



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 23, 2009

Ms. Ashley D. Fourt
Assistant District Attorney
Tarrant County Criminal District Attorney's Office
401 West Belknap
Fort Worth, Texas 76196-0201

OR2009-13429

Dear Ms. Fourt:

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# 356268.

The Tarrant County Criminal District Attorney's Office (the "district attorney") and the Tarrant County Sheriff's Office (the "sheriff") received separate requests from the same requestor for information relating to (1) prosecution of a named individual; (2) arrest and transportation of the individual, including medical records; and (3) sheriff's department policies regarding provision of medical care to and transportation of persons in custody.¹ You have submitted information that the district attorney and the sheriff (collectively "the county") seek to withhold under sections 552.101, 552.103 and 552.1325 of the Government Code. We also understand you to contend that some of the submitted information is not subject to disclosure under the Act. We have considered your arguments and reviewed the

¹You inform us that one case file involving the named individual has been destroyed in accordance with the district attorney's record retention policy. You also state that John Peter Smith Hospital, rather than the sheriff, is the custodian of inmate medical records. We note that the Act does not require a governmental body to release information that did not exist when it received a request, create responsive information, or obtain information that is not held by the governmental body or on its behalf. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 534 at 2-3 (1989), 518 at 3 (1989), 452 at 3 (1986), 362 at 2 (1983).

submitted information. We also have considered the comments that we received from the requestor.²

Initially, we address your objection to the release of grand jury information. The judiciary is expressly excluded from the requirements of the Act. *See* Gov't Code § 552.003(1)(B). This office has determined that for the purposes of the Act, a grand jury is a part of the judiciary and is therefore not subject to the Act. *See* Open Records Decision No. 411 (1984). Moreover, records kept by another person or entity acting as an agent for a grand jury are considered to be records in the constructive possession of the grand jury and therefore are not subject to the Act. *See* Open Records Decisions Nos. 513 (1988), 398 (1983); *but see* ORD 513 at 4 (defining limits of judiciary exclusion). The fact that information collected or prepared by another person or entity is submitted to the grand jury does not necessarily mean that such information is in the grand jury's constructive possession when the same information is also held in the other person's or entity's own capacity. Information held by another person or entity but not produced at the direction of the grand jury may well be protected under one of the Act's specific exceptions to disclosure, but such information is not excluded from the reach of the Act by the judiciary exclusion. *See* ORD 513. Thus, to the extent that the county has possession of the submitted information as an agent of the grand jury, such information is in the grand jury's constructive possession and is not subject to the Act. This decision does not address the public availability of any such information. To the extent that the county does not have possession of the submitted information as an agent of the grand jury, the information is subject to the Act and must be released unless it falls within an exception to public disclosure.

We note that much of the submitted information falls within the scope of section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). Section 552.022(a)(17) provides for required disclosure of "information that is also contained in a public court record[.]" *Id.* § 552.022(a)(17). In this instance, the information submitted as Exhibit C-1 consists of completed investigations made of, for, or by the county that are subject to section 552.022(a)(1), and the information submitted as Exhibit C-2 includes court-filed documents that are subject to section 552.022(a)(17). We have marked the information that is subject to section 552.022(a)(1) and (17). We note that you do not claim an exception under section 552.108 for the information that is subject to section 552.022(a)(1). Although you do seek to withhold all of the submitted information under section 552.103 of the Government Code, that section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex.

²*See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to Gov't Code § 552.103 could be waived). As such, section 552.103 is not other law that makes information expressly confidential for the purposes of section 552.022(a)(1), (14) and (17). Therefore, the county may not withhold any of the marked information that is subject to section 552.022(a)(1) and (17) under section 552.103. We note that you also raise sections 552.101 and 552.1325 of the Government Code, which are confidentiality provisions for the purposes of section 552.022(a)(1) and (17). Accordingly, we will determine whether the county must withhold any of the information that is subject to section 552.022(a)(1) and (17) under section 552.101 or section 552.1325. Additionally, we will address your claim under section 552.103 for the information that is not subject to section 552.022.

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 exception encompasses information that other statutes make confidential. You raise section 552.101 in conjunction with article 20.02(a) of the Code of Criminal Procedure, which provides that “[t]he proceedings of the grand jury shall be secret.” Crim. Proc. Code art. 20.02(a). In construing article 20.02 of the Code of Criminal Procedure, the types of “proceedings” Texas courts have generally stated are secret are testimony presented to the grand jury and the deliberations of the grand jury. *See In re Reed*, 227 S.W.3d 273, 276 (Tex. App.—San Antonio 2007, no pet.); *see also Stern v. State*, 869 S.W.2d 614 (Tex. App.—Houston [14th Dist] 1994, no writ) (stating that anything that takes place before the bailiffs and grand jurors, including deliberations and testimony, is secret). Although you claim article 20.02 for the information that is subject to section 552.022(a)(1), you have not demonstrated that any of the information in question reveals grand jury testimony or deliberations of the grand jury. We therefore conclude that the county may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with article 20.02 of the Code of Criminal Procedure.

Section 552.101 also encompasses common-law privacy, which protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy encompasses certain types of personal financial information. Financial information that relates only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See Open Records Decision Nos. 600 at 9-12 (1992) (identifying public and private portions of state employees' personnel records), 545 at 4 (1990) (“In general, we have found the kinds of financial information not excepted from public disclosure by common-law privacy to be those regarding the receipt of governmental funds or debts owed to governmental entities”), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial*

information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), 373 at 4 (1983) (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis). We have marked personal financial information that the county must withhold under section 552.101 in conjunction with common-law privacy.

Section 552.1325 of the Government Code provides as follows:

(a) In this section:

(1) "Crime victim" means a person who is a victim as defined by Article 56.32, Code of Criminal Procedure.

(2) "Victim impact statement" means a victim impact statement under Article 56.03, Code of Criminal Procedure.

(b) The following information that is held by a governmental body or filed with a court and that is contained in a victim impact statement or was submitted for purposes of preparing a victim impact statement is confidential:

(1) the name, social security number, address, and telephone number of a crime victim; and

(2) any other information the disclosure of which would identify or tend to identify the crime victim.

Gov't Code § 552.1325. In this instance, you have not demonstrated that any of the information encompassed by section 552.022 either is contained in a victim impact statement or was submitted for purposes of preparing a victim impact statement. We therefore conclude that the county may not withhold any of the submitted information under section 552.1325 of the Government Code.

Next, we note that sections 552.130, 552.136, and 552.137 of the Government Code are applicable to some of the information that is subject to section 552.022(a)(1) and (17).³ These sections also are confidentiality provisions for the purposes of section 552.022(a)(1) and (17). Section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle operator's or driver's license or permit or a motor vehicle title or registration issued by an agency of this state. *See* Gov't Code § 552.130(a)(1)-(2). We have

³Unlike other exceptions to disclosure under the Act, this office will raise sections 552.130, 552.136, and 552.137 on behalf of a governmental body, as these exceptions are mandatory and may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

marked Texas driver's license and motor vehicle information that the county must withhold under section 552.130.

Section 552.136 of the Government Code provides in part that "[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"). We have marked bank account numbers that the county must withhold under section 552.136.

Section 552.137 of the Government Code provides that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure. *Id.* § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We have marked a personal e-mail address that the county must withhold under section 552.137, unless the owner of the e-mail address has affirmatively consented to its public disclosure.

Next, we address the information that is not subject to 552.022(a)(1) and (17). We note that the information at issue includes medical records that are governed by the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. Section 159.002 of the MPA provides in part:

(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.

Id. § 159.002(b)-(c). This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of the Act. *See* Open Records Decision No. 598 (1991). Medical records must be released on the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) the reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). We

have marked medical records relating to the individual whose records are the subject of these requests for information. The marked medical records must be withheld under section 159.002 of the MPA unless the county receives the required written consent for release under sections 159.004 and 159.005.

We also note that the information at issue includes the individual's thumb print. Section 560.003 of the Government Code provides that "[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act]." Gov't Code § 560.003; *see id.* § 560.001(1) ("biometric identifier" means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry). Section 560.002 of the Government Code provides, however, that "[a] governmental body that possesses a biometric identifier of an individual . . . may not sell, lease, or otherwise disclose the biometric identifier to another person unless . . . the individual consents to the disclosure[.]" *Id.* § 560.002(1)(A). In this instance, the requestor is an attorney for the individual whose thumb print we have marked. Therefore, the marked thumb print must be released to this requestor pursuant to section 560.002(1)(A). *See* Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself).

Next, we address your claim under section 552.103 of the Government Code for the remaining information that is not subject to 552.022(a)(1) and (17). This exception provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To meet this burden, a governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v.*

Houston Post Co., 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.* This office has concluded that a governmental body’s receipt of a claim letter that it represents to be in compliance with the notice requirements of the Texas Tort Claims Act (the “TTCA”), chapter 101 of the Civil Practice and Remedies Code, is sufficient to establish that litigation is reasonably anticipated. If this representation is not made, then the receipt of the claim letter is a factor that we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established that litigation is reasonably anticipated. *See* Open Records Decision No. 638 at 4 (1996).

You contend that the county reasonably anticipated litigation on the date of its receipt of the present requests for information. You also contend that the remaining information is related to the anticipated litigation. You inform us, and have provided documentation reflecting, that the county received a notice of claim from the requestor prior to the county’s receipt of his requests for information. You do not affirmatively represent to this office, however, that the notice of claim complies with the TTCA. Nevertheless, based on your representations, the county’s receipt of the claim, and our review of the claim, we find that the county reasonably anticipated litigation on the date of its receipt of these requests. We also find that the remaining information is related to the anticipated litigation. We therefore conclude that section 552.103 is generally applicable to the remaining information.

We note, however, that the opposing party in the anticipated litigation has already seen or had access to some of the remaining information. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. If the opposing party has already seen or had access to information relating to anticipated litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, the information that the opposing party has already seen may not be withheld under section 552.103. We have marked that information, most of which must be released. The county may withhold the rest of the information that is not subject to 552.022(a)(1) and (17) under section 552.103. We note that the applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We note that section 552.101 is applicable to some of the information that the opposing party in the litigation has seen. Section 552.101 also encompasses constitutional privacy, which protects two kinds of interests. See *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first is the interest in independence in making certain important decisions related to the "zones of privacy" pertaining to marriage, procreation, contraception, family relationships, and child rearing and education that the United States Supreme Court has recognized. See *Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981); ORD 455 at 3-7. The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. See *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual's privacy interest against the public's interest in the information. See ORD 455 at 7. Constitutional privacy is reserved for "the most intimate aspects of human affairs." *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492). The county must withhold the inmate visitor information we have marked under section 552.101 in conjunction with constitutional privacy. See Open Records Decision No. 430 (1985) (list of inmate's visitors protected by constitutional law); cf. Open Records Decision No. 428 (1985) (list of inmate's correspondents protected by constitutional privacy).

Lastly, we note that some of the information that must be released appears to be protected by copyright. A governmental body must allow inspection of copyrighted information unless an exception to disclosure applies to the information. See Attorney General Opinion JM-672 (1987). An officer for public information also must comply with copyright law, however, and is not required to furnish copies of copyrighted information. *Id.* A member of the public who wishes to make copies of copyrighted information 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. See Open Records Decision No. 550 at 8-9 (1990).

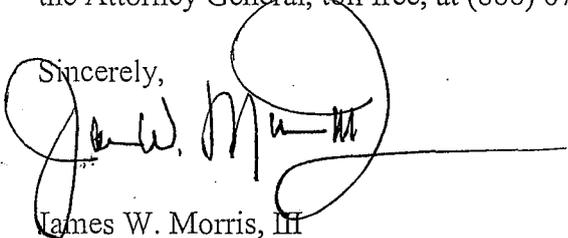
In summary: (1) any information maintained by the county as an agent of the grand jury is not subject to the Act; (2) the marked personal financial information must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy; (3) the marked Texas driver's license and motor vehicle information must be withheld under section 552.130 of the Government Code; (4) the marked bank account numbers must be withheld under section 552.136 of the Government Code; (5) the marked e-mail address must be withheld under section 552.137 of the Government Code unless the owner has consented to its disclosure; (6) the marked medical records must be withheld under section 159.002 of the MPA unless the county receives the required written consent for release under sections 159.004 and 159.005; (7) the marked thumb print must be released under section 560.002(1)(A) of the Government Code; (8) the rest of the information that is not subject to section 552.022(a)(1) and (17) may be withheld under section 552.103 of the Government Code, except for the marked information that the opposing party in the anticipated litigation has already seen; and (9) the marked inmate visitor information must

be withheld under section 552.101 in conjunction with constitutional privacy.⁴ The county must release the rest of the marked information that is subject to section 552.022(a)(1) and (17) of the Government Code and the remaining information that the opposing party has already seen.⁵ Any information that is protected by copyright may only be released in accordance with copyright law.

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 http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/cc

Ref: ID# 356268

Enc: Submitted documents

c: Requestor
(w/o enclosures)

⁴We note that the submitted information includes 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 under the Act. The requestor has a right, however, to his client's social security number. *See generally* Gov't Code § 552.023(b) (governmental body may not deny access to person to whom information relates, or that person's representative, solely on grounds t

⁵We note that the county would ordinarily be required to withhold some of the information that must be released to protect the privacy of the individual to whom the information pertains. In this instance, however, the requestor has a right of access to that information, which pertains to his client. *See* Gov't Code § 552.023(a); ORD 481 at 4. Should the county receive another request for these same records from a person who would not have a right to the requestor's client's private information, the county should resubmit these records and request another decision. *See* Gov't Code §§ 552.301(a), .302.