



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 3, 2011

Mr. J. David Dodd, III  
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OR2011-01796

Dear Mr. Dodd:

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# 406519 (Lancaster ID Number 46329 and 46384).

The City of Lancaster (the "city"), which you represent, received two requests for a specified investigation. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.119 of the Government Code.<sup>1</sup> You further state some of the submitted audio and video may be subject to the privacy interests of the family of the deceased individual at issue in the submitted audio and video. Thus, pursuant to section 552.304 of the Government Code, you state, and provide documentation showing, you have notified the family of the request and of their right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the city obtained the submitted mental health records in Tab 7 of the Dallas County Sheriff's Report pursuant to a grand jury subpoena. The judiciary is expressly excluded from the requirements of the Act. *See id.* § 552.003(1)(B). This office has

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<sup>1</sup>Although you raise section 552.103(a) of the Administrative Procedure Act, we note this section does not exist. Thus, we understand you to raise section 552.103 of the Government Code.

determined that a grand jury, for purposes of the Act, 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 therefore are also not subject to the Act. *See* Open Records Decisions Nos. 513 (1988), 411, 398 (1983). *But see* ORD 513 at 4 (defining limits of judiciary exclusion). We therefore conclude that the mental health records in Tab 7 are in the custody of the city as an agent of the grand jury and are not subject to the Act. Thus, this ruling does not address the public availability of this information.

Next, we note the city failed to meet the deadlines set forth in section 552.301 of the Government Code with respect to a portion of the submitted information. Section 552.301 of the Government Code describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code §552.301(e)(1)(A). You state the city received the present request for information on November 4, 2010. Accordingly, the city's fifteen-business-day deadline under section 552.301(e) was November 30, 2010. However, the city did not submit a portion of the responsive information until January 20, 2011. Consequently, with respect to the information submitted on January 20, we find the city failed to comply with the requirements of section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). Normally, a compelling interest is demonstrated when some other source of law makes the information at issue confidential or third-party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). You assert the information at issue, which was not timely submitted, is excepted from disclosure under section 552.101. Because section 552.101 of the Government Code can provide a compelling reason to withhold information, we will address your claim under this exception.

Section 552.101 of the Government Code excepts from public 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, such as section 261.201(a) of the Family Code, which provides in pertinent part:

(a) [T]he following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). You state the submitted information consists of an investigation wherein Child Protective Services ("CPS") was contacted and the case referred. Upon review, we agree that a portion of this information, Tab 14 of the Dallas County Sheriff's Report, pertains to an investigation by CPS of alleged child abuse or neglect. *See id.* § 261.001(1), (4) (defining "abuse" and "neglect" for purposes of Family Code ch. 261); *see also id.* § 101.003(a) (defining "child" for purposes of this section as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes). Accordingly, Tab 14 is within the scope of section 261.201 of the Family Code. You have not indicated that the city has adopted a rule that governs the release of this type of information. Therefore, we assume that no such regulation exists. Given that assumption, we find that Tab 14 is confidential pursuant to section 261.201 of the Family Code and must be withheld in its entirety under section 552.101 of the Government Code. *See* Open Records Decision Nos. 440 at 2 (1986) (predecessor statute). As to the remaining submitted information, we find it pertains to a murder investigation that was not created pursuant to chapter 261 of the Family Code. Accordingly, the remaining information may not be withheld under section 552.101 on that basis.

We understand you to raise section 552.103 of the Government Code for the timely submitted information. Section 552.103 provides, in part, as follows:

(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). The governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date of the governmental body's receipt of the request, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). For purposes of section 552.103(a), this office considers a contested case under the Texas Administrative Procedure Act, chapter 2001 of the Government Code, to constitute "litigation." See Open Records Decision No. 588 (1991).

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). When the governmental body is the prospective plaintiff in litigation, the evidence of anticipated litigation must at least reflect that litigation involving a specific matter is "realistically contemplated." See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982) (investigatory file may be withheld if governmental body's attorney determines that it should be withheld pursuant to Gov't Code § 552.103 and that litigation is "reasonably likely to result").

You state the remaining information relates to an ongoing internal affairs investigation. However, you have failed to provide any arguments explaining how this information is related to litigation that was pending or reasonably anticipated on the date of the city's receipt of the requests. Consequently, we find the city may not withhold any portion of the remaining information pursuant to section 552.103 of the Government Code.

You also raise section 552.119 of the Government Code for the timely submitted information. Section 552.119 provides:

(a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, the release of which would endanger the life or physical safety of the officer, is excepted from [required public disclosure] unless:

- (1) the officer is under indictment or charged with an offense by information;
- (2) the officer is a party in a civil service hearing or a case in arbitration; or
- (3) the photograph is introduced as evidence in a judicial proceeding.

(b) A photograph excepted from disclosure under Subsection (a) may be made public only if the peace officer gives written consent to the disclosure.

Gov't Code § 552.119. By its terms, section 552.119 only applies to photographs of licensed peace officers as defined by article 2.12. *Id.* § 552.119(a). Further, to demonstrate the applicability of section 552.119, a governmental body must demonstrate that release of the photograph would endanger the life or physical safety of a police officer. In this instance, you have not explained how release of any of the remaining information would endanger an officer's life or physical safety. Accordingly, we find you have failed to demonstrate the applicability of section 552.119 to any of the remaining information; therefore, no portion of the remaining information may be withheld on that basis.

Section 552.101 of the Government Code also encompasses criminal history record information ("CHRI") generated by the National Crime Information Center (the "NCIC") or by the Texas Crime Information Center (the "TCIC"). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that state agencies obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that DPS may disseminate this information in accordance with chapter 411, subchapter F 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 only release CHRI to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-411.127. Furthermore, 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, subchapter F. We note that because the laws governing the dissemination of information obtained from NCIC and TCIC are based on both law enforcement and privacy interests, the CHRI of a deceased individual that is obtained from a criminal justice agency may be disseminated only as permitted by subchapter F of chapter 411 of the Government Code. *See* ORD 565 at 10-12. Upon review, we have marked the portions of the remaining information that constitutes CHRI. The city must withhold the CHRI we have marked under section 552.101 of the

Government Code in conjunction with chapter 411 of the Government Code. *See* Gov't Code § 411.083(b)(3).

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is 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 demonstrated. *Id.* at 681-82. This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate and embarrassing. *See* Open Records Decision No. 545 (1990). However, because privacy is a personal right that lapses at death, the common-law right to privacy does not encompass information that relates only to a deceased individual. Accordingly, information pertaining to a deceased individual may not be withheld on common-law privacy grounds. *See Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ ref'd n.r.e.); *see also* Open Records Decision No. 272 at 1 (1981) (privacy rights lapse upon death). Upon review, we have marked information that is highly intimate or embarrassing and is not of legitimate public concern. This information must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.101 also encompasses the constitutional right to privacy. Constitutional privacy 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 have been recognized by the United States Supreme Court. *See Fado 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 under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492). We note that the right to privacy is a personal right that lapses at death and therefore may not be asserted solely on behalf of a deceased individual. *See Moore*, 589 S.W.2d at 491; ORD 272 at 1 (privacy rights lapse upon death).

The United States Supreme Court has determined, however, that surviving family members can have a privacy interest in information relating to their deceased relatives. *See Nat'l Archives & Records Admin. v. Favish*, 124 S. Ct. 1570 (2004). Because a portion of the submitted information relates to a deceased individual, it may not be withheld from disclosure based on his privacy interests. However, as noted above, you have notified the decedent's family of their right to assert a privacy interest in the information at issue.

However, as of the date of this decision, we have received no correspondence from the surviving family members of the decedent. Thus, we have no basis for determining that the family has a privacy interest in any of the submitted information. Therefore, the remaining information may not be withheld under section 552.101 of the Government Code on the basis of constitutional privacy.

Section 552.117(a)(4) excepts from disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of a peace officer who was killed in the line of duty, regardless of whether the deceased complied with Section 552.024 or 552.1175.<sup>2</sup> Gov't Code § 552.117(a)(4). Accordingly, the city must withhold the information we have marked under section 552.117(a)(4) of the Government Code.

Section 552.130 of the Government Code excepts from disclosure "information [that] relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state." *Id.* § 552.130(a). However, section 552.130 protects the privacy interests of individuals, and the right to privacy lapses at death. *See Moore*, 589 S.W.2d at 491. Thus, the city must withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code only if living individuals have ownership interests in the information at issue.<sup>3</sup>

In summary, the city must withhold Tab 14 of the Dallas County Sheriff's Report under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. The city must withhold the CHRI we have marked under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. The city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The city must withhold the information we have marked under section 552.117(a)(4) of the Government Code. The city must withhold the Texas motor vehicle record information we have marked pursuant to section 552.130 of the

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<sup>2</sup>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).*

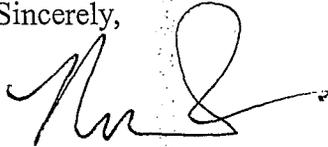
<sup>3</sup>We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas driver's license and license plate numbers and a copy of a Texas driver's license under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.

Government Code only if living individuals have an ownership interest in the information at issue. The remaining information must be released.<sup>4</sup>

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](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,



Nneka Kanu  
Assistant Attorney General  
Open Records Division

NK/vb

Ref: ID# 406519

Enc. Submitted documents

c: 2 Requestors  
(w/o enclosures)

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<sup>4</sup>The remaining information contains social security numbers of living individuals. 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. Gov't Code § 552.147(b).