



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 1, 2020

Mr. Destry Wilson
Assistant Criminal District Attorney
Rockwall County
1111 East Yellowjacket Lane, Suite 201
Rockwall, Texas 75087

OR2020-12403

Dear Mr. Wilson:

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# 825706.

The Rockwall County Criminal District Attorney's Office (the "district attorney's office") received a request for information pertaining to a particular case. You state the district attorney's office has released some information. You state the district attorney's office will redact information pursuant to sections 552.130(c) and 552.147(b) of the Government Code.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.1085, and 552.111 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

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

¹ Section 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² Although you do not cite section 552.1085 of the Government Code in your brief, we understand the district attorney's office to assert this exception based on your arguments.

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). The district attorney's office must release the submitted information pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. *See id.* Although you raise section 552.111 of the Government Code as an exception to disclosure of some of the submitted information, this section 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 portion 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). 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 a criminal prosecution, 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 information subject to section 552.022(a)(1) may be withheld under sections 552.101 and 552.108, we will address the applicability of these sections to the information at issue.

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses section 11(a) of article 49.25 of the Code of Criminal Procedure, which reads as follows:

The medical examiner shall keep full and complete records properly indexed, giving the name if known of every person whose death is investigated, the place where the body was found, the date, the cause and manner of death, and shall issue a death certificate. . . . The records may not be withheld, subject to a discretionary exception under [the Act], except that a photograph or x-ray of a body taken during an autopsy is excepted from required public disclosure in accordance with [the Act], but is subject to disclosure:

- (1) under a subpoena or authority of other law; or

(2) if the photograph or x-ray is of the body of a person who died while in the custody of law enforcement.

Crim. Proc. Code art. 49.25, § 11(a). You note, and we agree, Exhibit 5 consists of photographs of a body taken during an autopsy. The autopsy photographs at issue are confidential pursuant to section 11 of article 49.25. You state neither of the statutory exceptions to confidentiality is applicable in this instance. Accordingly, we find the district attorney's office must withhold Exhibit 5 under section 552.101 of the Government Code in conjunction with section 11 of article 49.25 of the Code of Criminal Procedure.

Section 552.108 of the Government Code provides, in relevant part, as follows:

(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 section 552.108 must explain how and why this exception is applicable to the information the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706, 710 (Tex. 1977). In *Curry v. Walker*, 873 S.W.2d 379 (Tex. 1994), the Texas Supreme Court held a request for a district attorney's "entire litigation

file” was “too broad” and, quoting *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993), held “the decision as to what to include in [the file] necessarily reveals the attorney’s thought processes concerning the prosecution or defense of the case.” 873 S.W.2d at 380 (internal quotations omitted). You state Exhibit 4 consists of internal records and notations prepared by a prosecutor for the district attorney’s office in the course of preparing for criminal litigation. We also understand this information reflects the mental impressions and legal reasoning of a prosecutor regarding prosecution of the case. Based on these representations and our review, we agree the information at issue reflects the mental impressions or legal reasoning of attorneys representing the state. Therefore, the district attorney’s office may withhold Exhibit 4 under section 552.108(a)(4) and section 552.108(b)(3) of the Government Code.

You raise section 552.101 of the Government Code in conjunction with the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) for Exhibit 3. At the direction of Congress, the Secretary of Health and Human Services (“HHS”) promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* HIPAA, 42 U.S.C. § 1320d-2 (historical and statutory notes); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. pts. 160, 164 (“Privacy Rule”); *see also* Tex. Att’y Gen. Op. No. JC-0508 (2002) at 2. These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, generally a covered entity may not use or disclose protected health information, except as provided by parts 160 and 164 of the Code of Federal Regulations. *Id.* § 164.502(a). This office has addressed the interplay of the Privacy Rule and the Act. In Open Records Decision No. 681 (2004) we considered section 164.512 of title 45 of the Code of Federal Regulations, which provides that “[a] covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law.” *See* 45 C.F.R. § 164.512(a)(1). We noted the Act “is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public.” ORD 681 at 8. Therefore, we held that disclosures under the Act come within section 164.512(a). *See id.* Consequently, the Privacy Rule does not make information confidential for purposes of section 552.101 of the Government Code. *Id.* at 9; *see also* *Abbott v. Tex. Dep’t of Mental Health & Retardation*, 212 S.W.3d 648, 652, 660 (Tex. App.—Austin 2006, no pet.); Open Records Decision No. 478 at 2 (1987) (as a general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the district attorney’s office may not withhold any portion of Exhibit 3 on this basis.

Section 552.101 of the Government Code also encompasses information made confidential by section 181.006 of the Health and Safety Code. Section 181.006 states that:

For a covered entity that is a governmental unit, an individual’s protected health information:

- (1) includes any information that reflects that an individual received health care from the covered entity; and

(2) is not public information and is not subject to disclosure under [the Act].

Health & Safety Code § 181.006. Section 181.001(b)(2) defines “[c]overed entity,” in part, as any person who:

(A) for commercial, financial, or professional gain, monetary fees, or dues, or on a cooperative, nonprofit, or pro bono basis, engages, in whole or in part, and with real or constructive knowledge, in the practice of assembling, collecting, analyzing, using, evaluating, storing, or transmitting protected health information. The term includes a business associate, health care payer, governmental unit, information or computer management entity, school, health researcher, health care facility, clinic, health care provider, or person who maintains an Internet site[.]

Id. § 181.001(b)(2)(A). You do not inform us the district attorney’s office is a covered entity for purposes of section 181.006 of the Health and Safety Code. Thus, we find you have failed to demonstrate Exhibit 3 is subject to section 181.006 of the Health and Safety Code, and the district attorney’s office may not withhold it 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). However, the right to privacy is a personal right that lapses at death and the common-law right to privacy does not encompass information that relates only to a deceased individual. *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 Broadcasting Corp.*, 472 F. Supp. 145, 147 (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))); 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”). Accordingly, information pertaining to a deceased individual may not be withheld on common-law privacy grounds. You assert some of the remaining information is excepted under section 552.101 in conjunction with common-law privacy. Upon review, however, we find no portion of the remaining information is highly intimate or embarrassing and of no legitimate public concern or it pertains solely to a deceased individual. Therefore, the district attorney’s office may not withhold any of the

remaining information under section 552.101 of the Government Code on the basis of common-law privacy.

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 (quoting *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). As previously noted, privacy is a personal right that lapses at death. Thus, information pertaining solely to a deceased individual may not be withheld under constitutional privacy. *See Moore*, 589 S.W.2d at 491; ORD 272 at 1. Upon review, we find the district attorney's office has failed to demonstrate any portion of the remaining information falls within the zones of privacy or implicates a living individual's privacy interests for purposes of constitutional privacy. Therefore, the district attorney's office may not withhold any of the remaining information under section 552.101 on the basis of constitutional privacy.

Section 552.1085 of the Government Code provides, in relevant part, the following:

(c) A sensitive crime scene image in the custody of a governmental body is confidential and excepted from the requirements of Section 552.021 and a governmental body may not permit a person to view or copy the image except as provided by this section. This section applies to any sensitive crime scene image regardless of the date that the image was taken or recorded.

Gov't Code § 552.1085(c). For purposes of section 552.1085, "sensitive crime scene image" means "a photograph or video recording taken at a crime scene, contained in or part of a closed criminal case, that depicts a deceased person in a state of dismemberment, decapitation, or similar mutilation or that depicts the deceased person's genitalia." *See id.* § 552.1085(a)(6). Upon review, we find the remaining photographs do not consist of sensitive crime scene images for the purposes of section 552.1085. Accordingly, the district attorney's office may not withhold any of the remaining photographs under section 552.1085(c) of the Government Code.

In summary, the district attorney's office must withhold Exhibit 5 under section 552.101 of the Government Code in conjunction with section 11 of article 49.25 of the Code of Criminal Procedure. The district attorney's office may withhold Exhibit 4 under section 552.108(a)(4) and section 552.108(b)(3) 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,

Erin Groff
Assistant Attorney General
Open Records Division

EMG/rm

Ref: ID# 825706

Enc. Submitted documents

c: Requestor
(w/o enclosures)