



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 19, 2011

Mr. Gerard A. Calderon  
Assistant Criminal District Attorney  
Bexar County  
300 Dolorosa, Fifth Floor  
San Antonio, Texas 78205

OR2011-18675

Dear Mr. Calderon:

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# 439339.

The Bexar County District Attorney's Office (the "district attorney") received a request for materials a named employee received from a specified conference, the named employee's record book of notarized documents, and the named employee's Bexar County business e-mails. You claim that some of the requested information is subject to sections 552.027 and 406.014 of the Government Code. You also claim that some the requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.111, 552.132, and 552.138 of the Government Code and privileged under Texas Rule of Evidence 503. We have considered your arguments and reviewed the submitted information, portions of which consist of a representative sample.<sup>1</sup> We have also received and considered comments from the requestor. *See Gov't Code § 552.304* (interested party may submit comments stating why information should or should not be released).

Initially, we note the district attorney sought to withdraw its present request for an open records decision because the requestor's public information request was withdrawn by

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<sup>1</sup>We assume 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 those records contain substantially different types of information than that submitted to this office.

operation of law for failure to timely respond to a cost estimate for providing requested records. Upon review of a copy of the cost estimate provided to the requestor, we note it does not comply with the requirements of section 552.2615 of the Government Code. *See id.* § 552.2615. Accordingly, we conclude the requestor's public information request has not been withdrawn by operation of law. We will, therefore, address your arguments against disclosure of the submitted information.

Next, we note some of the submitted information, which we have marked, is not responsive to the instant request for information because it was created after the date the request was received. This ruling does not address the public availability of non-responsive information, and the district attorney is not required to release non-responsive information in response to this request.

You claim the requested conference materials are subject to section 552.027 of the Government Code. Section 552.027 provides as follows:

(a) A governmental body is not required under this chapter to allow the inspection of or to provide a copy of information in a commercial book or publication purchased or acquired by the governmental body for research purposes if the book or publication is commercially available to the public.

(b) Although information in a book or publication may be made available to the public as a resource material, such as a library book, a governmental body is not required to make a copy of the information in response to a request for public information.

(c) A governmental body shall allow the inspection of information in a book or publication that is made part of, incorporated into, or referred to in a rule or policy of a governmental body.

*Id.* § 552.027. Section 552.027 is designed to alleviate the burden of providing copies of commercially available books, publications, and resource materials maintained by governmental bodies, such as telephone directories, dictionaries, encyclopedias, statutes, and periodicals. However, you have not demonstrated how the submitted conference brochure consists of information in a publication that was purchased or acquired by the district attorney for research purposes. Accordingly, we determine that the requested conference materials are not subject to section 552.027. As you raise no further exceptions to disclosure of this information, it must be released.

We now address the district attorney's obligations under section 552.301 of the Government Code, which prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See id.*

§ 552.301(b). You state the district attorney received the request for information on September 26, 2011. Accordingly, you were required to provide the information required by subsection 552.301(b) by October 10, 2011. However, the envelope in which the district attorney provided the information required by subsection 552.301(b) is meter-marked October 11, 2011. *See id.* § 552.308(a)(1) (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Accordingly, we conclude the district attorney failed to comply with the procedural requirements mandated by section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). The presumption that information is public under section 552.302 can be overcome by demonstrating the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982).

Although you raise sections 552.103, 552.108, and 552.111 of the Government Code and Texas Rule of Evidence 503, these exceptions and this rule are discretionary in nature. They serve only to protect a governmental body's interests and may be waived; as such, they do not constitute compelling reasons to withhold information for purposes of section 552.302. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 677 at 10 (2002) (attorney work-product privilege under section 552.111 is not compelling reason to withhold information under section 552.302), 676 at 12 (2002) (claim of attorney-client privilege under section 552.107 or rule 503 does not provide compelling reason to withhold information under section 552.302 if it does not implicate third-party rights), 177 (1977) (governmental body may waive statutory predecessor to section 552.108); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions in general). In failing to comply with section 552.301, the district attorney has waived its claims under sections 552.103, 552.108, and 552.111 of the Government Code, and Texas Rule of Evidence 503. Therefore, none of the submitted information may be withheld under those exceptions and this rule. However, you also raise sections 552.101, 552.132, and 552.138 of the Government Code, which can provide compelling reasons to withhold information. Thus, we will address the applicability of these exceptions.

Next, you state you seek to withdraw your request for an open records decision on the requested notary log books because the notary log books are not "public information." We note and you acknowledge, however, the information at issue is subject to section 406.014

of the Government Code. Chapter 406 of the Government Code is applicable to notaries public. *See* Gov't Code § 406.001 *et seq.* Section 406.014 provides in part:

(b) Entries in the notary's book are public information.

(c) A notary public shall, on payment of all fees, provide a certified copy of any record in the notary public's office to any person requesting the copy.

*Id.* § 406.014(b)-(c). A portion of the requested information is contained in the notary public books of a district attorney employee. This information is expressly made public by section 406.014 of the Government Code. You claim this information is excepted from disclosure under sections 552.101, 552.132, and 552.138 of the Government Code. However, information that a statute outside the Act expressly makes public generally may not be withheld from disclosure under an exception contained in the Act. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, we do not address your arguments against disclosure of the submitted notary public books.

However, we note some of the information in the submitted notary public books is subject to constitutional privacy. Section 552.101 of the Government Code excepts 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 the doctrine of constitutional privacy, which 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 far 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).

We note the information at issue in the submitted notary log books is maintained by the district attorney, which provides services to victims of domestic violence and sexual assault. We also note some of this information pertains to victims of domestic violence that used the district attorney's services for the application of protective orders. After reviewing the information at issue, we find a portion of the information in the submitted notary log books is protected by constitutional privacy and must be withheld under section 552.101.

Under the Supremacy Clause of the United States Constitution, the United States Constitution and duly-enacted federal statutes are “the supreme law of the Land,” and states have a responsibility to enforce federal law. *See* U.S. Const., art. VI, cl. 2; *Howlett v. Rose*, 496 U.S. 356, 367-69, 110 S.Ct. 2430, 2438-39, 110 L.Ed.2d 332 (1990). As a federal law, constitutional privacy preempts any conflicting state provisions, including section 406.014 of the Government Code. *See Equal Employment Opportunity Comm’n v. City of Orange, Texas*, 905 F. Supp 381, 382 (E.D. Tex. 1995) (federal law prevails over inconsistent provision of state law). Accordingly, we find that, notwithstanding section 406.014 of the Government Code, the names, addresses, and phone numbers belonging to victims of domestic violence that used the district attorney’s services for the application of protective orders, as well as types of documents notarized for the victims, must be withheld from the notary log books under section 552.101 of the Government Code in conjunction with constitutional privacy. We also note that portions of the e-mails submitted in Exhibit E also pertain to victims of domestic violence that used the district attorney’s services for the application of protective orders. Thus, the district attorney also must withhold the same types of information pertaining to victims of domestic violence in these e-mails. However, we find that no portion of the remaining information at issue in the notary log books comes within one of the constitutional zones of privacy or involves the most intimate aspects of human affairs. Therefore, no portion of the remaining requested information may be withheld under section 552.101 on the basis of constitutional privacy. Accordingly, the district attorney must release the remaining requested information in the notary log books pursuant to section 406.014 of the Government Code.

Section 552.101 of the Government Code also encompasses the common-law right of privacy, which protects information that is (1) highly intimate or embarrassing, such that 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. *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 the remaining requested e-mails are excepted from required disclosure under section 552.101 in conjunction with common-law privacy and “special circumstances” because release of the information would likely cause someone to face an imminent threat of physical danger.

For many years, this office determined section 552.101 of the Government Code, in conjunction with the common-law right to privacy, protects information from disclosure when “special circumstances” exist in which the disclosure of information would place an individual in imminent danger of physical harm. *See, e.g.*, Open Records Decision Nos. 169 (1977) (special circumstances required to protect information must be more than mere desire for privacy or generalized fear of harassment or retribution), 123 (1976) (information protected by common-law right of privacy if disclosure presents tangible physical danger).

However, the Texas Supreme Court recently held freedom from physical harm does not fall under the common-law right to privacy. *Tex. Dep't of Pub. Safety v. Cox Tex. Newspapers, L.P. & Hearst Newspapers, L.L.C.*, 343 S.W.3d 112 (Tex. 2011) (holding “freedom from physical harm is an independent interest protected under law, untethered to the right of privacy”). Instead, in *Cox*, the court recognized, for the first time, a separate common-law physical safety exception to required disclosure that exists independent of the common-law right to privacy. *Id.* at 118. Pursuant to this common-law physical safety exception, “information may be withheld [from public release] if disclosure would create a substantial threat of physical harm.” *Id.* In applying this new standard, the court noted “deference must be afforded” law enforcement experts regarding the probability of harm, but further cautioned that “vague assertions of risk will not carry the day.” *Id.* at 119.

You generally assert the remaining requested information in the e-mails at issue pertains to domestic violence victims. You state the “release of . . . emails concerning victims’ claims, and the myriad of privacy issue[s], could have a ‘chilling effect’ on these victims as they would fear for their safety and that of their families.” Upon review, we find you have made only vague assertions of risk of harm if the remaining information at issue is released. Accordingly, we find you have not established disclosure of this information would create a substantial threat of physical harm to an individual, and the district attorney may not withhold any of the remaining requested information under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.

You also raise common-law privacy for the remaining requested e-mails. Upon review, however, the remaining e-mails at issue are either not highly intimate or embarrassing or are of legitimate public interest, and the district attorney may not withhold this information under section 552.101 on that basis.

You also seek to withhold the remaining requested e-mails under section 552.101 in conjunction with section 261.201 of the Family Code, which provides as follows:

(a) Except as provided by Section 261.203, the following information is confidential, is not subject to public release under chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report.

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under

this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). You generally claim the information at issue is confidential under section 261.201 of the Family Code. You have not explained, nor does the information reflect, how the requested e-mails were used or developed in an investigation of alleged child abuse or neglect. *See id.* § 261.201(a); *see also id.* § 261.001(1), (4) (defining “abuse” and “neglect” for purposes of Fam. Code ch. 261). Thus, we find you have failed to establish the applicability of section 261.201 to the information at issue. Accordingly, the district attorney may not withhold the remaining requested e-mails under section 552.101 in conjunction with section 261.201 of the Family Code.

You assert the remaining requested e-mails are excepted under section 552.132 of the Government Code, which provides, in relevant part, the following:

(b) The following information held by the crime victim’s compensation division of the attorney general’s office is confidential:

(1) the name, social security number, address, or telephone number of a crime victim or claimant; or

(2) any other information the disclosure of which would identify or tend to identify the crime victim or claimant.

...

(d) An employee of a governmental body who is also a victim under Subchapter B, Chapter 56, Code of Criminal Procedure, regardless of whether the employee has filed an application for compensation under that subchapter, may elect whether to allow public access to information held by the attorney general’s office or other governmental body that would identify or tend to identify the victim, including a photograph or other visual representation of the victim.

Gov’t Code § 552.132(b), (d). The information at issue is held by the district attorney, not the crime victim’s compensation division of this office; therefore, section 552.132(b) is not applicable to this information. Additionally, you provide no representation that any of the victims are employees of the district attorney who elected in accordance with section 552.132(d). We, therefore, conclude the district attorney may not withhold any portion of the remaining requested e-mails under section 552.132.

Section 552.138 of the Government Code provides in relevant part:

(a) In this section:

(1) "Family violence shelter center" has the meaning assigned by Section 51.002, Human Resources Code.

(2) "Sexual assault program" has the meaning assigned by Section 420.003.

(b) Information maintained by a family violence shelter center or sexual assault program is excepted from [required public disclosure] if it is information that relates to:

...

(3) the name, home address, home telephone number, or numeric identifier of a current or former client of a family violence shelter center or sexual assault program[.]

*Id.* § 552.138(a), (b)(3). Section 552.138 applies only to information maintained by a family violence shelter center or sexual assault program. *See* House Comm. on State Affairs, Bill Analysis, Tex. S.B. 15, 77<sup>th</sup> Leg., R.S. (2001) (Engrossed version) ("Senate Bill 15 amends the Government Code to except family violence shelter centers (center) and sexual assault programs (program) from disclosing certain public information."). Therefore, because the submitted information is maintained by the district attorney, and not by a family violence shelter center or sexual assault program, the district attorney may not withhold any of the information at issue under section 552.138 of the Government Code.

We note some of the remaining information is subject to section 552.137 of the Government Code, which excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with 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).<sup>2</sup> *See* Gov't Code § 552.137(a)-(c). The e-mail address at issue is not excluded by subsection (c). Therefore, the district attorney must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.<sup>3</sup>

In summary, the names, addresses, and phone numbers belonging to victims of domestic violence that used the district attorney's services for the application of protective orders, as

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<sup>2</sup>The 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).

<sup>3</sup>This office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including 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.

well as types of documents notarized for the victims, in both the notary log books and e-mails in Exhibit E are confidential pursuant to constitutional privacy and must be withheld under section 552.101 of the Government Code. The district attorney must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure. 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](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,



Sarah Casterline  
Assistant Attorney General  
Open Records Division

SEC/ag

Ref: ID# 439339

Enc. Submitted documents

c: Requestor  
(w/o enclosures)