



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 18, 2014

Ms. Lisa D. Mares  
Counsel for the City of McKinney  
Brown & Hofmeister, L.L.P.  
740 East Campbell Road, Suite 800  
Richardson, Texas 75081

OR2014-23056

Dear Ms. Mares:

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# 547377 (City ID No. 10-11975).

The McKinney Police Department (the "department"), which you represent, received a request for the complete criminal file for a named individual pertaining to a specified incident. You claim the submitted information is excepted from disclosure under

section 552.101 of the Government Code.<sup>1</sup> We have considered the exception you claim and reviewed the submitted information.<sup>2</sup>

Next, we note some of the submitted information consists of a grand jury subpoena and information obtained pursuant to a grand jury subpoena. The judiciary is expressly excluded from the requirements of the Act. Gov't Code § 552.003(1)(B). This office has determined for purposes of the Act, a grand jury is a part of the judiciary and therefore not subject to the Act. *See* Open Records Decision No. 411 (1984). Further, records kept by a governmental body that is acting as an agent for a grand jury are considered records in the constructive possession of the grand jury, and are also not subject to the Act. *See* Open Records Decisions Nos. 513 (1988), 411, 398 (1983). Thus, to the extent the records at issue are in the custody of the department as an agent for the grand jury, these records are in the grand jury's constructive possession and are not subject to the Act. However, to the extent this information is not in the custody of the department as an agent for the grand jury, we will address your arguments against disclosure of this information.

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 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. This office has found a compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. United States Dep't of Justice v. Reporters Comm.*

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<sup>1</sup>We note a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 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. 630 (1994). Normally, a compelling interest is demonstrated when some other source of law makes the information at issue confidential or third-party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Although we are unable to determine whether the department complied with section 552.301 of the Government Code in seeking an open records decision from this office, sections 552.101, 552.130, 552.136, and 552.137 of the Government Code each can provide a compelling reason to overcome this presumption; thus, we will address the applicability of these exceptions to the submitted information. The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

<sup>2</sup>We note the submitted information contains social security numbers subject to section 552.147 of the Government Code. 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 officer under the Act. Gov't Code § 552.147(b).

for *Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Furthermore, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public.

Upon review, we find the requestor seeks information pertaining to a specified incident. Therefore, the submitted information does not implicate the privacy interests of the named individual, and the department may not withhold it under section 552.101 in conjunction with common-law privacy as a criminal history compilation.

However, some of the information at issue is otherwise subject to common-law privacy. Types of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation*. See 540 S.W. 2d 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). This office has also found personal financial information not relating to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. See Open Records Decision Nos. 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy).

Generally, only highly intimate information that implicates the privacy of an individual is withheld. However, in certain instances, where it is demonstrated the requestor knows the identity of the individual involved as well as the nature of certain incidents, the entire report must be withheld to protect the individual's privacy. You seek to withhold the information at issue in its entirety under section 552.101 in conjunction with common-law privacy. In this instance, you have not demonstrated, nor does it otherwise appear, this is a situation in which the entirety of the information at issue must be withheld on the basis of common-law privacy. Accordingly, the department may not withhold the entirety of the information at issue under section 552.101 of the Government Code in conjunction with common-law privacy. Upon review, though, we find some of the submitted information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. We note one of the submitted audio recordings contains information subject to common-law privacy. You claim the department lacks the technological capability to redact this information from the audio recording at issue. However, because the department had the ability to copy the audio recording in order to submit the requested information for our review, we believe the department has the capability to produce a copy of only the non-confidential portions of the audio recording. Therefore, the department must withhold the information we have indicated in the audio recording and marked in the submitted documents under section 552.101 of the Government Code in conjunction with common-law privacy. Additionally, we note the video recording we have indicated contains information subject to common-law privacy. You state the department lacks the technological capability to redact this information from the video recording. Based on this representation, we conclude the department must

withhold the video recording we have indicated in its entirety under section 552.101 of the Government Code in conjunction with common-law privacy. *See* Open Records Decision No. 364 (1983). However, you have not demonstrated the remaining information is highly intimate or embarrassing information of no legitimate public interest; thus, the department may not withhold it under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses information protected by other statutes, including federal law. The submitted information contains an Employment Eligibility Verification, Form I-9 and attachments. Form I-9 is governed by title 8, section 1324a of the United States Code, which provides the form “may not be used for purposes other than for enforcement of this chapter” and for enforcement of other federal statutes governing crime and criminal investigations. 8 U.S.C. § 1324a(b)(5); *see* 8 C.F.R. § 274a.2(b)(4). Release of this document under the Act would be “for purposes other than for enforcement” of the referenced federal statutes. Accordingly, the department must withhold the submitted I-9 form and attachments, which we have marked, under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code.

Section 552.101 of the Government Code also encompasses section 6103(a) of title 26 of the United States Code, which makes tax return information confidential. *See* Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 600 (1992) (W-4 forms). Section 6103(b) defines the term “return information” as follows:

a taxpayer’s identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Treasury] with respect to a return or with respect to the determination of the existence, or possible existence of liability . . . for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense[.]

26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term “return information” expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer’s liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *aff’d in part*, 993 F.2d 1111 (4th Cir. 1993). Upon review, we find the submitted information contains a W-4 form that constitutes tax return information made confidential under section 6103(a). Accordingly, the department must withhold the submitted W-4 form pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

Section 552.101 of the Government Code also encompasses the Medical Practice Act (“MPA”), subtitle B of title 3 of the Occupations Code, which governs release of medical records. Section 159.002 of the MPA provides, in relevant 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 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. *See Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982).* Upon review, we find the information we have marked constitutes a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that was created or is maintained by a physician. Accordingly, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the MPA.

Section 552.101 also encompasses the doctrine of constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. *Open Records Decision No. 455 at 4 (1987).* The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). Upon review, we conclude some of the remaining information falls within the zones of privacy. Thus, the department must withhold the information we have indicated under section 552.101 in conjunction with constitutional privacy.

Section 552.1175 of the Government Code protects the home address, home telephone number, emergency contact information, date of birth, social security number, 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. Gov't Code § 552.1175. Section 552.1175 applies, in part, to peace officers

as defined by Article 2.12, Code of Criminal Procedure, and commissioned security officers as defined by Section 1702.002, Occupations Code. *Id.* § 552.1175(a)(1), (4). As noted above, you state the department lacks the technological capability to redact information from video recordings. One of the remaining video recordings, which we have indicated, contains personal information of two department officers; as such, that video recording may be subject to section 552.1175. Thus, if either of the individuals at issue elects to restrict access to his information in accordance with section 552.1175(b), the department must withhold the video recording we have indicated in its entirety under section 552.1175 of the Government Code. *See* ORD 364. However, if no election is made, the department may withhold no portion of the video recording at issue under section 552.1175 of the Government Code.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's or driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release. Gov't Code § 552.130(a). Upon review, we find the department must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

Section 552.136 of the Government Code provides, "[n]otwithstanding any other provision of [the Act], 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." Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). Upon review, the department must withhold the information we have marked under section 552.136 of the Government Code.

Section 552.137 of the Government Code 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). *See id.* § 552.137(a)-(c). The e-mail addresses at issue are not subject to subsection (c). Therefore, we find the department must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

Some of the remaining information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, to the extent the grand jury subpoena and information obtained pursuant to a grand jury subpoena are in the custody of the department as an agent for the grand jury, these records are in the grand jury's constructive possession and are not subject to the Act. The

department must withhold the information we have indicated, including the video recording we have indicated in its entirety, under section 552.101 in conjunction with common-law privacy, constitutional privacy, section 1324a of title 8 of the United States Code, section 6103(a) of title 26 of the United States Code, and the MPA. If either of the officers at issue elects to restrict access to his information in accordance with section 552.1175(b), the department must withhold the video recording we have indicated in its entirety under section 552.1175 of the Government Code. The department must withhold the information we have marked under sections 552.130 and 552.136 of the Government Code. The department also must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. The department must release the remaining information; however, the department may only release information subject to copyright in accordance with copyright law.

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](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,



Lee Seidlits  
Assistant Attorney General  
Open Records Division

CLS/som

Ref: ID# 547377

Enc. Submitted documents

c: Requestor  
(w/o enclosures)