



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 22, 2011

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

OR2012-18915

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# 440065.

The Bexar County District Attorney's Office (the "district attorney") received a request for a named employee's notary public record book; the named employee's incoming and outgoing business e-mails during a specified time period; and protective order manuals, guides, books, pamphlets, and policies and procedures. You claim some of the requested information is subject to section 552.027 of the Government Code and chapter 406 of the Government Code. You claim the remaining 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.<sup>1</sup> We have considered your arguments and reviewed the submitted representative sample of information.<sup>2</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).

---

<sup>1</sup>Although you also raise chapter 71 of the Family Code, you have not provided arguments explaining how this chapter applies to the information at issue. Therefore, we assume you no longer assert chapter 71. *See* Gov't Code §§ 552.301(b), (e), .302.

<sup>2</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.

Initially, we note the district attorney seeks to withdraw its present request for an open records decision because the requestor's public information request was withdrawn by operation of law for failure to timely respond to a cost estimate for providing requested records.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 because it does not inform the requestor that inspection is an available less costly method of obtaining the requested information. *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 requested 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 protective order manuals, guides, books, pamphlets, and policies and procedures are subject to section 552.027 of the Government Code. Section 552.027 provides:

(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. In this instance, you have not demonstrated how the requested protective order materials consist of commercially available information in a publication that was purchased or acquired by the district attorney for research purposes. Consequently, you have failed to establish the requested protective order materials are subject to section 552.027 of the Government Code, and the district attorney may not withhold the information on this basis.

As you have not raised any other exceptions to disclosure for this information, the district attorney must release the requested protective order materials.

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 30, 2011. Accordingly, you were required to provide the information required by section 552.301(b) by October 14, 2011. However, the envelope in which the district attorney provided the information required by section 552.301(b) is meter-marked October 17, 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, the district attorney may not withhold any of the requested information under these exceptions and this rule. 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 consider the applicability of these exceptions.

Next, you seek to withdraw your request for an open records decision regarding the requested notary public record book because the notary book is not “public information.” We note, and you acknowledge, however, the notary book is subject to chapter 406 of the Government Code. *See* Gov’t Code § 406.001 *et seq.* Section 406.014 of the Government Code 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). In this instance, the notary public book at issue belongs to a district attorney employee, and information contained in a notary book is expressly made public by section 406.014 of the Government Code. You claim this information is excepted from disclosure under section 552.101 of the Government Code in conjunction with the common-law physical safety exception, common-law privacy, and section 261.201 of the Family Code. 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. However, information that is specifically made public by statute may not be withheld under section 552.101 on the basis of the common-law physical safety exception or common-law privacy. *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); *Center Point 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). You also claim the notary book information is excepted from disclosure under sections 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, the district attorney may not withhold any of the notary book information under section 552.101 in conjunction with the common-law physical safety exception or common-law privacy, or under section 552.132 or section 552.138. We will, however, consider your claim under section 261.201 of the Family Code for the notary book information, along with your claims under the common-law physical safety exception, common-law privacy, and sections 261.201, 552.132, and 552.138 for the requested responsive e-mails.

You seek to withhold the requested notary book and responsive e-mail information under section 552.101 in conjunction with section 261.201 of the Family Code, which provides:

(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). In this instance, the information at issue was not used or developed in an investigation of alleged or suspected 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. Consequently, the district attorney may not withhold any of the notary book or responsive e-mail information under section 552.101 in conjunction with section 261.201 of the Family Code.

We note, however, 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 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).

The notary book information reflects, and you acknowledge, most of the notary book entries identify Child Protective Services and district attorney employees who had documents

notarized on behalf of domestic violence victims. You state, however, some of the notary book and e-mail information identifies victims of domestic violence who used the district attorney's services to apply for protective orders.

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 conclude that, notwithstanding section 406.014 of the Government Code, the names and addresses belonging to victims of domestic violence who used the district attorney's services to apply for protective orders, as well as the types of documents notarized for the victims, must be withheld from the requested notary books under section 552.101 of the Government Code in conjunction with constitutional privacy. Furthermore, the district attorney must withhold the same types of information pertaining to victims of domestic violence in the requested responsive e-mails. However, we find none of the remaining information at issue 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 notary book information pursuant to section 406.014 of the Government Code.

You claim the remaining responsive e-mail information is protected under the common-law physical safety exception, common-law privacy, and section 552.132 of the Government Code. Common-law privacy 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). Pursuant to the common-law physical safety exception, "information may be withheld [from public release] if disclosure would create a substantial threat of physical harm." *Tex. Dep't of Pub. Safety v. Cox Tex. Newspapers, L.P. & Hearst Newspapers, L.L.C.*, 343 S.W.3d 112, 118 (Tex. 2011). Section 552.132 makes confidential a crime victim's or claimant's name, social security number, address, telephone number, or other identifying information held by the crime victim's compensation division of the attorney general's office. Gov't Code § 552.132(b). You generally assert the remaining e-mail information should be withheld because the nature of the information pertains to domestic violence and the information identifies domestic violence victims. As previously discussed, however, the domestic violence victims' identifying information must be withheld under constitutional privacy. Thus, any privacy or safety concerns have been addressed by our ruling under constitutional privacy. You have not demonstrated how the common-law physical safety exception, common-law privacy, or section 552.132 of the Government Code

applies to the remaining information. Therefore, the district attorney may not withhold any of the remaining responsive e-mail information under these provisions.

Lastly, you contend the remaining responsive e-mail information is excepted under section 552.138 of the Government Code, which 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:

...

(2) the location or physical layout of a family violence shelter center[.]

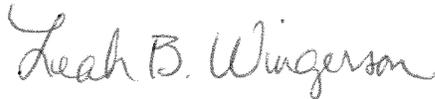
*Id.* § 552.138(a), (b)(2). Section 552.138 applies only to information maintained by a family violence shelter center or sexual assault program. *See* House Comm. on State Affairs, Bill Analysis, Tex. S.B. 15, 77th Leg., R.S. (2001) (Engrossed version) ("Senate Bill 15 amends the Government Code to except family violence shelter centers (center) and sexual assault programs (program) from disclosing certain public information."). Therefore, because the information at issue 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 remaining responsive e-mail information under section 552.138 of the Government Code.

In summary, the district attorney must withhold the names and addresses belonging to victims of domestic violence who used the district attorney's services to apply for protective orders, as well as the types of documents notarized for the victims, in both the notary record books and responsive e-mails, under section 552.101 of the Government Code in conjunction with constitutional privacy. The district attorney must release the remaining requested responsive information.

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,

A handwritten signature in cursive script that reads "Leah B. Wingerson".

Leah B. Wingerson  
Assistant Attorney General  
Open Records Division

LBW/dls

Ref: ID# 440065

Enc. Submitted documents

c: Requestor  
(w/o enclosures)