



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 12, 2013

Mr. William Schultz
Assistant District Attorney
Denton County Criminal District Attorney
P.O. Box 2850
Denton, Texas 76202

OR2013-19726

Dear Mr. Schultz:

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# 505353.

The Denton County District Attorney's Office (the "district attorney's office") received a request for a report of calls placed through the Denton County's voice-over-internet telephone system for a specified time period.¹ You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.117, 552.1175,

¹We note the county sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380,387 (Tex. 2010) (holding that when governmental entity, acting in good faith, requests clarification or narrowing of unclear or over-broad request for public information, ten-day period to request attorney general ruling is measured from date request is clarified or narrowed).

and 552.132 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

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. This section encompasses information protected by other statutes, such as section 58.007 of the Family Code. The relevant language of section 58.007 reads:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

(1) if maintained on paper or microfilm, kept separate from adult files and records;

(2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and

(3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapters B, D, and E.

Fam. Code § 58.007(c). Juvenile law enforcement records relating to delinquent conduct or conduct indicating a need for supervision that occurred on or after September 1, 1997, are confidential under section 58.007. *See id.* § 51.03(a), (b) (defining "delinquent conduct" and "conduct indicating a need for supervision"). For purposes of section 58.007(c), "child" means a person who is ten years of age or older and under seventeen years of age at the time of the reported conduct. *See id.* § 51.02(2). You contend some of the submitted information is subject to section 58.007(c). Upon review, we find you have not established the information consists of juvenile law enforcement records relating to delinquent conduct or

²Although you did not cite section 552.101 of the Government Code in your brief to this office, we understand you to raise this section based on the substance of your arguments. Further, although you raise section 552.117(a)(2) of the Government Code as an exception to disclosure of this information, we note section 552.117(a)(1) is the proper exception to raise when seeking to withhold information that is not related to a peace officer. *See Gov't Code § 552.117(a)(2)*. Although you also claim the informer's privilege under Texas Rule of Evidence 508, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); Gov't Code § 552.022(a). Because section 552.022 is not applicable to the information that you seek to withhold under the informer's privilege, we do not address your arguments under rule 508. We note that although you raise section 552.107 of the Government Code, you make no arguments to support this exception. Therefore, we assume you have withdrawn your claim this section applies to the submitted information. *See Gov't Code §§ 552.301, .302.*

conduct indicating a need for supervision that occurred after September 1, 1997. As such, section 58.007 is not applicable and the district attorney's office may not withhold the submitted information under section 552.101 of the Government Code on this basis.

Section 552.101 of the Government Code also encompasses section 261.201(a) of the Family Code, which provides, in relevant part, as follows:

(a) [T]he 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; and

(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.

Id. § 261.201(a). Although you raise section 261.201 for some of the submitted information, you have failed to demonstrate any portion of the submitted information was used or developed in an investigation of alleged or suspected child abuse or neglect under section 261.201(a)(2). Furthermore, you have not established the information is a report of alleged or suspected abuse or neglect made under section 261.201(a)(1). *See id.* § 261.001(1), (4) (defining "abuse" and "neglect" for purposes of Fam. Code ch. 261). Therefore, the district attorney's office may not withhold the submitted information under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.

Section 552.101 of the Government Code also encompasses section 611.002 of the Health and Safety Code, which provides "[communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential." Health & Safety Code § 611.002(a). Section 611.001 defines a "professional" as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate, or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See id.* § 611.001(2). Upon review, we find you have failed to demonstrate any of the submitted information consists of mental health records for purposes of section 611.002. Accordingly, the district attorney's office may not withhold any of the submitted information under section 552.101 of the Government Code on the basis of section 611.002(a) of the Health and Safety Code.

Section 552.101 of the Government Code also encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. 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.

Occ. Code § 159.002(a)-(c). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004. 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. Upon review, we find none of the submitted information constitutes medical records or information obtained from medical records. Accordingly, the district attorney's office may not withhold any of the submitted information under section 552.101 in conjunction with the MPA.

Section 552.101 of the Government Code also encompasses the common-law informer's privilege, which Texas courts have long recognized. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). The informer's privilege protects the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided the subject of the information does not already know the informer's identity. *See Open Records Decision Nos. 515 at 3 (1998), 208 at 1-2 (1978)*. The privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." *See Open Records Decision No. 279 at 2 (1981) (citing 8 John H. Wigmore, EVIDENCE IN TRIALS AT COMMON LAW, § 2374, at 767 (J. McNaughton rev. ed. 1961))*. The report must be of a violation of a criminal or civil statute. *See Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5*. The privilege excepts the informer's statement only to the extent necessary to protect the informer's identity. *See Open Records Decision No. 549 at 5 (1990)*.

You assert some of the submitted information is protected from public disclosure pursuant to the informer's privilege. However, you do not inform us which criminal or civil statutes

were reported to be violated in the submitted information. Further, you do not inform us whether any such violations were reported to law enforcement or other agencies with criminal or quasi-criminal authority. Therefore, we find the district attorney's office has failed to demonstrate any of the submitted information identifies an informer for the purposes of the informer's privilege. Accordingly, the district attorney's office may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with the common-law informer's privilege.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) 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 satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987).

Upon review, we find the telephone numbers of employees' doctors satisfy the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the district attorney's office must withhold the telephone numbers of employees' doctors under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find no portion of the remaining information is highly intimate or embarrassing and of no legitimate public concern, and the district attorney's office may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

You assert portions of the remaining information are excepted under section 552.108 of the Government Code, which provides, in relevant part, the following:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]

...

(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 [required public disclosure] if:

...

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a)(1), (b)(2), (b)(3). A governmental body raising section 552.108 must reasonably explain the applicability of section 552.108. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested).

A governmental body claiming section 552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* § 552.108(a)(1); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You generally state portions of the remaining information are excepted under section 552.108(a)(1). However, you do not inform us any of the remaining information pertains to any specific ongoing criminal investigation or prosecution, nor have you explained how its release would interfere in some way with the detection, investigation, or prosecution of crime. Thus, you have failed to demonstrate the applicability of section 552.108(a)(1). Therefore, the district attorney's office may not withhold any portion of the remaining information under section 552.108(a)(1) of the Government Code.

A governmental body claiming section 552.108(b)(2) must demonstrate the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See Gov't Code* § 552.108(b)(2). You have not explained how the remaining information pertains to any specific investigation that concluded in a final result other than a conviction or deferred adjudication. Thus, you have failed to demonstrate the applicability of section 552.108(b)(2), and the remaining information may not be withheld on that basis.

You also claim some of the remaining information is excepted from public disclosure under section 552.108(b)(3). However, we find you have failed to demonstrate how any of the remaining information was prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation or reflects the mental processes or legal reasoning of an attorney representing the state. Therefore, the district attorney's office may not withhold any of the remaining information under section 552.108(b)(3) of the Government Code.

Section 552.117(a)(1) of the Government Code exempts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. *See id.* § 552.117(a)(1). Section 552.117 is also applicable to cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 of the Government Code not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. You state some of the remaining call log entries pertain to calls made to employees and employees' family members. We note section 552.117 does not apply to an individual's work telephone number. Therefore, if the employees of the district attorney's office whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the district attorney's office must withhold the employees' home and cellular telephone numbers and family member telephone numbers under section 552.117(a)(1) of the Government Code; however, the employees' cellular telephone numbers may only be withheld if the cellular telephone services are not paid for by a governmental body. The district attorney's office may not withhold the telephone numbers at issue under section 552.117 if the employees did not make timely elections to keep their information confidential or if the cellular telephone services are paid for by a governmental body. Upon review, however, we find the remaining information does not consist of the home address, telephone number, emergency contact information, social security number, or family member information of a current or former employee the district attorney's office, and the remaining information may not be withheld under section 552.117(a)(1) of the Government Code.

You assert some of the remaining information is subject to section 552.1175 of the Government Code. Section 552.1175 of the Government Code protects the home address, home telephone number, emergency contact information, social security number, birth date, and family member information of certain individuals, when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential. *See* Gov't Code § 552.1175. Section 552.1175 applies, in part, to "peace officers as defined by Article 2.12, Code of Criminal Procedure." *Id.* § 552.1175(a)(1). Section 552.1175 is also applicable to personal pager and cellular telephone numbers, provided the cellular telephone service or pager service is not paid for by a governmental body. *See* ORD 506 at 5-6. You state some of the remaining call log entries consist of home telephone numbers and cellular telephone numbers that belong to currently licensed peace officers who are not employed by the district attorney's office. Accordingly, the district attorney's office must withhold under section 552.1175 of the Government Code the home telephone numbers and cellular telephone numbers of currently

licensed peace officers if the peace officers elect to restrict access to their information in accordance with section 552.1175(b) of the Government Code; however, the peace officers' cellular telephone numbers may only be withheld if the cellular telephone services are not paid for by a governmental body. If the peace officers whose information is at issue do not elect to restrict access to their information in accordance with section 552.1175(b) of the Government Code, the district attorney's office may not withhold their information under section 552.1175.

You claim portions of the remaining information are protected from public disclosure 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 remaining information is held by the district attorney's office, 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 remaining information pertains to a victim who is an employee of the district attorney's office who made an election in accordance with section 552.132(d). Accordingly, the district attorney's office may not withhold any of the remaining information under section 552.132 of the Government Code.

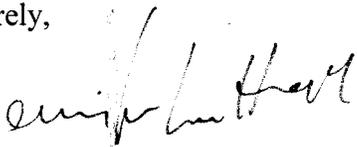
In summary, the district attorney's office must withhold the telephone numbers of employees' doctors under section 552.101 of the Government Code in conjunction with common-law privacy. If the employees whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the district attorney's office must withhold the employees' home and cellular telephone numbers and family member telephone numbers under section 552.117(a)(1) of the Government Code; however, the employees' cellular telephone numbers may only be withheld if the cellular telephone

services are not paid for by a governmental body. The district attorney's office must withhold under section 552.1175 of the Government Code the home telephone numbers and cellular telephone numbers of currently licensed peace officers if the peace officers elect to restrict access to their information in accordance with section 552.1175(b) of the Government Code; however, the peace officers' cellular telephone numbers may only be withheld if the cellular telephone services are not paid for by a governmental body. The district attorney's office must release the remaining 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.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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/som

Ref: ID# 505353

Enc. Submitted documents

c: Requestor
(w/o enclosures)