



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 11, 2019

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

OR2019-25450

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# 785070

The Tarrant County Criminal District Attorney's Office (the "district attorney's office") received a request for all communications between specified parties and the district attorney's office during a specified period, all communications between the district attorney's office and a specified judge related to a specified case, and a copy of the warrant issued in the case.¹ You state you will withhold certain information pursuant to Open Records Decision No. 684 (2009).² You also state you will release some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.130 and 552.142 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.107(2) of the Government Code excepts from required public disclosure information if "a court by order has prohibited disclosure of the information." You inform us, and the documentation reflects, that some of the submitted information was "filed under

¹The district attorney's office states it sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing 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 unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

² Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain information without the necessity of requesting an attorney general decision.

seal pursuant to a court order.” We have no indication the order to seal has been lifted by the court. Based upon your representation and our review, we agree a court, by order, has prohibited disclosure of the information at issue. Accordingly, the district attorney’s office must withhold Exhibit H under section 552.107(2) 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 information protected by other statutes. Section 261.201(a) of the Family Code provides as follows:

(a) [T]he following information is confidential, is not subject to public release under [the Act] and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). You state the information in Exhibit F-2 was used or developed in investigations of alleged child abuse or neglect. Upon review, we find the information in Exhibit F-2 is subject to section 261.201 of the Family Code. *See id.* § 261.001(1), (4) (defining “abuse” and “neglect” for purposes of Family Code ch. 261); *see also id.* §101.003(a) (defining “child” for purposes of this section as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes). As you do not indicate the district attorney’s office has adopted a rule that governs the release of this type of information, we assume no such rule exists. Accordingly, the district attorney’s office must withhold Exhibit F-2 under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (addressing predecessor statute).

Section 552.101 also encompasses section 58.008 of the Family Code, which provides, in part:

(b) Except as provided by Subsection (d), law enforcement records concerning a child and information concerning a child that are stored by electronic means or otherwise and from which a record could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult records;

(2) if maintained electronically in the same computer system as adult records, accessible only under controls that are separate and distinct from the controls to access electronic data concerning adults; and

(3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subsection (c) or Subchapter B, D, or E.

Fam. Code § 58.008(b); *see also* Fam. Code § 51.03 (defining “delinquent conduct” and “conduct indicating a need for supervision” for purposes of title 3 of Family Code).³ Section 58.008(b) is applicable to records of juvenile conduct that occurred before, on, or after September 1, 2017. The juvenile must have been at least 10 years old and less than 17 years of age when the conduct occurred. *See id.* § 51.02(2) (defining “child” for purposes of title 3 of Family Code). We note section 58.008(b) does not apply to law enforcement records that relate to a juvenile involved only as a complainant, victim, witness, or other involved party; rather, the juvenile must be involved as a suspect, offender, or defendant. Upon review, we find the information in Exhibit I involves delinquent conduct or conduct indicating a need for supervision. However, we are unable to determine the ages of the offenders involved in the information at issue. Accordingly, we must rule in the alternative. To the extent any portion of the submitted information in Exhibit I involves an offender who was ten years of age or older and under seventeen years of age at the time of the conduct at issue, then, as it does not appear any of the exceptions in section 58.008 apply, the district attorney’s office must withhold that information under section 552.101 of the Government Code in conjunction with section 58.008(b) of the Family Code. However, to the extent the information at issue does not involve an offender who was ten years of age or older and under seventeen years of age at the time of the conduct at issue, then the information does not involve juvenile conduct for purposes of section 58.008(b) of the Family Code, and the information at issue may not be withheld under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses information made confidential by other statutes, such as chapter 611 of the Health and Safety Code. Section 611.002 pertains to mental health records and provides, in pertinent part,

(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 id.* § 611.001 (defining “patient” and “professional”). Section 611.001 defines a “professional” as (1) a person authorized to

³ Although you raise section 552.101 of the Government Code in conjunction with section 58.007(c) of the Family Code, we note the 85th Legislature repealed this provision effective September 1, 2017. Act of May 28, 2017, 85th Leg., R.S., ch. 746, § 21, 2017 Tex. Sess. Law Serv. 3173, 3187.

practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See id.* § 611.001(2). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See id.* §§ 611.004, .0045; *see also* Open Records Decision No. 565 (1990). Upon review, we find the information in Exhibit K and some of the information in Exhibit G consists of mental health records that are subject to chapter 611 of the Health and Safety Code. Accordingly, the district attorney's office must withhold Exhibit K and the information we marked within Exhibit G under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code.⁴

Section 552.101 of the Government Code also encompasses the confidentiality provisions found in chapter 55 of the Code of Criminal Procedure. Articles 55.01 through 55.05 of the Code of Criminal Procedure provide for the expunction of criminal records in certain limited circumstances. Article 55.03 prescribes the effect of an expunction order and provides,

When the order of expunction is final:

- (1) the release, maintenance, dissemination, or use of the expunged records and files for any purpose is prohibited;
- (2) except as provided in Subdivision (3) of this article, the person arrested may deny the occurrence of the arrest and the existence of the expunction order; and
- (3) the person arrested or any other person, when questioned under oath in a criminal proceeding about an arrest for which the records have been expunged, may state only that the matter in question has been expunged.

Crim. Proc. Code art. 55.03. Article 55.04 imposes sanctions for violations of an expunction order and section 1 of this article provides,

A person who acquires knowledge of an arrest while an officer or employee of the state or of any agency or other entity of the state or any political subdivision of the state and who knows of an order expunging the records and files relating to that arrest commits an offense if he knowingly releases, disseminates, or otherwise uses the records or files.

Id. art. 55.04, § 1. This office has determined records subject to an expunction order are not subject to public disclosure under the Act. *See* Open Records Decision No. 457 at 2 (1987) (governmental body prohibited from releasing or disseminating arrest records subject to expunction order, as "those records are not subject to public disclosure under the [Act]"). The district attorney's office asserts some of the submitted information is subject

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

to orders of expunction. However, the district attorney's office also states "it is difficult for this office to ascertain whether the Order[s] of Expungement [were] granted." Based on the district attorney's office's representations and our review, we are unable to determine whether any of the information in Exhibit M is subject to an order of expunction. Therefore, to the extent that the information at issue is subject to an order of expunction, the district attorney's office must withhold it under section 552.101 of the Government Code in conjunction with article 55.03 of the Code of Criminal Procedure. To the extent that the information at issue is not subject to an order of expunction, the district attorney's office may not withhold it on the basis of section 552.101 of the Government Code in conjunction with article 55.03 of the Code of Criminal Procedure.

Section 552.101 of the Government Code also encompasses the doctrine of 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). 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.). Accordingly, the district attorney's office must withhold the public citizens' date of birth you indicated in Exhibit J under section 552.101 of the Government Code in conjunction with common-law privacy. However, upon review, we find you have failed to demonstrate any of the remaining information is highly intimate or embarrassing and of no legitimate public concern. Therefore, none of the remaining information may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.108(a)(1) of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must explain how and why this exception is applicable to the information at issue. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). The district attorney's office states the information in Exhibit E-3 relates to a pending criminal prosecution. Based on this representation, we conclude release of the information in Exhibit E-3 will interfere with the detection, investigation, or prosecution of crime. *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, we find the district attorney's office may withhold the information in Exhibit E-3 under section 552.108(a)(1) of the Government Code.

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. However, upon review, we find that the district attorney's office has failed to demonstrate the information at issue consists of motor vehicle information for purposes of section 552.130. Accordingly, the district attorney's office may not withhold the remaining information under section 552.130 of the Government Code.

Section 552.142 of the Government Code is applicable to records of certain deferred adjudications. Section 552.142 provides as follows:

(a) Information is excepted from [required public disclosure] if an order of nondisclosure of criminal history record information with respect to the information has been issued under Subchapter E-1, Chapter 411.

(b) A person who is the subject of information that is excepted from [required public disclosure] under this section may deny the occurrence of the arrest and prosecution to which the information relates and the exception of the information under this section, unless the information is being used against the person in a subsequent criminal proceeding.

Gov't Code § 552.142. Section 411.0725 of the Government Code authorizes a person placed on deferred adjudication community supervision for certain offenses to petition the court "for an order of nondisclosure," which prohibits criminal justice agencies from disclosing to the public criminal history record information related to the offense giving rise to the deferred adjudication community supervision. *See id.* § 411.0725. A criminal justice agency may only disclose criminal history record information that is the subject of the order to other criminal justice agencies, for criminal justice or regulatory purposes; non-criminal justice agencies listed in section 411.0765(b); or the person who is the subject of the order. *See id.* § 411.0765. The district attorney's office states that the information in Exhibit L pertains to cases in which orders of non-disclosure have been granted. Thus, we find the information at issue is subject to section 552.142 of the Government Code. The district attorney's office must withhold the information in Exhibit L under section 552.142 of the Government Code.

In summary, the district attorney's office must withhold Exhibit H under section 552.107(2) of the Government Code. The district attorney's office must withhold Exhibit F-2 under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code. To the extent any portion of the submitted information in Exhibit I involves an offender who was ten years of age or older and under seventeen years of age at the time of the conduct at issue, the district attorney's office must withhold that information under section 552.101 of the Government Code in conjunction with section 58.008(b) of the Family Code. The district attorney's office must withhold Exhibit K and the information we marked within Exhibit G under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code. To the extent that the information at issue is subject to an order of expunction, the district attorney's office must withhold it

under section 552.101 of the Government Code in conjunction with article 55.03 of the Code of Criminal Procedure. The district attorney's office must withhold the public citizens' date of birth you indicated in Exhibit J under section 552.101 of the Government Code in conjunction with common-law privacy. The district attorney's office may withhold the information in Exhibit E-3 under section 552.108(a)(1) of the Government Code. The district attorney's office must withhold the information in Exhibit L under section 552.142 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 <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,



Sean McCormick
Attorney
Open Records Division

SMC/eb

Ref: ID# 785070.

Enc. Submitted documents

c: Requestor
(w/o enclosures)