



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 5, 2012

Mr. Michael M. Kelly
Assistant Criminal District Attorney
Victoria County
205 North Bridge Street, Suite 301
Victoria, Texas 77901

OR2012-03245

Dear Mr. Kelly:

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# 447076.

The Victoria County Sheriff’s Office (the “sheriff”) received a request for all criminal history information related to a specified individual, including arrest warrants, search warrants, probable cause affidavits, complaint, information, indictment, offense reports, booking history, bond supervision information, laboratory and test results, sociological information, criminal history reports maintained by Victoria County, psychological and mental status reports, and any reports of misconduct while in custody. You state the sheriff does not have any information responsive to the request for sociological information. You state you have released or will release some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹Although you raise the attorney work product privilege in conjunction with section 552.101 of the Government Code, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). We note section 552.111 of the Government Code is the appropriate exception to raise for the attorney work product privilege, for information not subject to section 552.022.

²We assume the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

Initially, we address your statement that the requested arrest warrants, search warrants, probable cause affidavits, complaint, information, and indictment “are Public Records and can be acquired at the Victoria County District Clerk’s office.” You do not indicate whether the sheriff possesses or has a right of access to any information responsive to this portion of the request. The Act generally does not require a governmental body to obtain information not in its possession. *See* Open Records Decision Nos. 558 at 2 (1990) (Act not applicable if governmental body does not have right of access to or ownership of information prepared for it by an outside entity), 445 at 2 (1986) (Act not applicable to information governmental body never possessed or was entitled to receive). However, a governmental body must make a good-faith effort to relate a request to any responsive information within its possession or control. Open Records Decision No. 561 at 8-9 (1990). We assume the sheriff has made a good-faith effort to do so. Therefore, to the extent any information responsive to this portion of the request existed on the date the sheriff received the request, we presume the sheriff has released it. If not, the sheriff must do so at this time. *See* Gov’t Code §§ 552.301, .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to the requested information, it must release information as soon as possible).

Next, we note you have redacted portions of the submitted information. Pursuant to section 552.301 of the Government Code, a governmental body that seeks to withhold requested information must submit to this office a copy of the information, labeled to indicate which exceptions apply to which parts of the copy, unless the governmental body has received a previous determination for the information at issue. *See* Gov’t Code § 552.301(a), (e)(1)(D). You do not assert, nor does our review of our records indicate, the sheriff has been authorized to withhold the redacted information without seeking a ruling from this office. *Id.* § 552.301(a); Open Records Decision No. 673 (2000). As such, this information must be submitted in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. In this instance, we can discern the nature of the redacted information; thus, being deprived of that information does not inhibit our ability to make a ruling. In the future, however, the sheriff should refrain from redacting any information it is not authorized to withhold in seeking an open records ruling. Failure to do so may result in the presumption the redacted information is public. *See* Gov’t Code § 552.302.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. Section 552.101 encompasses section 611.002 of the Health and Safety Code. Section 611.002 of the Health and Safety Code provides, “[c]ommunications between a patient and a professional, records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional are confidential.” Health & Safety Code § 611.002; *see also id.* § 611.001 (defining “patient” and “professional”). Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See id.* § 611.001(2). Sections 611.004 and 611.0045

provide for access to mental health records only by certain individuals, including “a person who has the written consent of the patient, or a parent if the patient is a minor [.]” *See id.* §§ 611.004(a)(4), 611.0045; Open Records Decision No. 565 (1990). We have marked mental health records that are confidential under section 611.002 of the Health and Safety Code but must be released to the requestor if he is authorized to obtain the mental health records under sections 611.004 and 611.0045 of the Health and Safety Code.

Section 552.101 also encompasses information protected by the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. 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(b), (c). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has determined that 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). The medical records must be released upon the patient’s signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Medical records may be released only as provided under the MPA. ORD 598. In this instance, the requestor is the authorized representative of the individual whose medical records are at issue. Thus, the requestor may have a right of access to this individual’s medical records under the MPA. *See* Occ. Code § 159.005(a)(2). Accordingly, the medical records we have marked may only be released in accordance with the MPA.³

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

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information if it (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 established. *Id.* at 681–82. The type of information considered highly intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, although some of the information at issue may be considered highly intimate or embarrassing, we find it is of legitimate public interest here because it pertains to the details of the crime at issue. *See* Open Records Decision No. 400 at 4 (1983); *see generally* *Lowe v. Hearst Communications, Inc.*, 487 F.3d 246, 250 (5th Cir. 2007) (noting “legitimate public interest in facts tending to support an allegation of criminal activity” (citing *Cinel v. Connick*, 15 F.3d 1338, 1345-46 (1994))). Accordingly, the sheriff may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses information protected by the common-law informer’s privilege, which has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law enforcement authority, provided the subject of the information does not already know the informer’s identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer’s privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to “administrative officials having a duty of inspection or of law enforcement within their particular spheres.” Open Records Decision No. 279 at 2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law* § 2374, at 767 (J. McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5.

You seek to withhold an informer’s identifying information under the common-law informer’s privilege. You indicate one of the affidavits in Appendix E reveals the identity of an informer who aided in law enforcement efforts to investigate the person who is the subject of the information at issue. The alleged violations reported by this informer resulted in the arrest of the two individuals. There is no indication the subject of the information at issue knows the identity of the informer. Based on your representation and our review, we

conclude the sheriff may withhold the informer's identifying information on the affidavit indicated, which we have marked, under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. However, you have failed to establish the informer's privilege is applicable to the remaining information, and the sheriff may not withhold any of the remaining information, including the information you have redacted, under section 552.101 on that basis.

We understand you to also claim the identifying informer information in Appendix E is excepted from required disclosure under section 552.101 of the Government Code in conjunction with the common-law physical safety exception. For many years, this office determined section 552.101, in conjunction with the common-law right to privacy, protected information from disclosure when "special circumstances" exist in which the disclosure of information would place an individual in imminent danger of physical harm. *See, e.g.*, Open Records Decision Nos. 169 (1977) (special circumstances required to protect information must be more than mere desire for privacy or generalized fear of harassment or retribution), 123 (1976) (information protected by common-law right of privacy if disclosure presents tangible physical danger). However, the Texas Supreme Court has held freedom from physical harm does not fall under the common-law right to privacy. *Tex. Dep't of Pub. Safety v. Cox Tex. Newspapers, LP. & Hearst Newspapers, LLC*, 343 S.W.3d 112 (Tex. 2011) (holding "freedom from physical harm is an independent interest protected under law, untethered to the right of privacy"). Instead, in *Cox*, the court recognized, for the first time, a separate common-law physical safety exception to required disclosure that exists independent of the common-law right to privacy. *Id.* at 118. Pursuant to this common-law physical safety exception, "information may be withheld [from public release] if disclosure would create a substantial threat of physical harm." *Id.* In applying this new standard, the court noted "deference must be afforded" law enforcement experts regarding the probability of harm, but further cautioned that "vague assertions of risk will not carry the day." *Id.* at 119. You argue the disclosure of information that identifies the informers in this case could "jeopardize their physical and emotional well being" because their efforts helped the sheriff shut down an operation run by "bad people." Upon review, we conclude you have only made vague assertions of risk of harm that could result from the disclosure of this information. Accordingly, the sheriff may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.

You assert the submitted information in Appendix E is protected from disclosure because it is attorney work product. Section 552.111 of the Government Code excepts from disclosure "an 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 exception 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); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as:

(1) [M]aterial 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 that 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 demonstrate any of the information in Appendix E consists of materials prepared or mental impressions developed in anticipation of litigation or for trial by a party or a representative of a party. Accordingly, the sheriff may not withhold any of the submitted information under the work product privilege of section 552.111 of the Government Code.

The remaining information contains information subject to section 552.130 of the Government Code, which excepts from release information relating to a motor vehicle operator's license, driver's license, title, or registration issued by an agency of this state or another state or country.⁴ Gov't Code § 552.130(a)(1), (2). Upon review, we find the sheriff

⁴The 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).

must withhold the driver's license numbers and motor vehicle information we have marked in the remaining information under section 552.130 of the Government Code.⁵

The remaining information also contains e-mail addresses subject to section 552.137 of the Government Code. Section 552.137 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 owner of the e-mail address consents to its release or the e-mail address falls within the scope of section 552.137(c). *See id.* § 552.137(a)-(c). Section 552.137 is not applicable to the work e-mail address of an employee of a governmental body because such an address is not that of the employee as a "member of the public" but is instead the address of the individual as a government employee. The sheriff must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless their owners affirmatively consent to their public disclosure.⁶

In summary, the marked mental health records must be withheld under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code but must be released to the requestor if he is authorized to obtain the mental health records under sections 611.004 and 611.0045 of the Health and Safety Code. The medical records we have marked may only be released in accordance with the MPA. The sheriff may withhold the informer's identifying information on the affidavit indicated, which we have marked, under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. The sheriff must withhold the driver's license numbers we have marked in the remaining information under section 552.130 of the Government Code. Unless the owners affirmatively consent to their public disclosure, the sheriff must withhold the e-mail

⁵We note the submitted information includes a driver's license number to which the requestor has a right of access as the authorized representative of the subject of the information at issue, which the sheriff would be required to withhold from the general public under section 552.130(a)(1) of the Government Code. Because section 552.130 protects personal privacy, the requestor has a right of access to his client's driver's license number under section 552.023 of the Government Code. *See Gov't Code § 552.023(a)* ("A person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests."); *Open Records Decision No. 481 at 4 (1987)* (privacy theories not implicated when individual requests information concerning himself). We note section 552.130(c) of the Government Code authorizes a governmental body to redact information protected by section 552.130(a)(1) without the necessity of requesting a decision under the Act. *Gov't Code § 552.130(c)*. Thus, if the sheriff receives another request for this same information from a person who would not have a right of access to the present individual's private information, section 552.130(c) authorizes the town to redact this driver's license number.

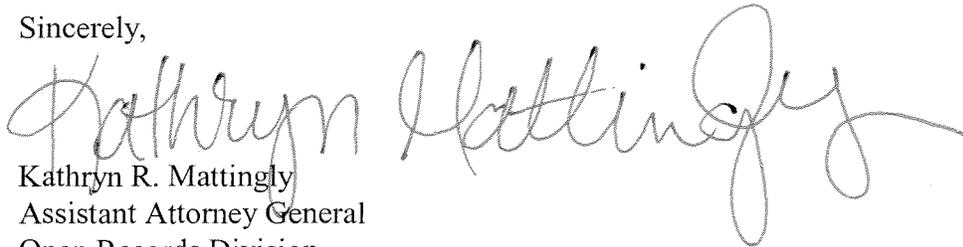
⁶We note *Open Records Decision No. 684 (2009)* is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general opinion.

addresses we have marked under section 552.137 of the Government Code. The remaining information must be released to the requestor.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 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,



Kathryn R. Mattingly
Assistant Attorney General
Open Records Division

KRM/dls

Ref: ID# 447076

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁷We note the information to be released contains information to which the requestor has a right of access. See Gov't Code § 552.023. Because such information may be confidential with respect to the general public, if the sheriff receives another request for this information from a different requestor, the sheriff must again seek a ruling from this office.