



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 7, 2010

Mr. Gary W. Bunyard
Assistant District Attorney
33rd & 424th Judicial Districts
Llano County
P.O. Box 725
Llano, Texas 78643

OR2010-10014

Dear Mr. Bunyard:

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# 385716.

The Office of the District Attorney for Llano County, 33rd & 424th Judicial Districts, (the "district attorney") received a request for the district attorney's file regarding a named individual. You state you will provide some information to the requestor with redactions of driver's license numbers, e-mail addresses of the members of the public, and social security numbers.¹ You claim that some of the submitted information is excepted from disclosure under sections 552.101, 552.130, and 552.136 of the Government Code.² We have

¹We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a Texas driver's license number under section 552.130 of the Government Code and an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. 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.

²Although you raise section 552.021 of the Government Code as an exception to disclosure, we note that this provision is not an exception to disclosure under the Act. *See* Gov't Code § 552.021 (providing that public information is available during normal business hours). Information confidential by law is excepted by section 552.101 of the Government Code, while credit card account numbers are excepted under section 552.136 of the Government Code, and social security numbers are subject to section 552.147 of the Government Code.

considered the exceptions you claim and reviewed the submitted representative sample of information.³

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. This section encompasses information made confidential by other statutes. Information collected about jurors in the jury selection process is governed by article 35.29 of the Code of Criminal Procedure, which provides:

Information collected by the court or by a prosecuting attorney during the jury selection process about a person who serves as a juror, including the juror's home address, home telephone number, social security number, driver's license number, and other personal information, is confidential and may not be disclosed by the court, the prosecuting attorney, the defense counsel, or any court personnel except on application by a party in the trial or on application by a bona fide member of the news media acting in such capacity to the court in which the person is serving or did serve as a juror. On a showing of good cause, the court shall permit disclosure of the information sought.

Crim. Proc. art. 35.29. Article 35.29 makes confidential certain personal information pertaining only to those individuals who actually served on the petit jury in a criminal trial. In addition to the confidential information listed in article 35.29, "other personal information" that is confidential pursuant to article 35.29 includes the juror's present employer, business telephone number, and spouse's employer. Juror names, however, are not made confidential by article 35.29, and are not "other personal information" that is confidential pursuant to article 35.29. We also note that a post office does not constitute a home address. *See id.* art. 35.29 (Article 35.29 applies only to the home address of juror).

The submitted information contains juror questionnaires, which you claim are confidential under article 35.29. You do not state that any of these individuals served on the jury. Thus, to the extent the information in the juror questionnaires consists of the home address, home telephone number, present employer, business telephone number, or spouse's employer of an individual who actually served on the petit jury, such information must be withheld under section 552.101 of the Government Code in conjunction with article 35.29 of the Code of Criminal Procedure. If the individual at issue did not serve on the petit jury, the information

³We 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.

at issue is not confidential under article 35.29 and it may not be withheld under section 552.101 on that basis.

Section 552.101 also encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. Section 159.002 of the MPA provides, in part:

(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.

Id. § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). 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 (1987), 370 (1983), 343 (1982).

You assert, and we agree, that portions of the remaining information constitute medical records subject to the MPA. Medical records must be released on the patient's signed, written consent. We note, however, that these medical records pertain to a deceased individual. Medical records pertaining to a deceased patient may only be released upon the signed consent of the deceased's personal representative. Accordingly, the district attorney may only release the submitted medical records, which we have marked, in accordance with the MPA.⁴

Section 552.101 also encompasses chapter 560 of the Government Code, which provides that a governmental body may not release fingerprint information except in certain limited circumstances. *See* Gov't Code §§ 560.001 (defining "biometric identifier" to include

⁴As we make this determination, we do not address your remaining claims for this information.

fingerprints), .002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), .003 (providing that biometric identifiers in possession of governmental body are exempt from disclosure under Act). Accordingly, the district attorney must withhold the fingerprint information we have marked under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code.

Section 552.101 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 establish the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82.

The types of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). In addition, this office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate and embarrassing. *See* Open Records Decision No. 545 (1990). However, the common-law right to privacy is a personal right that lapses at death, and therefore it does not encompass information that relates to a deceased individual. *See Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex.App.—Texarkana 1979, *writ ref'd n.r.e.*); Open Records Decision No. 272 at 1 (1981); *see also Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-47 (N.D. Tex. 1979) (“action for invasion of privacy can be maintained only by a living individual whose privacy is invaded”) (quoting Restatement of Torts 2d); Attorney General Opinions JM-229 (1984); H-917 (1976).

We have marked information that is highly intimate or embarrassing and is not of legitimate public concern. This information must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. You have failed to demonstrate, however, how any of the remaining information is highly intimate or embarrassing and not of legitimate public concern. Therefore, no portion of the remaining information may be withheld under section 552.101 on this basis.

Section 552.101 also encompasses the constitutional right to privacy. Constitutional privacy protects two kinds of interests. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first is the

interest in independence in making certain important decisions related to the “zones of privacy,” pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. *See Fado v. Coon*, 633 F.2d 1172 (5th Cir. 1981); Open Records Decision No. 455 at 3-7 (1987). The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. *See Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual’s privacy interest against the public’s interest in the information. *See* ORD 455 at 7. Constitutional privacy under section 552.101 is reserved for “the most intimate aspects of human affairs.” *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492). Upon review, we find that the district attorney has failed to demonstrate that any of the remaining information constitutes the most intimate aspects of human affairs, and the district attorney may not withhold it under section 552.101 based on constitutional privacy.

You claim portions of the remaining information are excepted from disclosure under section 552.130 of the Government Code. Section 552.130 excepts from disclosure information that “relates to . . . a motor vehicle operator’s or driver’s license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state.” Gov’t Code § 552.130. In this instance, some of the information you have marked under section 552.130 consists of out-of-state motor vehicle record information and the issuing state of the Texas driver’s licenses. We note that section 552.130 does not apply to out-of-state motor vehicle record information, nor does the driver’s license issuing state constitute motor vehicle record information for purposes of section 552.130. Upon review, we determine that the district attorney must withhold the Texas motor vehicle information we have marked under section 552.130 of the Government Code. The remaining information you have marked is not Texas motor vehicle information that is subject to section 552.130, and it may not be withheld on that basis.

Section 552.136 of the Government Code states that “[n]otwithstanding any other provision of this chapter, 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). Section 552.136(a) defines “access device” as “a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to . . . obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument.” *Id.* § 552.136(a). Upon review, we determine the credit card account number you have marked and the account numbers we have marked in the remaining records must be withheld under section 552.136 of the Government Code.

In summary, to the extent the information in the juror questionnaires consists of the home address, home telephone number, present employer, business telephone number, or spouse's employer of an individual who actually served on the petit jury, such information must be withheld under section 552.101 of the Government Code in conjunction with article 35.29 of the Code of Criminal Procedure. The district attorney may only release the marked medical records in accordance with the MPA. The district attorney must withhold (1) the fingerprint information we have marked under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code; (2) the marked information under section 552.101 of the Government Code in conjunction with common-law privacy; (3) the Texas motor vehicle information we have marked under section 552.130 of the Government Code; and (4) the marked account numbers in the remaining records under section 552.136 of the Government Code.⁵ The remaining submitted 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.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

⁵As noted previously, this office recently issued Open Records Decision No. 684, a previous determination to all governmental bodies authorizing them to withhold ten categories of information without the necessity of requesting an attorney general decision, including a Texas license plate number under section 552.130, credit card and bank account numbers under section 552.136, and a fingerprint under section 552.101 in conjunction with section 560.003 of the Government Code.

Ref: ID# 385716

Enc. Submitted documents

c: Requestor
(w/o enclosures)