



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 10, 2022

Ms. Amy L. Sims
Deputy City Attorney
City of Lubbock
P.O. Box 2000
Lubbock, Texas 79457

OR2022-07295

Dear Ms. Sims:

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# 934498 (ORR# G001131-113021).

The City of Lubbock (the "city") received a request for information pertaining to a specified incident. You claim the submitted information is excepted from disclosure under sections 552.101, 552.1085, 552.130, 552.136, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information consists of a grand jury subpoena and information obtained pursuant to the grand jury subpoena. The Act applies only to information that is "written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business . . . by a governmental body[.]" Gov't Code § 552.002(a)(1). The judiciary is expressly excluded from the requirements of the Act. *Id.* § 552.003(1)(B). This office has determined for purposes of the Act, a grand jury is a part of the judiciary and therefore not subject to the Act. *See* Open Records Decision No. 411 (1984). Further, records kept by a governmental body that is acting as an agent for a grand jury are considered records in the constructive possession of the grand jury, and are also not subject to the Act. *See* Open Records Decisions Nos. 513 (1988), 411, 398 (1983). Thus, to the extent the city holds the information at issue solely as an agent of the grand jury, such information consists of records of the judiciary that are not subject to disclosure under the Act and the city is not required to release that information in response to the instant request.¹ To the extent the city holds the information at issue in

¹ In that instance, as we are able to make this determination, we need not address your arguments against disclosure of this information.

its own capacity and not solely as an agent of the grand jury, we will address your arguments against its disclosure.

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 encompasses information protected by section 560.003 of the Government Code, which provides, “[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act].” *Id.* § 560.003; *see id.* § 560.001(1) (“biometric identifier” means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry). There is no indication the requestor has a right of access to the biometric identifiers under section 560.002. *See id.* § 560.002(1)(A) (governmental body may not sell, lease, or otherwise disclose individual’s biometric identifier to another person unless the individual consents to disclosure). Accordingly, the city must withhold the submitted fingerprints under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code.

Section 552.101 of the Government Code also encompasses information made confidential by federal law. The submitted information contains information that was reported to the National Trace Center of the Department of Justice Bureau of Alcohol, Tobacco, Firearms and Explosives (the “ATF”). Public Law number 112-55 states, in pertinent part, as follows:

[D]uring the current fiscal year and in each fiscal year thereafter, no funds appropriated under [the Consolidated and Further Continuing Appropriations Act, 2012] or any other [a]ct may be used to disclose part or all of the contents of the Firearms Trace System database maintained by the National Trace Center of the [ATF] or any information required to be kept by licensees pursuant to section 923(g) of title 18, United States Code, or required to be reported pursuant to paragraphs (3) and (7) of such section, except to: (1) a Federal, State, local, or trial law enforcement agency, or a Federal, State, or local Prosecution . . . unless such disclosure of such data to a[n] . . . entit[y] described in (1) . . . of this provision would compromise the identity of any undercover law enforcement officer or confidential informant, or interfere with any case under investigation; and no person or entity described in (1) . . . shall knowingly and publicly disclose such data; and all such data shall be immune from legal process, shall not be subject to subpoena or other discovery, shall be inadmissible in evidence, and shall not be used, relied on, or disclosed in any manner, nor shall testimony or other evidence be permitted based on the data, in a civil action in any State[.]

Consolidated and Further Continuing Appropriations Act, 2021, Pub. L. No. 112-55, 125 Stat. 552, 609-10 (2011). The submitted information contains a Firearms Trace Summary, which consists of content from the Firearms Trace System database maintained by the National Trace Center. Upon review, we find the submitted Firearms Trace Summary is confidential under Public Law number 112-55. *See Miller v. U.S. Dep’t of Justice*, 562 F.Supp. 2d 82, 111 (D.D.C. 2008) (holding Firearms Trace Report properly withheld under Freedom of Information Act exemption 3, which covers records that are exempt from

disclosure by statute). Accordingly, the city must withhold the submitted Firearms Trace Summary, which we marked and indicated, under section 552.101 of the Government Code in conjunction with Public Law number 112-55.

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. This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Upon review, we find the information we marked constitutes a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician. Accordingly, the city must withhold the information we marked under section 552.101 of the Government Code in conjunction with the MPA.

Section 552.101 of the Government Code also encompasses information protected by section 11 of article 49 of the Code of Criminal Procedure, which provides:

- (a) 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). Upon review, we find some of the remaining information at issue consists of photographs of a body taken during an autopsy. The city does not indicate either of the statutory exceptions to confidentiality is applicable in this instance. Thus, the city must withhold the information we indicated under section 552.101 of the Government Code in conjunction with section 11 of article 49.25 of the Code of Criminal Procedure.

Section 552.101 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. 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 personal financial information not relating to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. *See* Open Records Decision Nos. 600 (1992) (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). We note common-law privacy protects the interests of individuals, not those of corporate and other business entities. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989) (corporation has no right to privacy (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950))), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990). We also note 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 § 625I (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”). Accordingly, information pertaining to a deceased individual may not be withheld on common-law privacy grounds. We further note common-law privacy is not applicable to

information contained in public court records. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (action for invasion of privacy cannot be maintained where information is in public domain); *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57 (Tex. 1992) (law cannot recall information once in public domain).

Upon review, we find some of the remaining information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the city must withhold the information we marked and indicated under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find you have failed to demonstrate any of the remaining information is highly intimate or embarrassing and not of legitimate public concern. Thus, the city may not withhold any of the remaining information under section 552.101 in conjunction with common-law 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 none of the submitted photographs consist of sensitive crime scene images for the purposes of section 552.1085. Accordingly, the city may not withhold any of the submitted photographs under section 552.1085(c) of the Government Code.

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.² *Id.* § 552.1175. Section 552.1175 applies, in part, to "current or honorably retired peace officers as defined by Article 2.12, Code of Criminal Procedure[.]" *See id.* § 552.1175(a)(1); *see also id.* § 552.003(1-b) (defining "honorably retired" for purposes of the Act). Section 552.1175 also applies to "a firefighter or volunteer firefighter or emergency medical services personnel as defined by Section 773.003 of the Health and Safety Code[.]" *Id.* § 552.1175(a)(18). We note section 552.1175 is applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See Open Records Decision No. 506 at 5-6 (1988)*. Some of the remaining information may pertain to individuals subject

² 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)*.

to section 552.1175(a)(1) and section 552.1175(a)(18). Thus, to the extent the information we marked relates to individuals listed under section 552.1175(a) of the Government Code and the individuals elect to restrict access to the information in accordance with section 552.1175(b) of the Government Code, the city must withhold the information we marked under section 552.1175 of the Government Code; however, the city may only withhold the marked cellular telephone number if a governmental body did not pay for the cellular telephone service.

Section 552.130 of the Government Code exempts from public 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. *See* Gov't Code § 552.130. We note section 552.130 protects personal privacy. Because the right of privacy lapses at death, motor vehicle record information that pertains solely to a deceased individual may not be withheld under section 552.130. *See Moore*, 589 S.W.2d at 491; *see also* Attorney General Opinions JM-229, H-917; ORD 272. Accordingly, the city must withhold the motor vehicle record information we marked and indicated under section 552.130 of the Government Code.

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." Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). We note the purpose of section 552.136 is to protect the privacy interests of individuals. Because the right of privacy lapses at death, account information that pertains solely to a deceased individual may not be withheld under section 552.136. *See Moore*, 589 S.W.2d at 491; *see also* Attorney General Opinions JM-229, H-917; ORD 272. Therefore, to the extent the information we marked and indicated pertains to an account in which a living individual has an interest, the city must withhold the information we marked and indicated under section 552.136 of the Government Code. However, to the extent the information at issue pertains solely to a deceased individual, the city may not withhold the marked and indicated information under section 552.136 of the Government Code.

Section 552.147 of the Government Code exempts from disclosure the social security number of a living person. Gov't Code § 552.147. Upon review, we agree the city may withhold the social security numbers pertaining to living individuals within the remaining information under section 552.147 of the Government Code.

In summary, to the extent the city holds grand jury subpoenas solely as an agent of the grand jury, such information consists of records of the judiciary that are not subject to disclosure under the Act and the city is not required to release that information in response to the instant request. The city must withhold the submitted fingerprints under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code. The city must withhold the submitted Firearms Trace Summary, which we marked and indicated, under section 552.101 of the Government Code in conjunction with Public Law number 112-55. The city must withhold the information we marked under section 552.101 of the Government Code in conjunction with the MPA. The city must withhold the information we indicated under section 552.101 of the Government Code in conjunction

with section 11 of article 49.25 of the Code of Criminal Procedure. The city must withhold the information we marked and indicated under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the information we marked relates to individuals listed under section 552.1175(a) of the Government Code and the individuals elect to restrict access to the information in accordance with section 552.1175(b) of the Government Code, the city must withhold the information we marked under section 552.1175 of the Government Code; however, the city may only withhold the marked cellular telephone number if a governmental body did not pay for the cellular telephone service. The city must withhold the motor vehicle record information we marked and indicated under section 552.130 of the Government Code. To the extent the information we marked and indicated pertains to an account in which a living individual has an interest, the city must withhold the information we marked and indicated under section 552.136 of the Government Code; however, to the extent the information at issue pertains solely to a deceased individual, the city may not withhold the marked and indicated information under section 552.136 of the Government Code. The city may withhold the social security numbers pertaining to living individuals within the remaining information under section 552.147 of the Government Code. The city 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,

Joseph Hoggatt
Assistant Attorney General
Open Records Division

JWH/ba

Ref: ID# 934498

Enc. Submitted documents

c: Requestor
(w/o enclosures)