



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 23, 2014

Mr. Isidro R. Alaniz
District Attorney
49th Judicial District
P.O. Box 1343
Laredo, Texas 78042-1343

OR2014-01375

Dear Mr. Alaniz:

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# 511584.

The District Attorney's Office for the 49th Judicial District (the "district attorney's office") received a request for five categories of information pertaining to all cases on Operation Child Guardian Predator. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

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 section encompasses information protected by other statutes. Section 261.201 of the Family Code provides, in part, as follows:

¹Although you cite to section 552.018 of the Government Code in your brief, we understand you to raise section 552.108 of the Government Code based on the substance of your arguments.

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.

(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 assert the submitted information relates to investigations of child abuse by the district attorney's office. *See id.* §§ 261.001 (defining "abuse" for purposes of chapter 261 of the Family Code). We note the submitted information relates to investigations of alleged online solicitation of a minor. *See* Penal Code § 33.021(a)(1). However, the submitted information does not list a child as the complainant or victim. *See* Fam. Code § 101.003(a) (defining "child" for purposes of section 261.201 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). We therefore find the district attorney's office has failed to demonstrate that the submitted information consists of files, reports, records, communications, or working papers used or developed in an investigation of alleged child abuse under chapter 261 of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (addressing predecessor statute). Thus, we conclude the district attorney's office may not withhold the submitted information under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses 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.

In Open Records Decision No. 393 (1983), this office concluded generally, only information that either identifies or tends to identify a victim of sexual assault or other sex-related offense may be withheld under common-law privacy; however, because the identifying information was inextricably intertwined with other releasable information, the governmental body was required to withhold the entire report. ORD 393 at 2; *see* Open Records Decision No. 339

(1982); *see also Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information); ORD 440 (detailed descriptions of serious sexual offenses must be withheld). Further, in those instances where it is demonstrated the requestor knows the identity of the victim, the entire report must be withheld to protect the victim's privacy.

You argue the submitted information pertains to a report of alleged sexual assault or other sex-related offense, and you seek to withhold the entirety of the submitted information under section 552.101 in conjunction with common-law privacy. However, you have not demonstrated the submitted information involves an actual report of alleged sexual assault or other sex-related offense. Moreover, you have not demonstrated the submitted information identifies a victim of such a crime. Accordingly, the district attorney's office may not withhold the entirety of the submitted information under section 552.101 of the Government Code in conjunction with common-law privacy.

Next we address your argument under section 552.108 of the Government Code for the submitted information. Section 552.108 states, in pertinent part, the following:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime [is excepted from required public disclosure] if:

...

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication; [or]

...

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a)(2), (4). A governmental body must reasonably explain how and why section 552.108 is applicable to the information at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). A governmental body claiming

section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* You state “some of the Operation Child Guardian cases have been closed.” However, you have not demonstrated whether any of the submitted reports pertain to closed investigations that concluded in results other than conviction or deferred adjudication. Thus, we find you have failed to demonstrate the applicability of section 552.108(a)(2) to the submitted information, and the district attorney’s office may not withhold the information on that basis.

You also argue the submitted information is subject to section 552.108(a)(4) of the Government Code in conjunction with *Curry v. Walker*, 873 S.W.2d 379 (Tex. 1994), as a request for the entire prosecution file. In *Curry*, the Texas Supreme Court held that a request for a district attorney’s “entire litigation file” was “too broad” and, quoting *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458 (Tex. 1993) held, “the decision as to what to include in [the file] necessarily reveals the attorney’s thought processes concerning the prosecution or defense of the case.” *Curry*, 873 S.W.2d at 380 (internal quotations omitted). You contend the instant request for information seeks the district attorney’s office’s entire prosecution files for the cases at issue. We disagree the requestor seeks the entire prosecution file. Rather, the requestor has itemized five categories of specific information held by the district attorney related to these cases. Such a request does not constitute a request for the “entire” file. Thus, we conclude that the present request is not a request for the district attorney’s entire prosecution file. As a result, the district attorney’s office may not withhold the submitted information under section 552.108(a)(4) of the Government Code and the holding in *Curry*.

Section 552.101 of the Government Code also encompasses information made confidential by section 1304(b) of title 8 of the United States Code. Section 1304(b) addresses the confidentiality of the registration documentation of aliens under section 1301 of the United States Code and provides:

All registration and fingerprint records made under the provisions of this subchapter shall be confidential, and shall be made available only

(1) pursuant to section 1357(f)(2) of this title, and

(2) to such persons or agencies as may be designated by the Attorney General.

8 U.S.C. § 1304(b). Permanent resident cards are listed in section 264.1(b) of title 8 of the Code of Federal Regulations as documents that constitute evidence of registration. 8 C.F.R. § 264.1(b). We, therefore, conclude the submitted permanent resident card, which we have marked, is a registration record subject to the confidentiality provision of section 1304(b) of

title 8 of the United States Code and must be withheld under section 552.101 of the Government Code.

Section 552.101 of the Government Code also encompasses constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. *See* Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy," which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). Upon review, we find the district attorney's office must withhold the information we have marked under section 552.101 in conjunction with constitutional privacy.

We note some of the remaining information is subject to sections 552.1175, 552.130, 552.136, 552.137, and 552.139 of the Government Code.³ Section 552.1175 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. *See* Gov't Code § 552.1175. Section 552.1175 applies, in part, to "criminal investigators of the United States as described by article 2.122(a), Code of Criminal Procedure[.]" *Id.* § 552.1175(a)(7). The remaining information includes information pertaining to a United States Border Patrol agent that is not held by the district attorney's office in an employment capacity. Thus, if the agent at issue is a criminal investigator of the United States as described by article 2.122(a) of the Code of Criminal Procedure and elects to restrict access to his information in accordance with section 552.1175(b), then the district attorney's office must withhold the information at issue, which we have marked, under section 552.1175. However, if the agent is not a criminal investigator of the United States as described by article 2.122(a) or if the agent does not elect to restrict access to his information in accordance with section 552.1175(b), then the district attorney's office may not withhold the agent's information under section 552.1175.

Section 552.130 of the Government Code provides 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 is excepted from public release. *See id.* § 552.130. Accordingly, the district attorney's office

³The 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 motor vehicle record information we have marked under section 552.130 of the Government Code.⁴

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.” *Id.* § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Accordingly, the district attorney’s office must withhold the routing, bank account, and cellular account numbers we have marked under section 552.136 of the Government Code.

Section 552.137 of the Government Code 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 member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). The e-mail addresses at issue are not excluded by subsection (c). Therefore, the district attorney’s office must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.⁵

Section 552.139 of the Government code provides, in part, “a photocopy or other copy of an identification badge issued to an official or employee of a governmental body” is confidential. *Id.* § 552.139(b)(3). Therefore, the district attorney’s office must withhold the copy of the identification card issued to an employee of a governmental body, which we have marked, under section 552.139.

In summary, the district attorney’s office must withhold (1) the marked permanent resident card under section 552.101 of the Government Code in conjunction with section 1304(b) of title 8 of the United States Code; (2) the information we marked under section 552.101 in conjunction with constitutional privacy; (3) the information we marked under section 552.1175, if the agent at issue is a criminal investigator of the United States as described by article 2.122(a) of the Code of Criminal Procedure and elects to restrict access to his information in accordance with section 552.1175(b); (4) the motor vehicle record information we marked under section 552.130 of the Government Code; (5) the routing, bank account, and cellular account numbers we have marked under section 552.136 of the Government Code; (6) the personal e-mail addresses we have marked under section 552.137

⁴We note section 552.130 of the Government Code allows a governmental body to redact the information described in subsection 552.130(a) without the necessity of seeking a decision from the attorney general. *See Gov’t Code* § 552.130(c). However, if a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e).

⁵We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold certain 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 decision.

of the Government Code, unless the owners affirmatively consent to their public disclosure; and (7) the copy of the identification card issued to an employee of a governmental body we marked under section 552.139. The district attorney's office must release the remaining information.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink that reads "Claire Morris Sloan". The signature is written in a cursive style with a large, sweeping flourish at the end.

Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/som

Ref: ID# 511584

Enc. Submitted documents

c: Requestor
(w/o enclosures)