



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

July 2, 2015

Mr. Matthew Grove  
Assistant County Attorney  
Fort Bend County  
401 Jackson St., 3<sup>rd</sup> Floor  
Richmond, Texas 77469

OR2015-13348

Dear Mr. Groves:

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# 567729.

The Fort Bend County District Attorney's Office (the "district attorney's office") received a request for the personnel file of a named employee of the district attorney's office. You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed 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," and encompasses information made confidential by other statutes. Gov't Code § 552.101. You contend Exhibit C consist of records pertaining to the Texas Board of Legal Specialization. Section 81.033(a) of the Government Code provides that records of the state bar pertaining to grievances that are confidential under the Texas Rules of Disciplinary Procedure and records pertaining to the Texas Board of Legal Specialization are not subject to the Act. *See Id.* § 81.033(a). We note that section 81.033(a) applies to records of the state bar. *Id.* § 81.033(a). The information at issue consists of records of the district attorney's office. We find that section 81.033(a) is not applicable to the information at issue in the hands of the district attorney's office. We therefore determine Exhibit C is not confidential pursuant

to section 81.033(a) of the Government Code and may not be withheld under section 552.101 of the Government Code on that basis.

You also seek to withhold Exhibit C under section 552.101 of the Government Code in conjunction with article XII, section 12 of the Texas State Bar Rules. Article XII, section 12 of the Texas State Bar Rules provides that:

[T]he files, records and proceedings of the Committee [on Minimum Continuing Legal Education], as they relate to the compliance or noncompliance of any member with the requirements of this Article, shall be confidential and shall not be disclosed except upon consent of the member affected or as directed in the course of judicial proceeding by a court of competent jurisdiction.

Tex. State Bar R. art. XII, § 12, *reprinted in* Gov't Code, tit. 2, subtit. G app. A. Although you state Exhibit C consists of records "related to Minimum Continuing Legal Education," we note the confidentiality of section 12 of article XII of the Texas State Bar Rules extends only to records of the Committee on Minimum Continuing Legal Education. The information at issue consists of records of the district attorney's office. Accordingly, we find Exhibit C is not confidential pursuant to section 12 of article XII of the Texas State Bar Rules and may not be withheld under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses information protected by the Family and Medical Leave Act (the "FMLA"). *See* 29 U.S.C. §§ 2601 *et seq.* Section 825.500 of chapter V of title 29 of the Code of Federal Regulations identifies the record-keeping requirements for employers that are subject to the FMLA. Subsection (g) of section 825.500 states:

[r]ecords and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files. . . . If the [Americans with Disabilities Act (the "ADA"), as amended, is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements . . . , except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and

(3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g). Upon review, we find the information we have marked is confidential under section 825.500 of title 29 of the Code of Federal Regulations. Further, we find none of the release provisions of the FMLA apply to this information. Accordingly, the district attorney's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the FMLA.

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 constitutes records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that were created or are maintained by a physician. Accordingly, the district attorney's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the MPA.

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, both prongs of this test must be satisfied. *Id.* at 681-82. This office has found that personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990). Upon review, we find some of the remaining submitted information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the district attorney's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The district attorney's office has failed to demonstrate how any of the remaining information is highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and is not of legitimate concern to the public. Therefore, the district attorney's office may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.108(a)(2) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . 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[.]” Gov't Code § 552.108(a)(2). 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.* § 552.301(e) (governmental body must provide comments explaining why exceptions raised should apply to information requested). We note section 552.108 is generally not applicable to the records of an internal affairs investigation that is purely administrative in nature and does not involve the investigation or prosecution of crime. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.); *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution); *see also* Open Records Decision No. 350 at 3-4 (1982). You inform us that a portion of the submitted information in Exhibit E relates to a closed Fort Bend Independent School District police department case. We note however, the information at issue was generated as part of an internal investigation conducted by the district attorney's office that was purely administrative in nature. Therefore, we find the district attorney's office has failed to demonstrate the applicability of section 552.108(a)(2) to the remaining information at issue and none of it may be withheld on this basis.

You also state the information in Exhibit E is excepted from disclosure under section 552.108(b) of the Government Code, which provides the following:

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;

...

(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(b)(1), (3). 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). Section 552.108(b)(1) is intended to protect "information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State." *City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no writ). To demonstrate the applicability of this exception, a governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990).

You state the information in Exhibit E contains "notes, records relating to interviewing witnesses, and other information" that were created by a prosecutor of the district attorney's office in anticipation of litigation. You inform us this information reflects the prosecutor's mental impressions and legal reasoning. Upon review, we find the district attorney's office may withhold the information we marked under subsection 552.108(b)(3) of the Government Code. However, we find the district attorney's office has failed to demonstrate any of the remaining information in Exhibit E consists of mental impressions, opinions, conclusions or legal theories of an attorney or an attorney's representative that were created for trial or in anticipation of litigation. Therefore, we find you have failed to demonstrate the remaining information in Exhibit E is protected by section 552.108(b)(3) of the Government Code.

You also contend release of the remaining information in Exhibit E could interfere with prosecutions and investigations of cases because suspects and defendants could use this information to hinder investigations and prosecutions of future cases. We find you have not

demonstrated how release of any of the remaining information in Exhibit E would interfere with law enforcement or crime prevention. Consequently, the district attorney's office may not withhold any of the remaining information in Exhibit E under section 552.108(b)(1) of the Government Code.

You assert the remaining information in Exhibit E is excepted from disclosure under section 552.111 of the Government Code, which excepts from disclosure "[a]n 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) material 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 that 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 establish the remaining information in Exhibit E consists of material prepared, mental impressions developed, or a communication made in anticipation of litigation or for trial by or for the district attorney's office. Therefore, the

district attorney's office may not withhold any of the remaining information as attorney work product under section 552.111 of the Government Code.

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."<sup>1</sup> 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). Accordingly, the district attorney's office must withhold the date of birth we have marked in the remaining information under section 552.102(a) of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. Therefore, to the extent the individual at issue timely requested confidentiality under section 552.024 of the Government Code, the district attorney's office must withhold the information we have marked under section 552.117(a)(1) of the Government Code. Conversely, to the extent the employee at issue did not timely request confidentiality under section 552.024, the district attorney's office may not withhold the information at issue under section 552.117(a)(1).

Section 552.136 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." Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). Accordingly, the district attorney's office must withhold the bank and credit card account numbers we have marked under section 552.136 of the Government Code.

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<sup>1</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

In summary, the district attorney's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with 1) the FMLA, 2) the MPA, and 3) common-law privacy. The district attorney's office may withhold the information we have marked under section 552.108(b)(3) of the Government Code. The district attorney's office must withhold the date of birth we have marked in the remaining information under section 552.102(a) of the Government Code. To the extent the current or former employee whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the district attorney's office must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The district attorney's office must withhold the bank and credit card account numbers we have marked under section 552.136 of the Government Code. The district attorney's office must release the remaining submitted 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](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,



Debbie Lee  
Assistant Attorney General  
Open Records Division

DKL/akg

Ref: ID# 567729

Enc. Submitted documents

c: Requestor  
(w/o enclosures)