



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 26, 2019

Mr. Mark Kratovil
Assistant Criminal District Attorney
Tarrant County Criminal District Attorney's Office
401 West Belknap
Fort Worth, Texas 76196

OR2019-27022

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# 788284.

The Tarrant County Criminal District Attorney's Office (the "district attorney's office") received two requests from the same requestor for four specified case files and information pertaining to three named individuals. You state the district attorney's office does not have some of the requested information.¹ You also state the district attorney's office will release some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, some of which consists of a representative sample.² We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (permitting

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 *dism'd*); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

² We 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.

interested third party to submit to attorney general reasons why requested information should or should not be released).

Initially, we must address the procedural obligations of the district attorney's office under the Act with regard to the second request for information. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(b), the governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See id.* § 552.301(b). In this instance, you inform us the district attorney's office received the second request for information on July 31, 2019. You do not inform us the district attorney's office was closed on any business days between July 31, 2019 and August 14, 2019. Accordingly, the district attorney's office's ten business day deadline with regard to the second request for information under section 552.301(b) was August 14, 2019. However, the envelope in which the district attorney's office submitted the information under section 552.301(b) bears a post-meter mark of August 15, 2019. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail). Thus, we conclude the district attorney's office failed to comply with section 552.301 of the Government Code with regard to the second request.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ). Because sections 552.101 and 552.107 of the Government Code can provide compelling reasons to overcome the presumption of openness, we will address the applicability of these sections for the submitted information. Further, we will address your timely raised arguments. However, we find you have failed to establish a compelling reason to address the remaining exceptions you raise with regard to the second request for information.

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 261.201(a) of the Family Code, which provides as follows:

[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 some of the submitted information was used or developed in investigations of alleged child abuse or neglect under chapter 261 of the Family Code. *See id.* §§ 101.003(a) (defining “child” for purposes of section 261.201), 261.001(1), (4) (defining “abuse” and “neglect” for purposes of section 261.201 of Family Code). Thus, this information is within the scope of section 261.201 of the Family Code. The district attorney’s office does not indicate it has adopted a rule that governs the release of this type of information. Therefore, we assume no such rule exists. Given that assumption, the district attorney’s office must withhold the information you indicated, and the additional information we indicated, under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code.³ *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute).

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 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; Open Records Decision No. 598 (1991). This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the

³ As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982).

Upon review, we note the information at issue was created by nurses. The district attorney's office states the information at issue was created under the supervision of a physician. Accordingly, the district attorney's office must withhold the information you indicated under section 552.101 in conjunction with the MPA.

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). However, the requestor represents the named individual at issue and has a right of access to information pertaining to his client that would otherwise be confidential under common-law privacy. *See* Gov't Code § 552.023(a) ("a person or person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to a person and that is protected from public disclosure by laws intended to protect that person's privacy interests"); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself). Thus, the district attorney's office may not withhold the private information pertaining to the requestor's client under section 552.101 on the basis of common-law privacy. Upon review, we find you have failed to demonstrate the remaining information is highly intimate or embarrassing and not of legitimate public concern or it pertains to individuals who are deidentified. Thus, none of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "to facilitate the rendition of professional legal services" to the client governmental body. Tex. R. Evid. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators,

investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. Tex. R. Evid. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state the information at issue consists of communications between employees of the district attorney’s office. You state the communications were made in confidence for the purpose of facilitating the rendition of professional legal services to the district attorney’s office and these communications have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the district attorney’s office may generally withhold the information you indicated under section 552.107(1) of the Government Code. However, we note some of the otherwise privileged e-mail strings include e-mails received from or sent to a non-privileged party. Furthermore, if the e-mails received from or sent to the non-privileged party are removed from the otherwise privileged e-mail strings in which they appear and stand alone, they are responsive to the request for information. Therefore, if the district attorney’s office maintains these non-privileged e-mails, which we marked, separate and apart from the otherwise privileged e-mail strings in which they appear, then these non-privileged e-mails are not excepted under section 552.107(1), and the district attorney’s office must release them.

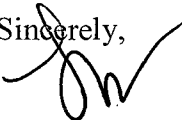
Section 552.101 of the Government Code also encompasses the doctrine of constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual’s interest in avoiding disclosure of personal matters. ORD 455 at 4. 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 any portion of the remaining information 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 the remaining information under section 552.101 on the basis of constitutional privacy.

In summary, the district attorney's office must withhold the information you indicated, and the additional information we indicated, under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code. The district attorney's office must withhold the information you indicated under section 552.101 in conjunction with the MPA. The district attorney's office may generally withhold the information you indicated under section 552.107(1) of the Government Code; however, if the district attorney's office maintains the non-privileged e-mails we marked separate and apart from the otherwise privileged e-mail strings in which they appear, then these non-privileged e-mails are not excepted under section 552.107(1), and the district must release them. The district attorney's office must release the remaining information.⁴

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,


Jahna Ward
Assistant Attorney General
Open Records Division

JW/jxd

⁴ We note the information being released contains an e-mail address to which the requestor has a right of access under section 552.137(b) of the Government Code. *See* Gov't Code § 552.137(b). However, Open Records Decision No. 684 (2009) is a previous determination authorizing all governmental bodies to withhold specific categories of information without the necessity of requesting an attorney general decision, including e-mail addresses of members of the public under section 552.137 of the Government Code. Thus, if the district attorney's office receives another request for this same information from a person who does not have a right of access to it, Open Records Decision No. 684 authorizes the district attorney's office to redact the requestor's e-mail address without the necessity of requesting an attorney general decision.

Mr. Mark Kratovil - Page 7

Ref: ID# 788284

Enc. Submitted documents

c: Requestor
(w/o enclosures)