



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

May 29, 2015

Mr. John C. West  
General Counsel  
Texas Department of Criminal Justice  
Office of the Inspector General  
4616 Howard Lane, Suite 250  
Austin, Texas 78728

OR2015-10497

Dear Mr. West:

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# 565172.

The Texas Department of Criminal Justice (the "department") received a request for all records pertaining to a named individual. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.1175, and 552.147 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

Initially, you inform us the submitted information contains a grand jury subpoena and records obtained pursuant to the subpoena. The judiciary is expressly excluded from the requirements of the Act. Gov't Code § 552.003(1)(B). This office has 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

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<sup>1</sup>Although you raise section 552.134 of the Government Code in your brief, you have provided no arguments to support this exception. Accordingly, we conclude you have withdrawn this exception. *See* Gov't Code §§ 552.301, .302. Although you also claim section 552.117 of the Government Code for portions of the submitted information, section 552.1175 is the proper exception to raise in this instance because the department does not hold the submitted information in an employment capacity.

Decisions Nos. 513 (1988), 411, 398 (1983). *But see* ORD 513 at 4 (defining limits of judiciary exclusion). Thus, the submitted information that is held by the department as an agent of the grand jury consists of records of the judiciary not subject to disclosure under the Act, and we do not address its public availability. To the extent the submitted information is not held by the department as an agent of the grand jury, we will address your arguments against disclosure of the submitted information.

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 information made confidential by statute, such as section 418.177 of the Texas Homeland Security Act, chapter 418 of the Government Code (the “HSA”). Section 418.177 provides the following:

Information is confidential if the information:

- (1) is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity; and
- (2) relates to an assessment by or for a governmental entity, or an assessment that is maintained by a governmental entity, of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity.

*Id.* § 418.177. The fact that information may relate to a governmental body’s security concerns does not make the information *per se* confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute’s key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the HSA must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov’t Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You seek to withhold the emergency action record, serious incident report, staff statements, and Office of Inspector General (the “OIG”) investigative report in the submitted information under section 552.101 of the Government Code in conjunction with section 418.177 of the Government Code. You state “the release of these records would enable a person to calculate times and number of correctional officers assigned to security coverage at any given period.” You further state this information would help anticipate and defeat security measures employed by the department’s Correctional Institution Division “to maintain offender and staff safety and to prevent disruption of unit activities and security protocols.” You claim release of this information would compromise department security measures and create potential danger to institutional security, staff, offenders, and the public. You further claim

this information “can serve as the key to an escape, an abduction or some other criminal act which could be devastating to the legitimate penological interests of the [department], the OIG[,] and the State.” Upon review, we find the department has failed to establish the information at issue is maintained by the department for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity. Thus, the department has not established the applicability of section 418.177 of the Government Code to the information at issue, and the department may not withhold any of the information at issue under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code 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). Article 20.02, however, does not define “proceedings” for purposes of subsection (a). Therefore, we have reviewed case law for guidance and found that Texas courts have not often addressed the confidentiality of grand jury subpoenas under article 20.02. Nevertheless, the court in *In re Reed* addressed the issue of what constitutes “proceedings” for purposes of article 20.02(a) and stated that although the court was aware of the policy goals behind grand jury secrecy, the trial court did not err in determining the grand jury summonses at issue were not proceedings under article 20.02. *See In re Reed*, 227 S.W.3d 273, 276 (Tex. App.—San Antonio 2007, orig. proceeding). The court further stated that the term “proceedings” could “reasonably be understood as encompassing matters that take place before the grand jury, such as witness testimony and deliberations.” *Id.* The court also discussed that, unlike federal law, article 20.02 does not expressly make subpoenas confidential. *See id.* at 276; FED. R. CRIM. P. 6(e)(6).

Subsequent to the ruling in *Reed*, the 80th Legislature, modeling federal law, added subsection (h) to article 20.02 to address grand jury subpoenas. *See* Crim. Proc. Code art. 20.02(h); FED. R. CRIM. P. 6(e)(6) (“Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury.”). Article 20.02(h) states that “[a] subpoena or summons relating to a grand jury proceeding or investigation must be kept secret to the extent and for as long as necessary to prevent the unauthorized disclosure of a matter before the grand jury.” Crim. Proc. Code art. 20.02(h). This provision, however, does not define or explain what factors constitute “necessary to prevent the unauthorized disclosure of a matter before the grand jury.” *Id.* Because subsection (h) is modeled on federal law, we reviewed federal case law for guidance on a definition or explanation of the factors that would constitute “necessary to prevent the unauthorized disclosure of a matter before the grand jury” for the purposes of keeping grand jury subpoenas secret. Our review of federal case law revealed that federal courts have ruled inconsistently on the issue of whether or not grand jury subpoenas must be kept secret. FED. R. CRIM. P. 6(e)(6) advisory committee’s note (stating federal case law has not consistently stated whether or not subpoenas are protected by rule 6(e)). Furthermore, even if we considered article 20.02 to be a confidentiality provision, information withheld under this statute would only be secret “for as long as necessary to prevent the unauthorized disclosure of a matter before the grand jury.” *Id.*

You have not submitted any arguments explaining how the matter upon which the submitted subpoena was based is still “before the grand jury” to warrant keeping the subpoena and documents gathered in response to the subpoena secret. Therefore, upon review of article 20.02 and related case law, it is not apparent, and you have not otherwise explained, how this provision makes the information gathered in response to a grand jury subpoena confidential. *See* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Consequently, the department may not withhold the information at issue under section 552.101 of the Government Code in conjunction with article 20.02 of the Code of Criminal Procedure.

Section 552.101 of the Government Code also encompasses the Medical Practice Act (“MPA”), subtitle B of title 3 of the Occupations Code, which governs release of medical records. Section 159.002 of 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(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004. This office has concluded 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). Upon review, we find the information we have marked consists of records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that were created or are maintained by a physician and information obtained from a patient’s medical records. Accordingly, the department must withhold the medical records we have marked under section 552.101 of the Government Code in conjunction with the MPA.<sup>2</sup> However, we find you have not demonstrated how any of the remaining information constitutes medical records for purposes of the MPA, and the department may not withhold any of the remaining information on that basis.

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<sup>2</sup>As our ruling is dispositive, we need not consider your remaining arguments against disclosure of this information.

Section 552.101 of the Government Code also encompasses section 58.005 of the Family Code, which provides that “[r]ecords and files concerning a child, including personally identifiable information, and information obtained for the purpose of diagnosis, examination, evaluation, or treatment or for making a referral for treatment of a child by a public or private agency or institution providing supervision of a child by arrangement of the juvenile court or having custody of the child under order of the juvenile court may be disclosed only to [certain listed individuals].” Fam. Code § 58.005(a). You contend a portion of the submitted information is confidential under section 58.005. You do not inform us, however, nor does the information at issue reflect, that it was “obtained for the purpose of diagnosis, examination, evaluation, or treatment or for making a referral for treatment of a child by a public or private agency or institution providing supervision of a child by arrangement of the juvenile court or having custody of the child under order of the juvenile court.” *Id.* We therefore conclude the department may not withhold the information at issue under section 552.101 of the Government Code on the basis of section 58.005 of the Family Code.

Section 552.101 of the Government Code also encompasses laws that make criminal history record information (“CHRI”) confidential. CHRI generated by the National Crime Information Center (“NCIC”) or by the Texas Crime Information Center (“TCIC”) is confidential under federal and state law. *See* Gov’t Code § 411.083(a). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 at 7 (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 the Department of Public Safety (“DPS”) maintains, except DPS may disseminate this information as provided in 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 not release CHRI except 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-.127. Similarly, 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. *See id.* § 411.082(2)(B) (term CHRI does not include driving record information). Accordingly, the department must withhold the Federal Bureau of Investigation number and the information we marked in the remaining information under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code and federal law.<sup>3</sup> However, we find none of the remaining information constitutes confidential CHRI for the purposes of chapter 411. Accordingly, the department may not withhold any of the remaining information under section 552.101 of the Government Code on that basis.

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<sup>3</sup>As our ruling is dispositive, we need not consider your remaining argument against disclosure of this information.

Section 552.101 of the Government Code 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, 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 Fadlo 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).

This office has applied privacy to protect certain information about incarcerated individuals. *See* Open Records Decision Nos. 430 (1985), 428 (1985), 185 (1978). Citing *State v. Ellefson*, 224 S.E.2d 666 (S.C. 1976) as authority, this office held that those individuals who correspond with inmates possess a “first amendment right . . . to maintain communication with [the inmate] free of the threat of public exposure;” and that this right would be violated by the release of information that identifies those correspondents, because such a release would discourage correspondence. ORD 185. The information at issue in Open Records Decision No. 185 was the identities of individuals who had corresponded with inmates, and our office found “the public’s right to obtain an inmate’s correspondence list is not sufficient to overcome the first amendment right of the inmate’s correspondents to maintain communication with him free of the threat of public exposure.” *Id.* Implicit in this holding is the fact that an individual’s association with an inmate may be intimate or embarrassing. In Open Records Decision Nos. 428 and 430, our office determined that inmate visitor and mail logs that identify inmates and those who choose to visit or correspond with inmates are protected by constitutional privacy because people who correspond with inmates have a First Amendment right to do so that would be threatened if their names were released. ORDs 430, 428. The right of those individuals to anonymity was found to outweigh the public’s interest in this information. ORD 185; *see* ORD 430 (list of inmate visitors protected by constitutional privacy of both inmate and visitors). Accordingly, the department must withhold the visitor information we marked under section 552.101 of the Government Code in conjunction with constitutional privacy.<sup>4</sup>

Section 552.101 of the Government Code also 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,

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<sup>4</sup>As our ruling is dispositive, we need not consider your remaining arguments against disclosure of this information.

both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered highly intimate or embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* ORD 455. Further, 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 Nos. 600, 545 (1990). In Open Records Decision No. 396, we considered whether certain types of information pertaining to inmate trust accounts were protected by common-law privacy. *See* Open Records Decision No. 396 (1983). We found that information regarding balances held in inmate accounts is highly intimate or embarrassing. *Id.* at 1. Furthermore, we concluded that there is not a legitimate public interest in inmate account balances because “the total amount an inmate has on deposit at any particular time does not . . . relate to the receipt or expenditure of public funds.” *Id.* Accordingly, we determined that information regarding inmate account balances, including amounts deposited into inmate accounts, is protected under common-law privacy. *Id.* Thus, in accordance with the decision in Open Records Decision No. 396, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find you have not demonstrated how any of the remaining information is highly intimate or embarrassing and not of legitimate public concern. Thus, the remaining information may not be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]” Gov’t Code § 552.102(a). The Texas Supreme Court held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). Thus, *Texas Comptroller* applies to only a public employee’s birth date maintained by the employer in an employment context. In this instance, the department is not holding the submitted law enforcement records in an employment context. Accordingly, the department may not withhold any of the remaining information under section 552.102(a) of the Government Code.

Section 552.108(b)(1) of the Government Code excepts from disclosure “[a]n 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 . . . if . . . release of the internal record or notation would interfere with law enforcement or prosecution[.]” Gov’t Code § 552.108(b)(1); *see City of Fort Worth v. Cornyn*, 86 S.W.3d at 327 (Tex. App.—Austin 2002, no pet.) (Gov’t Code 552.108(b)(1) protects information that, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws). The statutory predecessor to section 552.108(b)(1) protected information that would

reveal law enforcement techniques. *See, e.g.*, Open Records Decision Nos. 531 (1989) (detailed use of force guidelines), 456 (1987) (information regarding location of off-duty police officers), 413 (1984) (sketch showing security measures to be used at next execution). The statutory predecessor to section 552.108(b)(1) was not applicable to generally known policies and procedures. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (Penal Code provisions, common-law rules, and constitutional limitations on use of force not protected), 252 at 3 (1980) (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

You seek to withhold the emergency action record, serious incident report, staff statements, and OIG investigative report in the remaining information under section 552.108(b)(1) of the Government Code. You state “the release of these records would enable a person to calculate times and number of correctional officers assigned to security coverage at any given period.” You further state this information would help anticipate and defeat security measures employed by the department’s Correctional Institution Division “to maintain offender and staff safety and to prevent disruption of unit activities and security protocols.” You claim release of this information would compromise department security measures and create potential danger to institutional security, staff, offenders, and the public. You further claim this information “can serve as the key to an escape, an abduction or some other criminal act which could be devastating to the legitimate penological interests of the [department], the OIG[,] and the State.” Upon review, we find you have failed to demonstrate release of the remaining information at issue would interfere with law enforcement. Thus, no portion of the remaining information may be withheld under section 552.108(b)(1) of the Government Code.

Section 552.1175 of the Government Code 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 “current or former employees of the [department] or of the predecessor in function of the department or any division of the department[.]” *Id.* § 552.1175(a)(3). Some of the remaining information, which we have marked, relates to current or former employees of the department, and the information is not held in an employment capacity. Accordingly, if the individuals at issue elect to restrict access to their information in accordance with section 552.1175(b), the department must withhold the information we have marked under section 552.1175 of the Government Code.

Section 552.147(a) of the Government Code excepts the social security number of a living individual from public disclosure. *Id.* § 552.147. Thus, the department may withhold the remaining social security number within the submitted information under section 552.147 of the Government Code.

In summary, the information gathered under the grand jury subpoenas is not subject to the Act, and the department need not release it in response to this request. The department must withhold (1) the medical records we have marked under section 552.101 of the Government Code in conjunction with the MPA; (2) the FBI number and the information we marked under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code and federal law; (3) the information we have marked under section 552.101 of the Government Code in conjunction with constitutional and common-law privacy; and (4) the information we have marked under section 552.1175 of the Government Code, if the individuals to whom the information pertains elect to restrict access in accordance with section 552.1175(b) of the Government Code. The department may withhold the social security number within the submitted information under section 552.147 of the Government Code. The department must release the remaining information that is subject to the Act.

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](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,



Nicholas A. Ybarra  
Assistant Attorney General  
Open Records Division

NAY/cbz

Ref: ID# 565172

Enc. Submitted documents

c: Requestor  
(w/o enclosures)