



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 10, 2016

Ms. Leslie O. Haby
Assistant Criminal District Attorney - Civil Section
Bexar County Criminal District Attorney's Office
101 West Nueva Street, 7th Floor
San Antonio, Texas 78205

OR2016-10617

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# 609403 (BCDA File No. 5057).

The Bexar County Criminal District Attorney's Office (the "district attorney's office") received a request for all records sent from or to any employee of the district attorney's office relating to two named individuals, two specified cases, a named organization, or the named organization's e-mail Listserv during a specified time period. You state the district attorney's office has released some information to the requestor. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. You also state release of some of the requested information may implicate the interests of a third party. Accordingly, you state, and provide documentation demonstrating, you notified the third party of the request for information and of his right to submit arguments stating why any information relating to him should not be released. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released). We have considered the exception you claim and reviewed the submitted information. We have also received and considered comments from the requestor.¹ *See id.*

¹Although the requestor asserts the district attorney's office did not comply with section 552.301(e) of the Government Code, because section 552.101 of the Government Code and third-party interests can provide compelling reasons to overcome the presumption of openness, we will consider your arguments against

Initially, we note some of the submitted information is not responsive to the instant request because it was created outside the time frame specified in the request. 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.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section encompasses the doctrine of common-law privacy, which protects information if it (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 met. *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 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.

The request, in part, requires the district attorney's office to compile unspecified law enforcement records concerning the named individuals. We find such a request for unspecified law enforcement records implicates the individuals' rights to privacy. Therefore, to the extent the district attorney's office maintains law enforcement records depicting the named individuals as suspects, arrestees, or criminal defendants, other than the two specified cases, the district attorney's office must withhold such information under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find the part of the request seeking information pertaining to the two specified cases does not implicate either named individual's privacy interests. Thus, this information is not part of a criminal history compilation protected by common-law privacy and may not be withheld under section 552.101 on that basis. Accordingly, we will address your argument for the information at issue.

Section 552.101 of the Government Code also encompasses information protected by other statutes, such as chapter 55 of the Code of Criminal Procedure. Articles 55.01 through 55.05 of the Code of Criminal Procedure provide for the expunction of criminal records in certain

disclosure of the submitted information. *See* Gov't Code § 552.301 (b), (e); *see also id.* §§ 552.007, .302, .352.

limited circumstances. Article 55.03 prescribes the effect of an expunction order and provides:

When the order of expunction is final:

- (1) the release, maintenance, dissemination, or use of the expunged records and files for any purpose is prohibited;
- (2) except as provided in Subdivision (3) of this article, the person arrested may deny the occurrence of the arrest and the existence of the expunction order; and
- (3) the person arrested or any other person, when questioned under oath in a criminal proceeding about an arrest for which the records have been expunged, may state only that the matter in question has been expunged.

Crim. Proc. Code art. 55.03. Article 55.04 imposes sanctions for violations of an expunction order and provides, in relevant part:

Sec. 1. A person who acquires knowledge of an arrest while an officer or employee of the state or of any agency or other entity of the state . . . and who knows of an order expunging the records and files relating to that arrest commits an offense if he knowingly releases, disseminates, or otherwise uses the records or files.

Id. art. 55.04, § 1. This office has previously determined that the expunction statute prevails over the Act. *See* Open Records Decision No. 457 at 2 (1987) (governmental body prohibited from releasing or disseminating arrest records subject to expunction order, as “those records are not subject to public disclosure under the [Act]”). You contend the information you have indicated is the subject of expunction orders, and you seek to withhold this information under article 55.03 of the Code of Criminal Procedure. You have submitted expunction orders pertaining to the information at issue. Thus, we agree the information you have indicated is confidential under article 55.03 of the Code of Criminal Procedure, and the district attorney’s office must withhold it on that basis under section 552.101 of the Government Code.

In summary, to the extent the district attorney’s office maintains law enforcement records depicting the named individuals as suspects, arrestees, or criminal defendants, other than the two specified cases, the district attorney’s office must withhold such information under section 552.101 of the Government Code in conjunction with common-law privacy. The district attorney’s office must withhold the information you have indicated under

section 552.101 of the Government Code in conjunction with article 55.03 of the Code of Criminal Procedure.

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". The signature is written in a cursive, slightly stylized font.

Tim Neal
Assistant Attorney General
Open Records Division

TN/bw

Ref: ID# 609403

Enc. Submitted documents

c:
(w/o enclosures)