, no pet.) (statutory provision controls and preempts common law only when statute directly conflicts with common law principle). Thus, no portion of the CR-3 accident report may be withheld under section 552.101 of the Government Code on the basis of common-law privacy. Therefore, the district attorney's office must release the CR-3 accident report to the requestor pursuant to section 550.065(c) of the Transportation Code.

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 information protected by chapter 411 of the Government Code, which makes confidential criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center. *See id.* § 411.083(a). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual laws with respect to the CHRI it generates. *See id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that 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 find the Federal Bureau of Investigation ("FBI") number we have marked consists of CHRI that is confidential under section 411.083. Thus, the district attorney's office must withhold the FBI number we marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code and federal law.

Section 552.101 of the Government Code also encompasses chapter 611 of the Health and Safety Code, which pertains to mental health records. Section 611.002 of the Health and Safety Code provides, in part, as follows:

- (a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

- (b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b); *see also id.* § 611.001 (defining ““patient” and “professional”). Upon review, we find some of the remaining information consists of mental health records. Thus, the district attorney’s office must generally withhold the information we marked under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code.

However, we note the information at issue includes results of an analysis of a blood specimen. Section 724.018 of the Transportation Code provides that, on the request of the person who has given a specimen at the request of a peace officer, full information concerning the analysis of the specimen must be made available to that person or the person’s attorney. *See* Transp. Code § 724.018. In this instance, the requestor is an attorney representing the individual who submitted the specimen. Accordingly, we find the requestor generally has a right of access to his client’s blood test results pursuant to section 724.018 of the Transportation Code.

Thus, although the information at issue is generally confidential under section 611.002 of the Health and Safety Code, section 724.018 provides the requestor with a right of access to the information pertaining to the analysis of the blood specimen obtained by a peace officer. Therefore, there is a conflict between the confidentiality provision of section 611.002 and the right of access provision of section 724.018. Where general and specific statutes are in irreconcilable conflict, the specific provision typically prevails as an exception to the general provision, unless the general provision was enacted later and there is clear evidence the legislature intended the general provision to prevail. *See* Gov’t Code § 311.026(b); *City of Lake Dallas v. Lake Cities Mun. Util. Auth.*, 555 S.W.2d 163, 168 (Tex. Civ. App.—Fort Worth 1977, writ ref’d n.r.e.). In this instance, although section 611.002 of the Health and Safety Code generally makes mental health records subject to chapter 611 of the Health and Safety Code confidential, section 724.018 of the Transportation Code specifically requires release of information pertaining to the analysis of a blood specimen to certain parties. Additionally, we note section 724.018 is the later enacted statute. *See* Gov’t Code § 311.025(a) (if statutes enacted at different sessions of legislature are irreconcilable, statute latest in enactment prevails). We therefore conclude the information pertaining to the analysis of a blood specimen may not be withheld from this requestor under section 611.002. Although you also claim the information at issue is excepted under section 552.101 of the Government Code in conjunction with common-law privacy, a specific statutory right of access to information prevails over common-law privacy. *Collins v. Tex Mall, L.P.*, 297 S.W.3d 409, 415 (Tex. App.—Fort Worth 2009, no pet.) (statutory provision controls and preempts common law only when statute directly conflicts with common law principle); *CenterPoint Energy Houston Elec. LLC v. Harris County Toll Rd. Auth.*, 436 F.3d 541, 544 (5th Cir. 2006) (common law controls only where there is no conflicting or controlling statutory law). Therefore, the district attorney’s office may not withhold the submitted blood specimen analysis information under section 552.101 of the Government Code in conjunction with common-law privacy. Thus, the district

attorney's office must release the blood test results, which we marked, to this requestor pursuant to section 724.018 of the Transportation Code and must withhold the remaining information we marked under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code.⁴

Section 552.1175 of the Government Code excepts from disclosure 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. We note section 552.1175 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid by a governmental body. *See* Open Records Decision No. 506 a 5-6 (1988). Upon review, we find some of the remaining information, which we marked, pertains to peace officers and is held by the district attorney's office in a non-employment capacity. 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; however, to the extent the telephone numbers are cellular telephone numbers, they may only be withheld if a governmental body does not pay for the cellular telephone service. If the individuals whose information is at issue are no longer licensed peace officers or no election was made, the district attorney's office may not withhold this information under section 552.1175 of the Government Code. However, we find you have failed to demonstrate any of the remaining information is confidential under section 552.1175 of the Government Code, and the district attorney's office may not withhold any of the remaining information on that basis.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Under the common-law right of privacy, an individual has a right to be free from the publicizing of private affairs in which the public has no legitimate concern. *Id.* at 682. The Third 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.). We note the requestor has a right of access to his client's date of birth. *See* Gov't Code § 552.023(a) ("person or a person's authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and that is protected from public disclosure by laws intended to protect

⁴As our ruling is dispositive, we need not address your remaining argument against disclosure of this information. We note this ruling does not affect an individual's right of access to his or her own mental health records from the professional who provided treatment under chapter 611 of the Health and Safety Code. *See* Health & Safety Code §§ 611.004, .0045; *cf. Abbott v. Tex. State Bd. of Pharmacy*, 391 S.W.3d 253 (Tex. App.—Austin 2012, no pet.) (Medical Practice Act, subtitle B of title 3 of the Occupations Code, does not provide patient general right of access to his or her medical records from governmental body responding to a request for information under the Act).

that person's privacy interests"); ORD 481 at 4 (privacy theories not implicated when individual requests information concerning himself). Thus, with the exception of the date of birth of the requestor's client, the district attorney's office must withhold all public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy.

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). Gov't Code § 552.137(a)-(c). The e-mail address we marked is not of the type specifically excluded by section 552.137(c). *See id.* § 552.137(c). Accordingly, the district attorney's office must withhold the e-mail address we marked under section 552.137 of the Government Code, unless the owner of the address affirmatively consents to its release.

In summary, the district attorney's office must release the CR-3 accident report to the requestor pursuant to section 550.065(c) of the Transportation Code. The district attorney's office must withhold the FBI number we marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code and federal law. The district attorney's office must release the blood test results, which we marked, to this requestor pursuant to section 724.018 of the Transportation Code and must withhold the remaining information we marked under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code. With the exception of the date of birth of the requestor's client, the district attorney's office must withhold all public citizens' dates of birth 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) of the Government Code, the district attorney's office must withhold the information we marked under section 552.1175 of the Government Code; however, to the extent the telephone numbers are cellular telephone numbers, they may only be withheld if a governmental body does not pay for the cellular telephone service. The district attorney's office must withhold the e-mail address we marked under section 552.137 of the Government Code, unless the owner of the address affirmatively consents to its release. The district attorney's office must release the remaining information.⁵

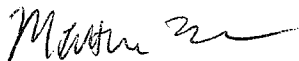
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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

⁵ We note the requestor has a right of access to some of the information being released in this instance. *See* Gov't Code § 552.023(a); ORD 481 at 4. Thus, if the district attorney's office receives another request for the same information from a different requestor, the district attorney's office must again seek a decision from this office.

responsibilities, please visit our website at <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



Matthew Taylor
Assistant Attorney General
Open Records Division

MHT/mo

Ref: ID# 782211

Enc. Submitted documents

c: Requestor
(w/o enclosures)