



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 12, 2014

Ms. Debbie F. Harrison
Assistant District Attorney
Civil Division
County of Collin
2100 Bloomingdale Road, Suite 100
McKinney, Texas 75071

OR2014-20547

Dear Ms. Harrison:

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# 541202.

The Collin County District Attorney's Office (the "district attorney's office") received a request for information related to a specified capital murder case. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.115, 552.130, and 552.1085 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We note, we have also received comments from the Office of the Attorney General (the "OAG"). *See* Gov't Code § 552.304 (interested party may submit comments to this office stating why the information at issue should or should not be released).

Initially, we note some of the submitted information, which we have marked, is not responsive to the instant request. This ruling does not address the public availability of any information that is not responsive to the request and the district attorney's office is not required to release such information in response to this request.

Section 552.103 of the Government Code provides, in relevant 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 has the burden of providing relevant facts and documents to show that the section 552.103(a) exception applies in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the requested information is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *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 parts of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

You assert the requested information relates to pending criminal litigation. You inform us the defendant in the case at issue was tried and convicted of capital murder and sentenced to death. The documents reflect the defendant in the case at issue filed an application for a writ of habeas corpus in the United States Court of Appeals for the Fifth Circuit. Further, you inform us the Office of the Attorney General (the "OAG") is representing the State of Texas in the matter, and that the district attorney's office is not a party to the pending litigation. Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990). In a situation such as the instant matter, we require an affirmative representation from the prosecuting attorney representing the governmental body that is a party to the litigation that it wants the submitted information withheld from disclosure under section 552.103. However, the OAG has informed this office it does not seek to withhold the submitted information. Therefore, the district attorney's office may not withhold the submitted information under section 552.103.

Section 552.108 of the Government Code provides 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 the requirements of Section 552.021 if:

- (1) release of the information would interfere with the detection, investigation, or prosecution of crime;
 - (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;
 - (3) it is information relating to a threat against a peace officer or detention officer collected or disseminated under Section 411.048; 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.
- (b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

- (1) release of the internal record or notation would interfere with law enforcement or prosecution;
- (2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or
- (3) the internal record or notation:
 - (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)-(b). A governmental body raising section 552.108 must reasonably explain the applicability of section 552.108. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). As stated above, you indicate the defendant in the case at issue has filed an application for a writ of habeas corpus in the United States Court of Appeals for the Fifth Circuit. We note a habeas corpus proceeding is a civil proceeding. Accordingly, the district

attorney's office has not shown how a habeas corpus proceeding is a criminal prosecution for purposes of section 552.108(a)(1) or 552.108(b)(1). Therefore, we conclude the district attorney's office may not withhold any of the information at issue under section 552.108(a)(1) or 552.108(b)(1) of the Government Code. You also raise sections 552.108(a)(2), 552.108(a)(4), 552.108(b)(2), and 552.108(b)(3). However, you have not submitted any arguments explaining the applicability of these sections to the submitted information. Therefore, we find the district attorney's office has not demonstrated the applicability of section 552.108(a)(2), 552.108(a)(4), 552.108(b)(2), or 552.108(b)(3) to the submitted information. Accordingly, none of the submitted information may be withheld on those bases.

You seek to withhold portions of the submitted information under section 552.1085 of the Government Code, which provides, in pertinent part:

(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.

(d) Notwithstanding Subsection (c) and subject to Subsection (e), the following persons may view or copy information that constitutes a sensitive crime scene image from a governmental body:

(1) the deceased person's next of kin[.]

Gov't Code § 552.1085(c), (d)(1). 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 some of these photographs, which we have marked and indicated, consist of sensitive crime scene images which must be withheld under section 552.1085 of the Government Code. However, we find the remaining information at issue does not consist of sensitive crime scene images for purposes of section 552.1085 of the Government Code and may not be withheld on that basis.

You seek to withhold Exhibit IIC under section 552.115 of the Government Code, which provides, "[a] birth or death record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official is excepted from the requirements of Section 552.021[.]" *Id.* § 552.115(a). Section 552.115 only applies to information maintained by the bureau of vital statistics or local registration official. The district attorney's office is not the bureau of vital statistics or a local registration official. Therefore, the district attorney's office may not withhold the information at issue under section 552.115 of the Government Code. *See Open Records Decision No. 338 (1982).*

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 the common-law right to 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 met. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683.

We note the common-law right to privacy is a personal right that “terminates upon the death of the person whose privacy is invaded.” *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* 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.”); Open Records Decision No. 272 at 1 (1981) (privacy rights lapse upon death). Thus, information pertaining solely to a deceased individual may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

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. Open Records Decision No. 393 at 2 (1983); *see 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). Upon review, we find the identifying information of a victim of sexual assault satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Thus, the district attorney’s office must withhold the victim’s identifying information, which we have 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 of no legitimate public interest. Thus, the district attorney’s office may not withhold any portion of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

You claim portions of the remaining information are confidential under article 20.02 of the Texas Code of Criminal Procedure. Section 552.101 also encompasses 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). When 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. *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). Upon review, we find the information we have marked and indicated consists of information that is confidential under article 20.02(a) of the Texas Code of Criminal Procedure and must be withheld under section 552.101 of the Government Code.

You claim some of the remaining information is confidential under section 411.153 of the Government Code. Section 552.101 of the Government Code also encompasses section 411.153, which provides, as follows:

- (a) A DNA record stored in the DNA database is confidential and is not subject to disclosure under [the Act].
- (b) A person commits an offense if the person knowingly discloses to an unauthorized recipient information in a DNA record or information related to a DNA analysis of a sample collected under this subchapter.
- (c) An offense under this section is a state jail felony.
- (d) A violation under this section constitutes official misconduct.

Gov't Code § 411.153. A "DNA record" means the results of a forensic DNA analysis performed by a DNA laboratory. *See id.* § 411.141(6)-(7). "Forensic analysis" is defined as "a medical, chemical, toxicologic, ballistic, or other expert examination or test performed on physical evidence, including DNA evidence, for the purpose of determining the connection of the evidence to a criminal action." *See* Crim. Proc. Code art. 38.35(4); *see also* Gov't Code § 411.141(10) (providing that "forensic analysis" has meaning assigned by article 38.35). A "DNA database" means "one or more databases that contain forensic DNA records maintained by the director of [DPS]." Gov't Code § 411.141(5); *see id.* § 411.001(3).

The director of DPS is required to establish certain procedures for DNA laboratories. *See id.* §§ 411.142(h) (requiring director establish standards for DNA analysis), .144(a). Section 411.144 of the Government Code provides that a DNA laboratory conducting a forensic DNA analysis under subchapter G of chapter 411 shall comply with subchapter G and the rules adopted under subchapter G. *See id.* § 411.144(d); 37 T.A.C. §§ 28.81, .82 (describing minimum standards by which forensic DNA laboratory must abide); *see also* Gov't Code § 411.147(b). The director of DPS may release a DNA record in certain instances, including to a criminal justice agency for criminal justice or law enforcement purposes. *See* Gov't Code § 411.147(c).

Upon review, we find a portion of the remaining information consists of records relating to DNA analyses of samples that appear to have been collected under subchapter G of chapter 411 of the Government Code. We note this information is contained in records of a criminal investigation and appears to be the result of forensic DNA analyses performed by

a DNA laboratory in accordance with DPS regulations. Therefore, the district attorney's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 411.153 of the Government Code.¹

Section 552.101 of the Government Code also encompasses section 414.009 of the Government Code. Section 414.009 provides in pertinent part:

(a) A person who is a member or employee of the [Texas Crime Stoppers Council] or who accepts a report of criminal activity on behalf of a crime stoppers organization commits an offense if the person intentionally or knowingly divulges to a person not employed by a law enforcement agency the content of a report of a criminal act or the identity of the person who made the report without the consent of the person who made the report.

Id. § 414.009. The documents reflect a portion of the remaining information contains a report made to a crime stoppers organization. *See id.* § 414.001(2)(B) (defining "crime stoppers organization" as public organization operated on local or statewide level, that pays rewards to persons who report to organization information about criminal activity, and that forwards information to appropriate law enforcement agency). Accordingly, we conclude the report at issue is confidential under section 414.009 of the Government Code and must be withheld under section 552.101 of the Government Code.

Section 552.101 of the Government Code also encompasses section 1703.306 of the Occupations Code. Section 1703.306 provides as follows:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or

¹As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

(5) any other person required by due process of law.

(b) The [Texas Department of Licensing and Regulation] or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Occ. Code § 1703.306. Upon review, we find some of the remaining information, which we have marked, consists of information acquired from a polygraph examination subject to section 1703.306. The requestor does not appear to fall into any of the categories of individuals who are authorized to receive the polygraph information under section 1703.306(a). Accordingly, the district attorney's office must withhold the polygraph information we have marked under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.

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* Gov't Code § 552.130. Accordingly, the district attorney's office must withhold the types of information we have marked and indicated under section 552.130 of the Government Code.

In summary, the district attorney's office must withhold the information we have marked and indicated under section 552.1085 of the Government Code. The district attorney's office must withhold the information we have marked and indicated under section 552.101 of the Government Code in conjunction with common-law privacy. The district attorney's office must withhold the information we have marked and indicated under section 552.101 of the Government Code in conjunction with article 20.02(a) of the Texas Code of Criminal Procedure. The district attorney's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 411.153 of the Government Code. The district attorney's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 414.009 of the Government Code. The district attorney's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. The district attorney's office must withhold the

types of information we have marked and indicated under section 552.130 of the Government Code. The remaining information must be released.²

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, appearing to read 'J. Behrke', written over a horizontal line.

Joseph Behrke
Assistant Attorney General
Open Records Division

JB/som

Ref: ID# 541202

Enc. Submitted documents

c: Requestor
(w/o enclosures)

²We note the information being released contains social security numbers subject to section 552.147 of the Government Code. 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 officer under the Act. Gov't Code § 552.147(b).