



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 14, 2016

Mr. Benjamin I. Kaminar
Assistant Criminal District Attorney
Fannin County Criminal District Attorney's Office
101 East Sam Rayburn Drive, Suite 301
Bonham, Texas 75418

OR2016-08425

Dear Mr. Kaminar:

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# 605891.

The Fannin County Criminal District Attorney's Office (the "district attorney's office") received a request for all records involving two named individuals. You claim the submitted information is excepted from disclosure under section 552.108 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."¹ 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 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. A compilation of

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

an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (finding significant privacy interest in compilation of individual's criminal history by recognizing distinction between public records found in courthouse files and local police stations and compiled summary of criminal history information). Furthermore, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. Upon review, we find the present request requires the district attorney's office to compile unspecified law enforcement records concerning the named individuals. Therefore, to the extent the district attorney's office maintains law enforcement records depicting the named individuals as suspects, arrestees, or criminal defendants, the district attorney's office must generally withhold such information under section 552.101 in conjunction with common-law privacy.²

However, we note you have submitted reports of alleged violations of section 32.51 of the Penal Code, which provides "[a] person commits an offense if the person, with the intent to harm or defraud another, obtains, possesses, transfers, or uses an item of . . . identifying information of another person without the other person's consent[.]" Penal Code § 32.51(b)(1). For purposes of section 32.51, "identifying information" includes an individual's name and financial institution account number. *Id.* § 32.51(a)(1)(A), (C). Article 2.29 of the Code of Criminal Procedure pertains to alleged violations of section 32.51 that occurred on or after September 1, 2005, and provides:

(a) A peace officer to whom an alleged violation of Section 32.51, Penal Code, is reported shall make a written report to the law enforcement agency that employs the peace officer that includes the following information:

- (1) the name of the victim;
- (2) the name of the suspect, if known;
- (3) the type of identifying information obtained, possessed, transferred, or used in violation of Section 32.51, Penal Code; and
- (4) the results of any investigation.

(b) On the victim's request, the law enforcement agency shall provide the report created under Subsection (a) to the victim. In providing the report, the law enforcement agency shall redact any otherwise confidential information that is included in the report, other than the information described by Subsection (a).

²As our ruling is dispositive, we need not consider your argument against disclosure of any such information.

Crim. Proc. Code art. 2.29. For purposes of article 2.29, an offense is committed on or after September 1, 2005, if no “element of the offense occurs before that date.” Act of June 17, 2005, 79th Leg., R.S., ch. 294, § 1(b), 2005 Tex. Gen. Laws 885.

In this instance, the information we have marked pertains to forgery of a financial instrument, which constitutes an alleged violation of section 32.51. We note the requestor is the victim of the offenses listed in the reports, and the alleged offenses occurred after September 1, 2005. Therefore, we find the requestor has a right of access to this information pursuant to article 2.29(b). But article 2.29(b) also states “[i]n providing the report, the law enforcement agency shall redact any otherwise confidential information that is included in the report, *other than the information described by Subsection (a).*” Crim. Proc. Code art. 2.29(b) (emphasis added). Because section 552.101 of the Government Code in conjunction with common-law privacy makes information confidential for the purposes of article 2.29, the district attorney’s office is authorized by article 2.29(b) to withhold most of the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. However, because article 2.29(b) provides the requestor with a right of access to the information described in article 2.29(a), which is also subject to common-law privacy, there is a conflict between the doctrine of common-law privacy and article 2.29(b) with regard to the information described by article 2.29(a). However, we note a specific statutory right of access prevails over the common law. *See Collins v. Tex Mall, L.P.*, 297 S.W.3d 409, 415 (Tex. App.—Fort Worth 2009, no pet.) (statutory provision controls and preempts common law only when statute directly conflicts with common-law principle); *see also CenterPoint Energy Houston Elec. LLC v. Harris County Toll Rd. Auth.*, 436 F.3d 541, 544 (5th Cir. 2006) (common law controls only where there is no conflicting or controlling statutory law). Furthermore, although you seek to withhold the information at issue under section 552.108 of the Government Code, this exception does not make information confidential. *See Open Records Decision Nos. 665 at 2 n.5* (2000) (discretionary exceptions generally), 586 (1991) (governmental body may waive section 552.108). Therefore, the district attorney’s office may not withhold the information at issue from this requestor under section 552.108 of the Government Code. Accordingly, pursuant to article 2.29(b) the district attorney’s office must release to this requestor the information listed in article 2.29(a) within the information we have marked. The district attorney’s office must withhold the remaining information we have marked under section 552.101 in conjunction with common-law privacy.

In summary, with the exception of the information listed in article 2.29(a) of the Code of Criminal Procedure within the information we have marked, which must be released to the requestor pursuant to article 2.29(b) of the Code of Criminal Procedure, the district attorney’s office must withhold the remaining information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the district attorney’s office maintains any additional law enforcement records depicting the named individuals as suspects, arrestees, or criminal defendants, the district attorney’s office must

withhold such information under section 552.101 of the Government Code in conjunction with common-law privacy.

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 "Tim Neal", written in a cursive style.

Tim Neal
Assistant Attorney General
Open Records Division

TN/bhf

Ref: ID# 605891

Enc. Submitted documents

c: Requestor
(w/o enclosures)