



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 12, 2019

Mr. Wes Mau
Criminal District Attorney
Hays County Government Center
712 South Stagecoach Trail, Suite 2057
San Marcos, Texas 78666

OR2019-31865

Dear Mr. Mau:

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# 796600 (ORR# 19-0670).

The Hays County District Attorney's Office (the "district attorney's office") received a request for all public record requests received during a specified period of time. The district attorney's office claims the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.111 of the Government Code.¹ We have considered the claimed exceptions and reviewed the submitted representative sample of information.²

Next, we note the submitted information contains a peace officer's Texas Commission on Law Enforcement ("TCOLE") identification number. Section 552.002(a) of the Government Code defines "public information" as information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body;
- (2) for a governmental body and the governmental body:

¹ We understand the district attorney's office to raise section 552.101 in conjunction with common-law privacy rather than section 552.305 of the Government Code based on its arguments.

² This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

(A) owns the information;

(B) has a right of access to the information; or

(C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or

(3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

Gov't Code § 552.002(a). In Open Records Decision No. 581 (1990), this office determined certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. We understand a police officer's TCOLE identification number is a unique computer-generated number assigned to peace officers for identification in the commissioner's electronic database and may be used as an access device number on the TCOLE website. Accordingly, we find the police officer's TCOLE identification number in the submitted information does not constitute public information under section 552.002 of the Government Code. Therefore, the submitted TCOLE identification number is not subject to the Act and need not be released to the requestor.³

The remaining information contains a court-filed document that is subject to section 552.022(a)(17) of the Government Code, which provides the following:

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:

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(17). This information must be released unless it is made confidential under the Act or other law. *See id.* The district attorney's office seeks to withhold the information subject to section 552.022(a)(17) under sections 552.108 and 552.111 of the Government Code. However, sections 552.108 and 552.111 of the Government Code are discretionary and do not make information confidential under the Act. Open Records Decision Nos. 677 (2002) (governmental body may waive attorney work product privilege under section 552.111), 177 (1977) (governmental body may waive statutory predecessor to section 552.108); *see also* Open Records Decision No. 665 at 2 n.5

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

(2000) (discretionary exceptions generally). Therefore, the district attorney's office may not withhold the information subject to section 552.022(a)(17) under section 552.108 or section 552.111. The attorney work product privilege is also found in rule 192.5 of the Texas Rules of Civil Procedure. See TEX. R. CIV. P. 192.5. The Texas Supreme Court has held "[t]he Texas Rules of Civil Procedure are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). However, the Texas Rules of Civil Procedure apply only to "actions of a civil nature." See TEX. R. CIV. P. 2. Thus, because the information at issue relates to a criminal case, the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure does not apply, and the district attorney's office may not withhold the information at issue on that basis. In addition, we note common-law privacy is not applicable to information contained in public court records. See *Star-Telegram v. Walker*, 834 S.W.2d 54 (Tex. 1992). Therefore, no portion of the submitted court-filed document may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. As no other exceptions to disclosure have been raised for this information, the district attorney's office must release the court-filed document pursuant to section 552.022(a)(17) of the Government Code.

The remaining information includes a CR-3 accident report. 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 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). Thus, the district attorney's office must withhold the submitted accident report under section 552.101 of the Government Code in conjunction with section 550.065(b) of the Transportation Code.⁴

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. In addition, the Third 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.). This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate or embarrassing. See generally Open Records Decision Nos.

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

600 at 9-10 (1992), 545 (1990), 523 (1989), 373 (1983). However, there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* ORDs 600 at 9 (information revealing employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure), 545 (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common-law privacy). Whether the public's interest in obtaining personal financial information is sufficient to justify its disclosure must be determined on a case-by-case basis. *See* ORD 373. Additionally, we note, because "the right of privacy is purely personal[,] that right "terminates upon the death of the person whose privacy is invaded[.]" *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 Broad. Corp.*, 472 F. Supp. 145, 146-47 (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))); *see* Attorney General Opinions JM-229 (1984) ("the right of privacy lapses upon death"), H-917 (1976) ("We are . . . of the opinion that the Texas courts would follow the almost uniform rule of other jurisdictions that the right of privacy lapses upon death."); Open Records Decision No. 272 (1981) (the right of privacy is personal and lapses upon death).

Upon review, we find some of the remaining information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the district attorney's office must withhold all living public citizens' dates of birth and the information we indicated, a representative sample of which we marked, under section 552.101 of the Government Code in conjunction with common-law privacy.⁵ However, we find you have failed to demonstrate the remaining information is highly intimate or embarrassing and not of legitimate public concern. Therefore, the district attorney's office may not withhold any of the remaining information under section 552.101 on that basis.

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.

⁵ As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

...

(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 section 552.108 must explain how and why this exception is applicable to the information the governmental body seeks to withhold. *See id.* §§ 552.108, .301(e)(1)(A); *see also* Open Records Decision No. 434 at 2-3 (1986). Upon review, we find you have failed to establish sections 552.108(a)(4) and 552.108(b)(3) are applicable to the remaining information. Therefore, the district attorney's office may not withhold the information on either ground.

You also assert the remaining information is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 of the Government Code excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” Gov't Code § 552.111. This section encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); ORD 677 at 4-8. Rule 192.5 defines work product as:

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.*; ORD

677 at 6-8. In order for this office to conclude the information was made or developed in anticipation of litigation, we must be satisfied that

- a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7. Upon review, we find you have failed to establish section 552.111 is applicable to the remaining information. Therefore, the district attorney's office may not withhold the remaining information on that ground.

Section 552.1175 of the Government Code protects 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.⁶ Gov't Code § 552.1175. Section 552.1175 is also applicable to personal pager and cellular telephone numbers, provided the cellular telephone service or pager service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 of the Government Code not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). The personal information we marked may pertain to individuals subject to section 552.1175(a). Therefore, to the extent the information we marked pertains to an individual subject to section 552.1175(a) of the Government Code and the individual elects to restrict access to the 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, if the marked cellular telephone number is a personal cellular telephone number, it may only be withheld if a governmental body does not pay for the cellular telephone service.

Section 552.130 of the Government Code excepts from disclosure 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. The district attorney's office must withhold the submitted driver's license photograph in its entirety, as well as driver's license numbers, driver's license class types and states of issuance, license plate numbers and states of issuance, and vehicle identification numbers under section 552.130 of the Government Code.

⁶ 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).

Section 552.136 of the Government Code provides, “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” *Id.* § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. *See* Open Records Decision No. 684 at 9 (2009). Accordingly, the district attorney’s office must withhold insurance policy numbers under section 552.136 of the Government Code.

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). *See* Gov’t Code § 552.137(a)-(c). The district attorney’s office must withhold personal e-mail addresses not specifically excluded by subsection (c) under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their public disclosure.

We note some of the remaining information may be subject to copyright law. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the submitted TCOLE identification number is not subject to the Act and need not be released to the requestor. The district attorney’s office must release the court-filed document pursuant to section 552.022(a)(17) of the Government Code. The district attorney’s office must withhold the submitted accident report under section 552.101 of the Government Code in conjunction with section 550.065(b) of the Transportation Code. The district attorney’s office must withhold all living public citizens’ dates of birth and the information we indicated, a representative sample of which we marked, under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the information we marked pertains to an individual subject to section 552.1175(a) of the Government Code and the individual elects to restrict access to the 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, if the marked cellular telephone number is a personal cellular telephone number, it may only be withheld if a governmental body does not pay for the cellular telephone service. The district attorney’s office must withhold the submitted driver’s license photograph in its entirety, as well as driver’s license numbers, driver’s license class types and states of issuance, license plate numbers and states of issuance, and vehicle identification numbers under section 552.130 of the Government Code. The district attorney’s office must withhold insurance policy numbers under section 552.136 of the Government Code. The district attorney’s office must withhold personal e-mail addresses not specifically excluded by subsection (c) under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their public disclosure.

The district attorney's office must release the remaining information; however, any information protected by copyright may only be released in accordance with copyright law.⁷

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,



Michelle Garza
Assistant Attorney General
Open Records Division

MRG/mo

Ref: ID# 796600

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁷ We note the information to be released contains social security numbers and partial social security numbers. 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. Gov't Code § 552.147(b).