



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 7, 2016

Ms. Leslie O. Haby
Assitant Criminal District Attorney
Civil Section
101 West Nueva Street, 7th Floor
San Antonio, Texas 78205

OR2016-07877

Dear Ms. Haby:

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# 605129.

The Bexar County District Attorney's Office (the "district attorney's office") received a request for communications sent or received by two named individuals for specified time periods, including the attachments to each communication. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.104, 552.107, 552.108, 552.111, 552.115, 552.117, and 552.136 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence.¹ We have considered your arguments and reviewed the submitted representative sample of information.²

¹Although you raise section 552.1175 of the Government Code, we note section 552.117 is the proper exception to raise for information held in an employment context. Although you also raise Texas Rule of Civil Procedure 192.5, we note the proper exception to raise when asserting the attorney work product privilege for information not subject to section 552.022 of the Government Code is section 552.111 of the Government Code. *See* Open Records Decision Nos. 677 (2002), 676 at 6 (2002).

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Initially, we note some of the submitted information, which we have marked, is not responsive to the instant request for information. 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.

We note you have redacted a street address and a cellular telephone number. Pursuant to section 552.301 of the Government Code, a governmental body that seeks to withhold requested information must submit to this office a copy of the information, labeled to indicate which exceptions apply to which parts of the copy, unless the governmental body has received a previous determination for the information at issue. Gov't Code § 552.301(a), (e)(1)(D). You do not assert, nor does our review of our records indicate, the district attorney's office has been authorized to withhold the redacted information without seeking a ruling from this office. *Id.* § 552.301(a); Open Records Decision No. 673 (2001). As such, this information must be submitted in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. In this instance, we can discern the nature of the redacted information; thus, we will address your arguments against the disclosure of this information. In the future, however, the district attorney's office should refrain from redacting any information it is not authorized to withhold in seeking an open records ruling. Failure to do so may result in the presumption the redacted information is public. *See* Gov't Code § 552.302.

We note portions of the submitted information are subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; [and]

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Id. § 552.022(a)(1), (3). The information we have marked consists of completed reports subject to section 552.022(a)(1). The district attorney's office must release the completed reports pursuant to section 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or

other law. *See id.* § 552.022(a)(1). Portions of the submitted information also consist of information relating to the expenditure of funds by a governmental body subject to section 552.022(a)(3). The information subject to section 552.022(a)(3), which we have marked, must be released unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(3). Although you raise section 552.103 and section 552.107 of the Government Code for the information at issue, these sections are discretionary exceptions to disclosure and do not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision Nos. 676 at 10-11 (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, none of the information subject to sections 552.022(a)(1) and 552.022(a)(3), which we have marked, may be withheld under section 552.103 or section 552.107. However, the Texas Supreme Court has held the Texas Rules of Evidence are “other law” that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503. Further, we will consider your arguments against disclosure of the remaining information.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

- (A) between the client or the client’s representative and the client’s lawyer or the lawyer’s representative;
- (B) between the client’s lawyer and the lawyer’s representative;
- (C) by the client, the client’s representative, the client’s lawyer, or the lawyer’s representative to a lawyer representing another party in a pending action or that lawyer’s representative, if the communications concern a matter of common interest in the pending action;
- (D) between the client’s representatives or between the client and the client’s representative; or
- (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is “confidential” if it is not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* ORD 676 at 6-7. Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).

You explain the information that is subject to section 552.022 consists of attachments to privileged e-mail communications between the district attorney’s office and its clients for the purpose of facilitating the rendition of professional legal services. You state the communications were intended to be confidential and have remained confidential. Upon review, we find the district attorney’s office has established the information at issue constitutes privileged attorney-client communications under rule 503. Thus, the district attorney’s office may withhold the information subject to section 552.022, which we have marked, under Texas Rule of Evidence 503.

Section 552.101 of the Government Code exempts 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 subject to chapter 550 of the Transportation Code. Section 550.065 applies only to a written report of an accident required under section 550.061, 550.062, or 601.004. Transp. Code § 550.065(a)(1). Chapter 550 requires the creation of a written report when the accident resulted in injury to or the death of a person or damage to the property of any person to the apparent extent of \$1,000 or more. Transp. Code §§ 550.061 (operator’s accident report), .062 (officer’s accident report). An accident report is privileged and for the confidential use of the Texas Department of Transportation or a local governmental agency of Texas that has use for the information for accident prevention purposes. *Id.* § 550.065(b). However, a governmental entity may release an accident report in accordance with subsections (c) and (c-1). *Id.* § 550.065(c), (c-1). Section 550.065(c) provides a governmental entity shall release an accident report to a person or entity listed under this subsection. *Id.* § 550.065(c). In this instance, the requestor is not a person listed under section 550.065(c). Thus, the submitted

accident report is confidential under section 550.065(b), and the district attorney's office must withhold it under section 552.101 of the Government Code.

We understand the district attorney's office to raise section 552.104 of the Government Code for some of the submitted information on behalf of the Bexar County Purchasing Department (the "department"). Section 552.104(a) excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The "test under section 552.104 is whether knowing another bidder's [or competitor's information] would be an advantage, not whether it would be a decisive advantage." *Boeing Co. v. Paxton*, 466 S.W.3d 831, 841 (Tex. 2015). The district attorney's office states the submitted information pertains to a competitive bidding situation. In addition, the district attorney's office states release of the information at issue "could give one of the other bidders an unfair competitive advantage in current or future solicitations by providing proprietary information about the other bidders." After review of the information at issue and consideration of the arguments, we find the district attorney's office has established the release of the information we have marked would give advantage to a competitor or bidder. Thus, we conclude the district attorney's office may withhold the information we have marked under section 552.104(a) of the Government Code on behalf of the department.

The district attorney's office claims section 552.107 of the Government Code for some of the remaining information. Section 552.107(1) protects information that comes within the attorney-client privilege. *See* Gov't Code § 552.107(1). The elements of the privilege under section 552.107 are the same as those for rule 503. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* ORD 676 at 6-7. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege. *See Huie*, 922 S.W.2d at 923.

The district attorney's office states some of the submitted information consists of communications between attorneys and employees of the district attorney's office. The district attorney's office states the communications were made for the purpose of facilitating the rendition of professional legal services and these communications have remained confidential. Upon review, we find the district attorney's office has demonstrated the applicability of the attorney-client privilege to the information we have marked. Thus, the district attorney's office may withhold the information we have marked under section 552.107(1) of the Government Code.³ However, we note the remaining information at issue consists of a communication with an individual whom the district attorney's office has not demonstrated is a privileged party. Thus, we find the district attorney's office has not demonstrated this information, which we have marked for release, constitutes privileged attorney-client communications for the purposes of section 552.107(1). Therefore, the

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

district attorney's office may not withhold the remaining information at issue under section 552.107(1) of the Government Code.

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[.]” Gov’t Code § 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). The district attorney’s office states the information you have marked relates to pending criminal investigations or prosecutions. Based on this representation, we conclude the release of the information you have marked would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177, 186-87 (Tex. Civ. App.—Houston [14th Dist.] 1975) (delineating law enforcement interests present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Therefore, section 552.108(a)(1) is applicable to the information at issue.

However, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov’t Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle*. *See* 531 S.W.2d at 186-88; Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). Thus, with the exception of basic information, the district attorney’s office may withhold the information you have marked under section 552.108(a)(1) of the Government Code.⁴

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. Types of information considered intimate or 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. *Id.* 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’

⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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.⁵ *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. However, 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))); 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, the district attorney's office may not withhold information pertaining solely to a deceased individual under section 552.101 of the Government Code in conjunction with common-law privacy. 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. However, we find you have failed to demonstrate the remaining information that pertains to living individuals 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 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses the doctrine of constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. ORD 455 at 4. The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). As noted above, the right to privacy is a personal right that lapses at death and therefore may not be asserted solely on behalf of a deceased individual. See *Moore*, 589 S.W.2d at 491; see also Attorney General Opinions JM-229, H-917; ORD 272 at 1. Upon review, we find the district attorney's office has failed to demonstrate any portion of the information at issue falls within the zones of privacy or

⁵Section 552.102(a) exempts 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).

implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the district attorney's office may not withhold any of the remaining information under section 552.101 on the basis of constitutional privacy.

Section 552.117(a)(1) of the Government Code exempts 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. The district attorney's office informs us the employee at issue timely elected confidentiality under section 552.024. Therefore, the district attorney's office must withhold the information we have marked under section 552.117(a)(1) of the Government Code. However, we find none of the remaining information constitutes the home address or telephone number, emergency contact information, social security number, or family member information of a current or former official or employee of the district attorney's office under section 552.117(a)(1). Thus, the district attorney's office may not withhold any portion of the remaining information under section 552.117(a)(1).

We note the remaining information contains information subject to section 552.130 of the Government Code, which provides information relating to a motor vehicle operator's or 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.⁶ Gov't Code § 552.130(a). 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.

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." *Id.* § 552.136(b); *see id.* § 552.136(a) (defining "access device"). Upon review, we find the district attorney's office must withhold the information you have marked under section 552.136 of the Government Code.

Section 552.137 of the Government Code exempts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with

⁶The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). Section 552.137 does not apply to an institutional e-mail address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address of a vendor who seeks to contract with a governmental body, an e-mail address maintained by a governmental entity for one of its officials or employees, or an e-mail address provided to a governmental body on a letterhead. *See id.* § 552.137(c). Upon review, we find the district attorney’s office must withhold the e-mail addresses in the remaining information under section 552.137 of the Government Code, unless their owners affirmatively consent to their public disclosure or if subsection (c) applies.

In summary, the district attorney’s office may withhold the information subject to section 552.022 of the Government Code, which we have marked, under Texas Rule of Evidence 503. The district attorney’s office must withhold the submitted accident report under section 552.101 of the Government Code in conjunction with section 550.065(b) of the Transportation Code. The district attorney’s office may withhold the information we have marked under section 552.104(a) of the Government Code on behalf of the department. The district attorney’s office may withhold the information we have marked under section 552.107(1) of the Government Code. With the exception of basic information, the district attorney’s office may withhold the information you have marked under section 552.108(a)(1) 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 common-law privacy. 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 motor vehicle record information we have marked under section 552.130 of the Government Code. The district attorney’s office must withhold the information you have marked under section 552.136 of the Government Code. The district attorney’s office must withhold the e-mail addresses in the remaining information under section 552.137 of the Government Code, unless their owners affirmatively consent to their public disclosure or if subsection (c) applies. The district attorney’s office must release the remaining responsive 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, 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 'Cristian Rosas-Grillet', with a long horizontal flourish extending to the right.

Cristian Rosas-Grillet
Assistant Attorney General
Open Records Division

CRG/bw

Ref: ID# 605129

Enc. Submitted documents

c: Requestor
(w/o enclosures)