



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 16, 2015

Ms. Laura Anne Coats
Assistant District Attorney
County of Dallas
133 North Riverfront Boulevard, LB-19
Dallas, Texas 75207-4399

OR2015-24092

Dear Ms. Coats:

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# 587268.

The Dallas County Criminal District Attorney's office (the "district attorney's office") received a request for eight categories of information pertaining to six specified cases. You state you do not have information responsive to two of the specified cases.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.108 of the Government Code 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:

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

(1) release of the information would interfere with the detection, investigation, or prosecution of crime; [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;

...

(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)(1), (a)(4), (b)(1), (b)(3). A governmental body claiming subsections 552.108(a)(1) and (b)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You provide no arguments as to how release of the information at issue would interfere with the detection, investigation, or prosecution of crime or interfere with law enforcement and crime prevention. Consequently, we find you have failed to demonstrate the applicability of section 552.108(a)(1) and section 552.108(b)(1) to the submitted

information. Therefore, the submitted information may not be withheld on either of these bases.

In *Curry v. Walker*, 873 S.W.2d 379 (Tex. 1994), the Texas Supreme Court held 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, 460 (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." 873 S.W.2d at 380. However, a party is not prevented from requesting specific documents or categories of documents relevant to issues in a pending case, even though some or all of the documents may be contained in an attorney's files. *National Union*, 863 S.W.2d at 461. You claim the instant request for information seeks the district attorney's office's entire prosecution files for the specified cases. Upon review, we find the requestor seeks specific categories of information related to the specified cases. Such a request does not constitute a request for the "entire" file. Thus, we conclude the present request is not a request for the district attorney's office's entire prosecution files. As a result, the district attorney's office may not withhold the information at issue under section 552.108(a)(4) or section 552.108(b)(3) of the Government Code and the holding in *Curry*.

You also argue the information at issue was created or assembled in anticipation of or in the course of preparing for criminal litigation and reflects the mental impressions and legal reasoning of prosecutors in the district attorney's office. Upon review, we find you have demonstrated a portion of the information at issue, which we have marked, was prepared by an attorney representing the state in the course of preparing for criminal litigation and reflects the mental impressions and legal reasoning of the attorney. Thus, the district attorney's office may withhold the information we marked under sections 552.108(a)(4) and 552.108(b)(3) of the Government Code. However, we find you have failed to demonstrate any of the remaining responsive information is protected by sections 552.108(a)(4) and 552.108(b)(3), and the district attorney's office may not withhold the remaining information at issue on those bases.

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 article 20.02(a) of the Code of Criminal Procedure, which provides "[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). The Fourth Court of Appeals in *In re Reed* addressed the issue of what constitutes "proceedings" for purposes of article 20.02(a) and stated the term "proceedings" could "reasonably be understood as encompassing matters that take place before the grand jury, such as witness testimony and deliberations." See *In re Reed*, 227 S.W.3d 273, 276 (Tex. App.—San Antonio 2007, orig. proceeding).

Subsequent to the ruling in *Reed*, the 80th Legislature, modeling federal law, added subsection (h) to article 20.02. *See* Crim. Proc. Code art. 20.02; 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 “[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 to consider in making such a determination, and even if we considered article 20.02 to be a confidentiality provision, information withheld under this statute would be secret only “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 the matter upon which the submitted information was based is still “before the grand jury” to warrant keeping it 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 submitted information confidential. *See* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Consequently, the submitted information may not be withheld under section 552.101 of the Government Code in conjunction with article 20.02 of the Criminal Code of Procedure.

Section 552.101 of the Government Code also encompasses section 11 of article 49.25 of the Code of Criminal Procedure, which provides:

The medical examiner shall keep full and complete records properly indexed, giving the name if known of every person whose death is investigated, the place where the body was found, the date, the cause and manner of death, and shall issue a death certificate. . . . The records may not be withheld, subject to a discretionary exception under Chapter 552, Government Code, except that a photograph or x-ray of a body taken during an autopsy is excepted from required public disclosure in accordance with Chapter 552, Government Code, but is subject to disclosure:

- (1) under a subpoena or authority of other law; or
- (2) if the photograph or x-ray is of the body of a person who died while in the custody of law enforcement.

Crim. Proc. Code art. 49.25, § 11. Exhibit K consists of photographs taken during an autopsy. We note neither of the statutory exceptions to confidentiality are applicable in this instance. Accordingly, we agree the district attorney’s office must withhold Exhibit K under

section 552.101 of the Government Code in conjunction with section 11 of article 49.25 of the Code of Criminal Procedure.

Section 552.101 of the Government Code also encompasses information made confidential by 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, the following:

(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 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 at 3-4 (1987), 370 at 2 (1983), 343 at 1 (1982). Section 159.001 of the Occupations Code defines a “patient” as a person who consults with or is seen by a physician to receive medical care. Occ. Code § 159.001. Based on this definition, a deceased individual cannot be a “patient” under section 159.001. Thus, section 159.002 protects only the medical records of an individual who was alive at the time the records were created. Upon review, we find the information we have marked must be withheld under section 552.101 of the Government Code in conjunction with the MPA. However, we find none of the remaining information constitutes a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that was created or is maintained by a physician. Accordingly, the district attorney’s office may not withhold any of the remaining information under section 552.101 in conjunction with the MPA.

Section 552.101 of the Government Code also encompasses section 411.083 of the Government Code which pertains to criminal history record information (“CHRI”). CHRI generated by the National Crime Information Center (“NCIC”) or by the Texas Crime Information Center is confidential under federal and state law. CHRI means “information

collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions.” Gov’t Code § 411.082(2). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI obtained from the NCIC network or other states. *See* 28 C.F.R. § 20.21. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. Open Records Decision No. 565 at 7 (1990); *see generally* Gov’t Code ch. 411 subch. F. Section 411.083 of the Government Code deems confidential CHRI the Texas Department of Public Safety (“DPS”) maintains, except DPS may disseminate this information as provided in chapter 411, subchapter F or suchpater E-1 of the Government Code. *See id.* § 411.083(a). 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). Thus, 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. We note records relating to routine traffic violations are not considered criminal history information. *Cf. Id.* § 411.082(2)(B) (criminal history record information does not include driving record information). We note section 411.083 does not apply to active warrant information or other information relating to one’s current involvement in the criminal justice system. *See id.* § 411.081(b) (police department allowed to disclose information pertaining to person’s current involvement in the criminal justice system). Upon review, we find the information we have marked constitutes confidential CHRI. Therefore, the district attorney’s office must withhold the CHRI we have marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code and federal law.² However, none of the remaining information constitutes confidential CHRI; 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 section 411.083 of the Government Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that (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 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. 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 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

²We note the requestor can obtain her client’s CHRI from DPS. Gov’t Code § 411.083(b)(3).

(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.³ *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. 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. 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))); 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"). 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. We also note the requestor is the authorized representative of one of the individuals whose privacy interests are implicated. As such, this requestor has a special right of access to her client's information under section 552.023 of the Government Code to information that would otherwise be withheld to protect her privacy. See Gov't Code § 552.023 (person or person's authorized representative has special right of access to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person's privacy interests); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Thus, the district attorney's office may not withhold the requestor's client's information from her. Accordingly, with the exception of the requestor's client's date of birth, the district attorney's office must withhold all living public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find the district attorney's office has failed to demonstrate the remaining information is highly intimate or embarrassing and of no legitimate public interest. Thus, the district attorney's office may not withhold the remaining information under section 552.101 in conjunction with common-law privacy.

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 a personal identification document issued by an agency of this state or another state or country is excepted from public release. Gov't Code § 552.130(a). We note section 552.130 protects

³Section 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).

personal privacy. Thus, the requestor has a special right of access to her client's motor vehicle record information. *See id.* 552.023; ORD 481 at 4. Upon review, we find the district attorney's office must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code. However, we find the remaining information does not consist of motor vehicle record information subject to section 552.130. Accordingly, the remaining information may not be withheld under section 552.130 of the Government Code.

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." Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). We note the purpose of section 552.136 is to protect the privacy interests of individuals. Because "the right of privacy is purely personal," that right "terminates upon the death of the person whose privacy is invaded." Therefore, account information that pertains solely to a deceased individual may not be withheld under section 552.136. *See Moore*, 589 S.W.2d at 491; *see also* Attorney General Opinions JM-229; H-917. We have marked information generally subject to section 552.136. However, we note some of the information we have marked consists of an account number which belongs to a deceased individual. To the extent the information we have marked pertains to an account in which a living individual has an interest, the district attorney's office must withhold it under section 552.136 of the Government Code. However, if the information we have marked pertains solely to the deceased individual, the district attorney's office may not withhold it under section 552.136 of the Government Code. The district attorney's office must withhold the remaining information we have marked, which pertains to a living individual, under section 552.136 of the Government Code.

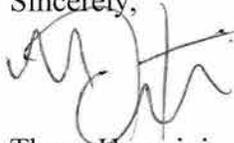
In summary, the district attorney's office may withhold the information we have marked under section 552.108(a)(4) and 552.108(b)(3) of the Government Code. The district attorney's office must withhold Exhibit K under section 552.101 of the Government Code in conjunction with section 11 of article 49.25 of the 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 the MPA. The district attorney's office must withhold the CHRI we have marked in conjunction with section 411.083 of the Government Code and federal law. With the exception of the requestor's client's date of birth, the district attorney's office must withhold all living public citizens' dates of birth 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 under section 552.130 of the Government Code. If a living individual owns an interest in the account number belonging to the deceased individual, the district attorney's office must withhold the account number, which we have marked under section 552.136 of the Government Code. The department

must withhold the remaining information we have marked under section 552.136 of the Government Code. The district attorney's office must release the remaining information.⁴

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,



Thana Hussaini
Assistant Attorney General
Open Records Division

TSH/som

Ref: ID# 587268

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴We note the requestor has a special right of access to some of the information being released in this instance. Because such information is confidential with respect to the general public, if the district attorney's office receives another request for this information from a different requestor, then the district attorney's office should again seek a ruling from this office. Furthermore, we note the information being released contains social security numbers. 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 office under the Act. Gov't Code § 552.147(b).