



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 9, 2015

Mr. Jorge Trevino
Assistant County Attorney
Webb County
1110 Washington Street, Suite 301
Laredo, Texas 78040

OR2015-18858

Dear Mr. Trevino:

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# 578541.

The Webb County Sheriff's Office (the "sheriff's office") received seven different requests for information. You state you do not have some information responsive to the requests.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.117, and 552.1175 of the Government Code. Additionally, we have considered comments from interested third parties. *See* Gov't Code § 552.304 (interested third party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted information.

Initially, we note you have not submitted information responsive to portions of the requests. Thus, to the extent such information existed and was maintained by the sheriff's office on the date the sheriff's office received the request for information, we presume the sheriff's office has released it. If not, you must do so at this time. *See id.* §§ 552.301, .302; *see also*

¹The Act does not require a governmental body to release information that did not exist when it received a request, create responsive information, or obtain information that is not held by the governmental body or on its behalf. *See Economic 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), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to the requested information, it must release the information as soon as possible).

Next, we note the submitted information contains a peace officer's Texas Commission on Law Enforcement ("TCOLE") identification number.² In Open Records Decision No. 581 (1990), this office determined certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. We understand an officer's TCOLE identification number is a unique computer-generated number assigned to peace officers for identification in the commissioner's electronic database and may be used as an access device number on the TCOLE website. Accordingly, we find the TCOLE identification number in the submitted information does not constitute public information under section 552.002 of the Government Code. Therefore, the TCOLE identification number is not subject to the Act and need not be released to the requestor.³

Section 552.108(b)(1) of the Government Code excepts from disclosure "[a]n 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 . . . if . . . release of the internal record or notation would interfere with law enforcement or prosecution[.]" Gov't Code § 552.108(b)(1). Section 552.108(b)(1) is intended to protect "information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State." *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.). To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a governmental body must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. Instead, the governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. *See* Open Records Decision No. 562 at 10 (1990) (construing statutory predecessor). This office has concluded that section 552.108(b)(1) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (section 552.108 of the Government Code is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection

²The Texas Commission on Law Enforcement Officer Standards and Education was renamed the Texas Commission on Law Enforcement by the 83rd Legislature. *See* Act of May 6, 2013, 83rd Leg. R.S., ch. 93, § 1.01, 2013 Tex. Gen. Laws 174, 174.

³As we are able to make this determination, we need not address your arguments against the disclosure of this information.

of crime may be excepted). Section 552.108(b)(1) is not applicable, however, to generally known policies and procedures. *See, e.g.*, ORDs 531 at 2-3 (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

Exhibits 15-20 consist of time sheets of law enforcement officers. You contend disclosure of the information at issue would put officers at risk by indicating their hours of operations, including specific hours regarding task force investigations on the border. Further, you state “by releasing the information requested it would undermine their ability to retain their cover and anonymity that is necessary to infiltrate criminal organizations.” You explain release of this information would “lead to a total disruption of criminal investigations” by undermining the abilities of officers to do their job. Based on your arguments and our review of the information at issue, we agree the release of Exhibits 15-20, which we have marked, would interfere with law enforcement. Accordingly, the sheriff’s office may withhold Exhibits 15-20 under section 552.108(b)(1).⁴

Section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”⁵ Gov’t Code § 552.102(a). The Texas Supreme Court has held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. Of Tex.*, 354 S.W.3d 336 (Tex. 2010). The sheriff’s office must withhold the information we have marked under section 552.102(a) of the Government Code.⁶

Section 552.117(a)(2) of the Government Code applies to records a governmental body holds in an employment capacity and excepts from public disclosure the current and former home addresses and telephone numbers, emergency contact information, social security number, and family member information of a peace officer, regardless of whether the peace officer made an election under section 552.024 or section 552.1175 of the Government Code to keep such information confidential. Gov’t Code § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. *Id.* Accordingly, if the individuals whose information we have marked are still licensed peace officers, the sheriff’s office must withhold the information we have marked under

⁴As our ruling is dispositive as to this information, we need not address your remaining arguments against disclosure.

⁵The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁶As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

section 552.117(a)(2).⁷ However, none of the remaining information is confidential under section 552.117(a)(2) of the Government Code and it may not be withheld from disclosure on this basis.

If the information we marked under section 552.117 pertains to individuals who are not licensed peace officers, the marked information may be subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) applies to records a governmental body holds in an employment capacity and excepts 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. *Id.* § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, a governmental body must withhold information under section 552.117 on behalf of a current or former official or employee only if the individual made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the individuals whose information is at issue timely requested confidentiality pursuant to section 552.024, the sheriff's office must withhold the information we have marked under section 552.117(a)(1). The sheriff's office may not withhold this information under section 552.117(a)(1) for those employees who did not make a timely election to keep the information confidential.⁸ However, we find none of the remaining information is confidential under section 552.117(a)(1) and it may not be withheld from disclosure on this basis.

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. *Id.* § 552.1175. Section 552.1175 applies, in part, to "peace officers as defined by Article 2.12, Code of Criminal Procedure[.]" Gov't Code § 552.1175(a)(1). Some of the remaining information may pertain to a peace officer and is not held by the sheriff's office in an employment capacity. Thus, to the extent the information we have marked consists of the telephone number of a currently licensed peace officer and the officer elects to restrict access to his information in accordance with section 552.1175(b), the sheriff's office must withhold the information we have marked under section 552.1175. If the individual whose

⁷As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

⁸As our ruling is dispositive of this information, we need not address your remaining arguments against disclosure. In the event the employees' social security numbers are not excepted from disclosure under section 552.117(a)(1) of the Government Code, we note 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 office under the Act. Gov't Code § 552.147(b).

information we have marked is no longer licensed peace officer or no election is made, the sheriff's office may not withhold this information under section 552.1175. However, none of the remaining information is confidential under section 552.1175 and it may not be withheld from disclosure on this basis.

We note portions of the remaining information are subject to section 552.130 of the Government Code. Section 552.130 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. Accordingly, the sheriff's office must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

We note the remaining information includes an e-mail address of a member of the public that is subject to section 552.137 of the Government Code. Section 552.137 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). *Id.* § 552.137(a)-(c). The e-mail address we have marked is not one of the types specifically excluded by section 552.137(c). *See id.* § 552.137(c). Accordingly, the sheriff's office must withhold the e-mail address we have marked under section 552.137 unless the owner of the address affirmatively consents to its release.

Section 552.152 of the Government Code provides:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from the requirements of Section 552.021 [of the Government Code] if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

Id. § 552.152. You inform us portions of the submitted information relate to undercover police officers. You state release of this information would subject these officers to danger. Based on your representations and our review, we find you have demonstrated the release of the information at issue would subject the officers at issue to a substantial threat of harm. Thus, the sheriff's office must withhold the identifying information of undercover officers in the remaining information under section 552.152 of the Government Code.⁹

⁹As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

Section 552.101 of the Government Code excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. Section 552.101 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. Upon review, we find you have failed to demonstrate any portion of the remaining information is highly intimate or embarrassing and not of a legitimate public interest. Accordingly, the sheriff’s office may not withhold any portion of the remaining information under section 552.101 on the basis of common-law privacy.

Section 552.101 also encompasses the common-law physical safety exception. You claim some of the remaining information is protected under “special circumstances.” For many years, this office determined section 552.101, in conjunction with the common-law right to privacy, protected 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 has 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.*, 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, “vague assertions of risk will not carry the day.” *Id.* at 119. Upon review of the submitted arguments, we find the sheriff’s office has failed to demonstrate how release of the remaining information at issue would create a substantial threat of physical harm. Therefore, the sheriff’s office may not withhold the remaining information under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.

In summary, the TCOLE identification number is not subject to the Act and need not be released to the requestor. The sheriff’s office may withhold Exhibits 15-20 under section 552.108(b)(1) of the Government Code. The sheriff’s office must withhold: (1) the information we have marked under section 552.102(a) of the Government Code; (2) the

information we have marked under section 552.117(a)(2) of the Government Code if the individuals whose information we marked are still licensed peace officers; (3) the information we have marked under section 552.117(a)(1) of the Government Code, if the individuals whose information is at issue timely requested confidentiality pursuant to section 552.024 of the Government Code; (4) the information we have marked under section 552.1175 of the Government Code, if the information we have marked consists of the telephone number of a currently licensed peace officer and the officer elects to restrict access to his information in accordance with section 552.1175(b); (5) the motor vehicle record information we have marked under section 552.130 of the Government Code; (6) the e-mail address we have marked under section 552.137 of the Government Code, unless the owner of the address affirmatively consents to its release; and (7) the identifying information of undercover officers under section 552.152 of the Government Code. The remaining information that is subject to the Act 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.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,



Mili Gosar
Assistant Attorney General
Open Records Division

MG/akg

Ref: ID# 578541

Enc. Submitted documents

c: Requestor
(w/o enclosures)