



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 9, 2010

Ms. Paula M. Rosales
Assistant District Attorney
Dallas County
Frank Crowley Courts Building
133 North Riverfront Boulevard, LB-19
Dallas, Texas 75207-4399

OR2010-10133

Dear Ms. Rosales:

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# 385929.

The Dallas County District Attorney's Office (the "district attorney") received a request for a specified incident report. You state you have no information responsive to a portion of the request.¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.130, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You claim portions of the submitted information are excepted from disclosure under section 552.101 of the Government Code based on the common-law and constitutional rights to privacy. Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses the common-law right of privacy, which protects information that is (1) highly intimate or embarrassing, such that

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

its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *See 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. *See id.* at 683.

You claim some of the information should be withheld under section 552.101 in conjunction with common-law privacy upon a showing of a "special circumstances" in which the release of information would likely cause someone to face an imminent threat of physical danger. *See, e.g.*, Open Records Decision Nos. 169 (1977), 123 (1976). However, the Third Court of Appeals ruled the "special circumstances" aspect of the common law right to privacy recognized in past open records decisions directly conflicts with Texas Supreme Court precedent regarding common law privacy. *Tex. Dep't of Pub. Safety v. Cox Tex. Newspapers*, 287 S.W.3d 390 (Tex. App.—Austin 2009, pet. filed). The court of appeals ruled that the two-part test set out in *Industrial Foundation* is the "sole criteria" for determining whether information can be withheld under common law privacy. *Id.*; *see also Indus. Found.*, 540 S.W.2d at 686.

Upon review, we find no portion of the submitted information is highly intimate or embarrassing. Therefore, as you have not satisfied the first element of the *Industrial Foundation* test for common-law privacy, we find that the submitted information is not protected by common-law privacy and conclude that no portion of the information may be withheld under section 552.101 of the Government Code on this basis.

Section 552.101 also encompasses the doctrine of constitutional privacy. The constitutional right to privacy protects two types of interests. *See* Open Records Decision No. 600 at 4 (1992) (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985)). The first is the interest in independence in making certain important decisions related to the "zones of privacy" recognized by the United States Supreme Court. *Id.* The zones of privacy recognized by the United States Supreme Court are matters pertaining to marriage, procreation, contraception, family relationships, and child rearing and education. *See id.* The second interest is the interest in avoiding disclosure of personal matters. The test for whether information may be publicly disclosed without violating constitutional privacy rights involves a balancing of the individual's privacy interests against the public's need to know information of public concern. *See* Open Records Decision No. 455 at 5-7 (1987) (citing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981)). The scope of information considered private under the constitutional doctrine is narrower than that under the common-law right to privacy; the material must concern the "most intimate aspects of human affairs." *See id.* at 5 (citing *Ramie*, 765 F.2d at 492). You argue that portions of the submitted information are confidential under constitutional privacy. Upon review, we find you failed to

demonstrate how any portion of the submitted information falls within the zones of privacy or implicates any party's privacy interests for purposes of constitutional privacy. Accordingly, the district attorney may not withhold any of the submitted information under section 552.101 in conjunction with constitutional privacy.

You claim portions of the submitted information are excepted from disclosure under section 552.108 of the Government Code. Section 552.108 provides in relevant part the following:

(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;

Gov't Code § 552.108(b)(1). A governmental body claiming section 552.108(b)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

This office has previously determined that, when it can be established from an examination of the facts of a particular case that disclosure of witness identities and statements might subject the witnesses to possible intimidation or harassment, that information may be excepted from disclosure under the predecessor to section 552.108. *E.g.*, Open Record Decision Nos. 329 (1982), 313 (1982), 297 (1981). You state the information pertains to a murder investigation and release of the witness information would compromise witness safety. Based on your representations and our review, the district attorney may withhold the information we have marked under section 552.108.² However, after review of your arguments and the information at issue, we find the district attorney has not established that release of the remaining information would subject any individual to possible intimidation or harassment. Accordingly, the district attorney may not withhold any of the remaining information under section 552.108 of the Government Code.

Section 552.147 of the Government Code provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. Gov't

²As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

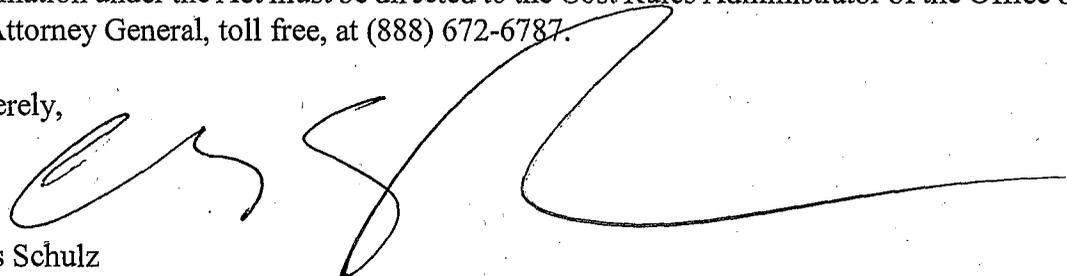
Code § 552.147(a). The district attorney may withhold the social security number in the remaining information under section 552.147.³

In summary, the district attorney may withhold the information we have marked under section 552.108. The district attorney may withhold the social security number in the submitted information under section 552.147. The remaining 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,



Chris Schulz
Assistant Attorney General
Open Records Division

CS/tp

Ref: ID# 385929

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³Section 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.