



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

October 9, 2019

Mr. Bill Delmore  
Assistant District Attorney  
9<sup>th</sup> Judicial District Attorney's Office  
207 West Phillips, 2<sup>nd</sup> Floor  
Conroe, Texas 77301

OR2019-28286

Dear Mr. Delmore:

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# 790467.

The 9<sup>th</sup> Judicial District Attorney's Office (the "district attorney's office") received a request for 1) 13 categories of information pertaining to a specified criminal case, and 2) five categories of information pertaining to two named employees.<sup>1</sup> You state you will release some information with information redacted under section 552.1175 of the Government Code, Open Records Letter No. 2016-19908 (2016), and Open Records Decision No. 684 (2009).<sup>2</sup> You claim the submitted information is excepted from

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<sup>1</sup> You state the district attorney's office sought and received clarification of the request for information. See Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

<sup>2</sup> Section 552.1175(f) of the Government Code authorizes a governmental body to redact information subject to section 552.1175(b) of the Government Code without the necessity of requesting a decision from this office under the Act, if the individual properly elects to keep such information confidential. See Gov't Code § 552.1175(b), (f). Open Records Letter No. 2016-19908 authorizes the district attorney's office to withhold

disclosure under sections 552.101, 552.107, 552.108, 552.111, and 552.117 of the Government Code and privileged under Texas Rule of Civil Procedure 192.5 and Texas Rule of Evidence 503. We have considered the submitted arguments and reviewed the submitted 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. Section 552.101 of the Government Code encompasses the Family and Medical Leave Act (the “FMLA”). *See* 29 U.S.C. §§ 2601 *et seq.* Section 825.500 of chapter V of title 29 of the Code of Federal Regulations identifies the record-keeping requirements for employers that are subject to the FMLA. Subsection (g) of section 825.500 states:

[r]ecords and documents relating to medical certifications, recertifications or medical histories of employees or employees’ family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files. If the Genetic Information Nondiscrimination Act of 2008 (GINA) is applicable, records and documents created for purposes of FMLA containing family medical history or genetic information as defined in GINA shall be maintained in accordance with the confidentiality requirements of Title II of GINA (*see* 29 C.F.R. 1635.9), which permit such information to be disclosed consistent with the requirements of FMLA. If the [Americans with Disabilities Act (the “ADA”)], as amended, is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements . . . , except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee’s physical or medical condition might require emergency treatment; and
- (3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

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the dates of birth of public citizens under section 552.101 of the Government Code in conjunction with common-law privacy without requesting a decision from this office. Open Records Decision No. 684 is a previous determination issued by this office authorizing all governmental bodies to withhold certain categories of information without the necessity of requesting an attorney general decision.

29 C.F.R. § 825.500(g). You state the information you have indicated is subject to the FMLA. Upon review, we find the information you have indicated is confidential under section 825.500 of title 29 of the Code of Federal Regulations. Further, we find none of the release provisions of the FMLA apply to this information. Accordingly, the district attorney's office must withhold the information you have indicated under section 552.101 of the Government Code in conjunction with the FMLA.<sup>3</sup>

Section 552.101 of the Government Code also encompasses section 411.083 of the Government Code, which pertains to criminal history record information ("CHRI"). CHRI generated by the National Crime Information Center ("NCIC") 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 NCIC network or other states. *See* 28 C.F.R. § 20.21. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. Open Records Decision No. 565 at 7 (1990); *see generally* Gov't Code ch. 411 subch. F. 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. 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). Thus, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411. We note, however, active warrant information or other information relating to an individual's current involvement in the criminal justice system does not constitute criminal history information for purposes of section 552.101. *See id.* § 411.081(b). We also note records relating to routine traffic violations are not considered criminal history information. *Cf. id.* § 411.082(2)(B) (criminal history record information does not include driving record information). You assert section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code for some of the remaining information. Upon review, except for the information we have marked for release, we find the information you have indicated consists of CHRI which the district attorney's office must withhold under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code and federal law. However, we find you have failed to demonstrate the remaining information at issue consists of confidential CHRI. Therefore, the district

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<sup>3</sup> As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

attorney's office may not withhold any portion of the information we have marked for release under section 552.101 of the Government Code on this 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). Upon review, we conclude some of the remaining information meets the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the district attorney's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

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

(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). 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 state the information you have indicated consists of internal records or notations prepared by attorneys representing the state in preparation of criminal litigation. Based on your representation and our review, we agree section 552.108(a)(4) and section 552.108(b)(3) are applicable to the information at issue. Accordingly, the district attorney's office may withhold the information you have indicated under section 552.108(a)(4) and section 552.108(b)(3) of the Government Code.<sup>4</sup>

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.<sup>5</sup> *See* Gov't Code § 552.130. Accordingly, the district attorney's office must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

In summary, the district attorney's office must withhold the information you have indicated under section 552.101 of the Government Code in conjunction with the FMLA. Except for the information we have marked for release, district attorney's office must withhold the information you have indicated 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 withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The district attorney's office may withhold the information you have indicated under section 552.108(a)(4) and section 552.108(b)(3) of the Government Code. The district attorney's office must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code. The district attorney's office must release the remaining information.

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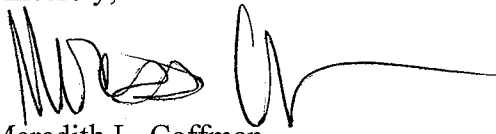
<sup>4</sup> As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

<sup>5</sup> The Office of the Attorney General will raise a mandatory exception 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 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,

A handwritten signature in black ink, appearing to read 'Meredith L. Coffman', with a long horizontal flourish extending to the right.

Meredith L. Coffman  
Assistant Attorney General  
Open Records Division

MLC/jxd

Ref: ID# 790467

Enc. Submitted documents

c: Requestor  
(w/o enclosures)