



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 7, 2016

Ms. Rickie C. Redman
Assistant County Attorney
Lamb County and District Attorney's Office
100 6th Drive, Room 111
Littlefield, Texas 79339

OR2016-24715

Dear Ms. Redman:

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# 633455.

The Lamb County and District Attorney's Office (the "district attorney's office") received a request for certain information pertaining to a named individual. You state you are providing some information to the requestor. You indicate you do not have information responsive to portions of the request.¹ You further indicate you will redact information pursuant to section 552.147(b) of the Government Code.² You claim some of the submitted information is subject to section 552.027 of the Government Code. Additionally, you claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.108, 552.1085, 552.130, and 552.1325 of the Government Code. We

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *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), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

²Section 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. *See Gov't Code* § 552.147(b).

have considered the submitted arguments and reviewed the submitted representative sample of information.³

Section 552.027 of the Government Code provides, in relevant part:

(a) A governmental body is not required under [the Act] 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.

Gov't Code § 552.027(a). 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. You state the information you indicated is commercially available. In this instance, however, the requestor has not requested a particular commercially available publication, but rather the requestor seeks information pertaining to a named individual. The fact that commercially available research materials happen to be responsive to the request does not, in our view, bring such materials within the ambit of section 552.027. Accordingly, due to the nature of the request, we determine the information you indicated is not subject to section 552.027 of the Government Code, and must be released unless it falls within an exception to disclosure. *See id.* §§ 552.006, .021, .301, .302.

Next, we must address the district attorney's office's procedural obligations under the Act. Section 552.301 of the Government Code prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. *Id.* § 552.301. 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). Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the claimed exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). You state the district attorney's office "[does] not maintain a specific date [its] office received the [request for information.]" You further state the district attorney's office "must have received [the request for information] in [its] office on or after July 15, 2016." We note the submitted request reflects a certified mail

³We 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.

tracking number that demonstrates the district attorney's office received the request for information on July 15, 2016. You do not inform us the district attorney's office was closed for any business days between July 15, 2016, and July 29, 2016. Thus, the district attorney's office's ten-business-day deadline under section 552.301(b) was July 29, 2016. You state, and provide documentation demonstrating, the district attorney's office sought clarification of the request on August 3, 2016. Consequently, we find the district attorney's office did not request clarification of the request until after the ten-business-day deadline had passed. As such, the statutory deadlines for requesting an opinion from this office and submitting the required documentation were not reset by the district attorney's office's receipt of the requestor's clarification and must be measured from the date the district attorney's office received the request for information. *See generally City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (after requesting clarification within ten-business-day deadline, city timely submitted request for opinion within ten business days after receiving clarification). Thus, as discussed above, the district attorney's office's ten-business-day deadline was July 29, 2016. The district attorney's office's request for a ruling was sent to this office in an envelope post-marked August 31, 2016. *See Gov't Code* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Accordingly, we find the district attorney's office failed to comply with section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption the requested information is public and must be released unless a compelling reason exists 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); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third-party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Although the district attorney's office seeks to withhold portions of the submitted information under section 552.108 of the Government Code, section 552.108 is a discretionary exception to disclosure that protects a governmental body's interest and may be waived. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions), 177 (1977) (statutory predecessor to section 552.108 subject to waiver). Thus, because the district attorney's office has failed to comply with the procedural requirements of the Act, the district attorney's office has waived section 552.108. However, sections 552.101, 552.1085, 552.130, 552.1325, and 552.136 of the Government Code can

provide compelling reasons to overcome the presumption of openness.⁴ Therefore, we will address the applicability of sections 552.101, 552.1085, 552.130, 552.1325, and 552.136 to 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. Section 552.101 encompasses information subject to chapter 550 of the Transportation Code. Section 550.065 applies only to a written report of an accident required under section 550.061, 550.062, or 601.004. Transp. Code § 550.065(a)(1). Chapter 550 requires the creation of a written report when the accident resulted in injury to or the death of a person or damage to the property of any person to the apparent extent of \$1,000 or more. *Id.* §§ 550.061 (operator’s accident report), .062 (officer’s accident report). An accident report is privileged and for the confidential use of the Texas Department of Transportation or a local governmental agency of Texas that has use for the information for accident prevention purposes. *Id.* § 550.065(b). However, a governmental entity may release an accident report in accordance with subsections (c) and (c-1). *Id.* § 550.065(c), (c-1). Section 550.065(c) provides a governmental entity shall release an accident report to a person or entity listed under this subsection. *Id.* § 550.065(c).

We note the submitted information includes an ST-3 accident report form. In this instance, the requestor is not a person listed under section 550.065(c). Thus, the submitted accident report is confidential under section 550.065(b), and the district attorney’s office must withhold it under section 552.101 of the Government Code.⁵ However, section 550.065(c-1) requires the district attorney’s office to create a redacted accident report that may be requested by any person. *Id.* § 550.065(c-1). The redacted accident report may not include the information listed in subsection (f)(2). *Id.* Therefore, the requestor has a right of access to the redacted accident report.

Section 552.101 of the Government Code also encompasses chapter 411 of the Government Code, which makes confidential criminal history record information (“CHRI”) generated by the National Crime Information Center or by the Texas Crime Information Center. *See* Gov’t Code § 411.083(a). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual laws with respect to the CHRI it generates. *See id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety (“DPS”) maintains,

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁵As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

except that DPS may disseminate this information as provided in chapter 411, subchapter E-1 or subchapter F of the Government Code. *See* Gov't Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-.127. Thus, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 in conjunction with chapter 411, subchapter E-1 or subchapter F of the Government Code. We note CHRI does not include driving record information. *See id.* § 411.082(2)(B). We further note section 411.083 does not apply to active warrant information or other information relating to one's current involvement with the criminal justice system. *See id.* § 411.081(b) (police department allowed to disclose information pertaining to person's current involvement in the criminal justice system). Upon review, we find some of the submitted information, which we have marked, consists of CHRI that is confidential under section 411.083. Accordingly, the district attorney's office must withhold the information we have marked under section 552.101 in conjunction with section 411.083 of the Government Code. However, no portion of the remaining information constitutes CHRI for purposes of chapter 411 of the Government Code. Accordingly, the district attorney's office may not withhold any of the remaining information under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses section 62.0132 of the Government Code. This provision authorizes the Office of Court Administration of the Texas Judicial System to create a standardized juror questionnaire form to be used in courts throughout the state. *See id.* § 62.0132(a). Section 62.0132(f) states information contained in a completed questionnaire is confidential and not subject to the Act. Accordingly, the district attorney's office must withhold the completed juror questionnaires under section 552.101 in conjunction with section 62.0132(f) of the Government Code.

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. This office has 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 No. 600 (1992) (personal financial information includes choice of a particular insurance carrier). Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987).

Under the common-law right of privacy, an individual has a right to be free from the publicizing of private affairs in which the public has no legitimate concern. *Indus. Found.*, 540 S.W.2d at 682. In considering whether a public citizen's date of birth is private, the Third Court of Appeals looked to the supreme court's rationale in *Texas Comptroller of Public Accounts v. Attorney General of Texas*, 354 S.W.3d 336 (Tex. 2010). *Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at *3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.). The supreme court concluded public employees' dates of birth are private under section 552.102 of the Government Code because the employees' privacy interest substantially outweighed the negligible public interest in disclosure.⁶ *Tex. Comptroller*, 354 S.W.3d at 347-48. Based on *Texas Comptroller*, the court of appeals concluded the privacy rights of public employees apply equally to public citizens, and thus, public citizens' dates of birth are also protected by common-law privacy pursuant to section 552.101. *City of Dallas*, 2015 WL 3394061, at *3. Because "the right of privacy is purely personal[.]" that right "terminates upon the death of the person whose privacy is invaded[.]" *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); see also *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 147 (N.D. Tex. 1979) ("action for invasion of privacy can be maintained only by a living individual whose privacy is invaded" (quoting RESTATEMENT (SECOND) OF TORTS § 652I)); Attorney General Opinions JM-229 (1984) ("the right of privacy lapses upon death"), H-917 (1976) ("We are . . . of the opinion that the Texas courts would follow the almost uniform rule of other jurisdictions that the right of privacy lapses upon death."); Open Records Decision No. 272 (1981) ("the right of privacy is personal and lapses upon death").

Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the district attorney's office must withhold the information we have marked and all living public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.1085 of the Government Code provides, in pertinent part, the following:

(c) A sensitive crime scene image in the custody of a governmental body is confidential and excepted from the requirements of Section 552.021 and a governmental body may not permit a person to view or copy the image except as provided by this section. This section applies to any sensitive crime scene image regardless of the date that the image was taken or recorded.

Gov't Code § 552.1085(c). For purposes of section 552.1085, "sensitive crime scene image" means "a photograph or video recording taken at a crime scene, contained in or part of a

⁶Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a).

closed criminal case, that depicts a deceased person in a state of dismemberment, decapitation, or similar mutilation or that depicts the deceased person's genitalia." *See id.* § 552.1085(a)(6). Upon review, we find none of the remaining information consists of sensitive crime scene images for the purposes of section 552.1085. Accordingly, the district attorney's office may not withhold any portion of the remaining information under section 552.1085(c) of the Government Code.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, 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. *See id.* § 552.130(a). Accordingly, the district attorney's office must withhold the motor vehicle record information you marked and we have marked under section 552.130 of the Government Code.

Section 552.1325 of the Government Code provides the following:

(a) In this section:

(1) "Crime victim" means a person who is a victim as defined by Article 56.32, Code of Criminal Procedure.

(2) "Victim impact statement" means a victim impact statement under Article 56.03, Code of Criminal Procedure.

(b) The following information that is held by a governmental body or filed with a court and that is contained in a victim impact statement or was submitted for purposes of preparing a victim impact statement is confidential:

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

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

Id. § 552.1325. The definition of a victim under article 56.32 of the Code of Criminal Procedure includes an individual who suffers physical or mental harm as a result of criminally injurious conduct. Crim. Proc. Code § 56.32(a)(10), (11). The remaining information includes a victim impact statement as defined by article 56.03 of the Code of Criminal Procedure. *See id.* § 56.03. The information at issue reflects the victim suffered mental harm as a result of the criminally injurious conduct. Thus, we find the individual who completed the impact statement is a victim for purposes of article 56.32, and thus is a crime victim for purposes of section 552.1325. *See id.* § 56.32(a)(2)(D). We have marked the name of a crime victim and information that otherwise identifies or tends to identify the

crime victim. Accordingly, the district attorney's office must withhold the information we have marked under section 552.1325 of the Government Code. However, we find you have failed to demonstrate the applicability of section 552.1325 to any of the remaining information at issue. Accordingly, the district attorney's office may not withhold any of the remaining information on the basis of section 552.1325 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"). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. *See* Open Records Decision No. 684 at 9 (2009). Upon review, the district attorney's office must withhold the insurance policy number we have marked under section 552.136 of the Government Code.

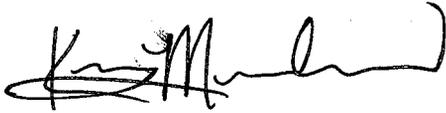
We note some of the remaining information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted 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, the district attorney's office must withhold the submitted accident report under section 552.101 of the Government Code in conjunction with section 550.065(b) of the Transportation Code but must release the redacted accident report pursuant to section 550.065(c-1) of the Transportation Code. The district attorney's office must withhold the information we have marked under section 552.101 in conjunction with section 411.083 of the Government Code. The district attorney's office must withhold the completed juror questionnaires under section 552.101 in conjunction with section 62.0132(f) of the Government Code. The district attorney's office must withhold the information we have marked and all living public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy. The district attorney's office must withhold the motor vehicle record information you marked and we have marked under section 552.130 of the Government Code. The district attorney's office must withhold the information we have marked under section 552.1325 of the Government Code. The district attorney's office must withhold the insurance policy number we have marked under section 552.136 of the Government Code. The district attorney's office must release the remaining information; however, any information protected by copyright may only be released 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, 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,

A handwritten signature in black ink, appearing to read "Kenny Moreland", written over a horizontal line.

Kenny Moreland
Assistant Attorney General
Open Records Division

KJM/akg

Ref: ID# 633455

Enc. Submitted documents

c: Requestor
(w/o enclosures)