



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 24, 2015

Ms. Yahitza Nuñez
Assistant Criminal District Attorney
Hays County
712 South Stagecoach Trail, Suite 2057
San Marcos, Texas 78666

OR2015-20092

Dear Ms. Nunez:

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# 580607 (Hays Ref. 15-0510).

The Hays County District Attorney's Office (the "district attorney's office") received two requests from the same requestor for all police reports pertaining to named individuals and the requestor, as well as nine specified police reports. You state you have released some of the specified reports. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

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 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

¹This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

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 or embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation. Id.* at 683.

A compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Moreover, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. However, information that refers to an individual solely as a victim, witness, or involved person does not implicate the privacy interest of the individual and may not be withheld under section 552.101 on that basis.

The present requests, in part, require the district attorney's office to compile unspecified law enforcement records concerning the individuals named in the requests, thus implicating the right to privacy of the named individuals at issue. Therefore, to the extent the district attorney's office maintains law enforcement records depicting the named individuals other than the requestor as suspects, arrestees, or criminal defendants, the district attorney's office must withhold any such information under section 552.101 in conjunction with common-law privacy. However, in each of the requests, the requestor also seeks information pertaining to specified incidents, which you have submitted. Thus, these portions of the requests do not require the district attorney's office to compile an individual's criminal history and do not implicate the privacy interests of any of the named individuals. Additionally, you have submitted reports that do not depict any of the named individuals as suspects, arrestees, or criminal defendants. This information is not part of a criminal history compilation and may not be withheld under section 552.101 on that basis. Therefore, we will address arguments against the disclosure of this information.

Next, you state, and we agree, some of the submitted information was the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2015-05400 (2015), 2015-08734 (2015), and 2015-15009 (2015). In Open Records Letter Nos. 2015-05400 and 2015-15009, we determined the district attorney's office may withhold the submitted information under section 552.108(a)(1) of the Government Code, with the exception of basic information, which must be released. There is no indication the law, facts, or circumstances on which these two prior rulings were based have changed. Thus, with regard to report number C15-05287, the district attorney's office may continue to rely on Open Records Letter Nos. 2015-05400 and 2015-15009 as previous determinations

and withhold and release that information in accordance with those rulings.² *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

In Open Records Letter No. 2015-08734, we determined the district attorney's office must withhold certain information in report number C13-09804 under section 552.101 of the Government Code in conjunction with common-law privacy and release the remaining information. However, we note the law has changed with regard to dates of birth of public citizens and the district attorney's office may not rely on Open Records Letter No. 2015-08734 as a previous determination for the dates of birth at issue in report number C13-09804. Moreover, the district attorney's office raises section 552.108 of the Government Code for report C13-09804. Section 552.007 of the Government Code provides if a governmental body releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the district attorney's office may not now withhold any previously released information unless its release is expressly prohibited by law or the information is confidential under law. Although the district attorney's office raises section 552.108, this section does not prohibit the release of information or make information confidential. *See* Open Records Decision No. 177 at 3 (1977) (governmental body may waive statutory predecessor to section 552.108); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, the district attorney's office may not now withhold the information previously released under section 552.108 of the Government Code. With the exception of the dates of birth, the district attorney's office must continue to rely on Open Records Letter No. 2015-08734 and withhold and release report number C13-09804 in accordance with that ruling.³ *See* ORD 673. The remaining information you have submitted was not at issue in the previous rulings. Accordingly, we will address the public availability of this information and the dates of birth in report number C13-09804.

²As we are able to make this determination, we need not address your argument against disclosure of report number C15-05287.

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

As noted above, section 552.101 of the Government Code encompasses the doctrine of common-law privacy. In addition to the standard articulated in *Industrial Foundation*, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. See Open Records Decision No. 455 (1987). Because “the right of privacy is purely personal,” that right “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. Civ. App.—Texarkana 1979, writ ref’d n.r.e.); see also *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 147 (N.D. Tex. 1979) (“action for invasion of privacy can be maintained only by a living individual whose privacy is invaded” (quoting RESTATEMENT (SECOND) OF TORTS § 652I (1977))); see 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 (1981) (“the right of privacy is personal and lapses upon death”). Moreover, under the common-law right of privacy, an individual has a right to be free from the publicizing of private affairs in which the public has no legitimate concern. *Indus. Found.*, 540 S.W.2d 668 at 682. In considering whether a public citizen’s date of birth is private, the Third Court of Appeals looked to the supreme court’s rationale in *Texas Comptroller of Public Accounts v. Attorney General of Texas*, 354 S.W.3d 336 (Tex. 2010). *Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at *3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.). The supreme court concluded public employees’ dates of birth are private under section 552.102 of the Government Code because the employees’ privacy interest substantially outweighed the negligible public interest in disclosure.⁴ *Texas Comptroller*, 354 S.W.3d at 347-48. Based on *Texas Comptroller*, the court of appeals concluded the privacy rights of public employees apply equally to public citizens, and thus, public citizens’ dates of birth are also protected by common-law privacy pursuant to section 552.101. *City of Dallas*, 2015 WL 3394061, at *3.

Portions of the remaining information contain information that satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Generally, only highly intimate information that implicates the privacy of an individual is withheld. However, in certain instances, where it is demonstrated the requestor knows the identity of the individual involved, as well as the nature of certain incidents, the entire report must be withheld to protect the individual’s privacy. In this instance, some of the information at issue reveals the requestor knows the identity of the individual involved as well as the nature of the information in the submitted documents. Therefore, withholding only the individual’s identity or certain details of the some of the incidents at issue from this requestor would not preserve the subject individual’s common-law right of privacy. Accordingly, to protect the privacy of the individual to whom the information relates, the district attorney’s office must withhold the information we have marked in its entirety, as well as the additional information we have marked, under section 552.101 of the Government Code in conjunction with

⁴Section 552.102(a) 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).

common-law privacy. Moreover, except for the date of birth of the requestor, the district attorney's office must withhold all public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common law privacy. *See* Gov't Code § 552.023(a) (“[a] person or 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”). We note a portion of the information we have marked may pertain to a deceased individual. Thus, to the extent the information pertains to a deceased individual, the district attorney’s office may not withhold the information under section 552.101 in conjunction with common-law privacy based on the privacy interests of the deceased individual. Additionally, we find you have failed to demonstrate the remaining information is highly intimate or embarrassing and not of legitimate public concern. Therefore, the district attorney’s office may not withhold the remaining information under section 552.101 on that basis.

Section 552.108(a) 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: (1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]” *Id.* § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must reasonably explain how and why the release of the information at issue would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706, 710 (Tex. 1977).

You state the remaining information is excepted from disclosure under section 552.108(a)(1) of the Government Code. However, you do not inform us the remaining information at issue relates to a specific open or pending criminal investigation or prosecution. Further, we find you have failed to otherwise demonstrate release of the information at issue would interfere with law enforcement. Therefore, the district attorney’s office may not withhold any of the remaining information under section 552.108(a)(1) of the Government Code.

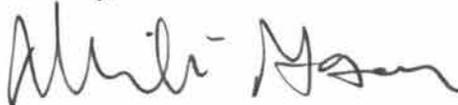
In summary, to the extent the district attorney’s office maintains law enforcement records, other than the specified incidents, depicting the named individuals other than the requestor as suspects, arrestees, or criminal defendants, the district attorney’s office must withhold any such information under section 552.101 of the Government Code in conjunction with common-law privacy. With regard to report number C15-05287, the district attorney’s office may continue to rely on Open Records Letter Nos. 2015-05400 and 2015-15009 as previous determinations and withhold and release that information in accordance with those rulings. With the exception of the dates of birth, the district attorney’s office must continue to rely on Open Records Letter No. 2015-08734 and withhold and release report number C13-09804 in accordance with that ruling. The district attorney’s office must withhold the information we have marked that pertains to living individuals under section 552.101 of the Government Code in conjunction with common-law privacy. The district attorney’s office must also withhold all public citizens’ dates of birth, other than the requestor’s, under section 552.101

of the Government Code in conjunction with common-law privacy. The remaining information must be released.

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 "Mili Gosar". The signature is fluid and cursive, with a horizontal line extending from the end.

Mili Gosar
Assistant Attorney General
Open Records Division

MG/akg

Ref: ID# 580607

Enc. Submitted documents

c: Requestor
(w/o enclosures)