



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 29, 2015

Mr. James Kopp
Assistant City Attorney
Office of the City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283

OR2015-22749

Dear Mr. Kopp:

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# 585046 (COSA File No. W091536).

The City of San Antonio (the "city") received a request for a specified incident report. You claim the submitted information is excepted from disclosure under section 552.108 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we must address the city's procedural obligations under section 552.301 of the Government Code when requesting a decision from this office under the Act. Pursuant to section 552.301(b), within ten business days after receiving a written request the governmental body must request a ruling from this office and state the exceptions to disclosure that apply. Gov't Code § 552.301(b). Further, pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated 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. *Id.* § 552.301(e). You state the city received the request for information on

July 29, 2015. Accordingly, the city's ten-business-day deadline was August 12, 2015, and its fifteen-business-day deadline was August 19, 2015. This office received the city's request for a ruling on August 25, 2015. The envelope in which you submitted the request for a ruling under section 552.301 does not bear a postmark, nor have you provided sufficient evidence to establish you requested a ruling from this office within the ten-business day deadline. *See id.* § 552.308(a), (b) (prescribing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Consequently, we find the city 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. Open Records Decision No. 150 at 2 (1977). You claim section 552.108 of the Government Code for the submitted information. However, section 552.108 is discretionary in nature. It serves to protect a governmental body's interests and may be waived; as a result, section 552.108 does not constitute a compelling reason to withhold information. *See Simmons*, 166 S.W.3d at 350 (section 552.108 is not compelling reason to withhold information under section 552.302); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). Accordingly, the city may not withhold any portion of the submitted information under section 552.108 of the Government Code. However, we note sections 552.101, 552.130, and 552.136 of the Government Code are applicable to some of the submitted information.¹ These sections can provide compelling reasons to overcome the presumption of openness. Therefore, we will address the applicability of these sections to the submitted information.

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 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

¹The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision No. 481 (1987), 480 (1987), 470 (1987).

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. 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. *Id.* 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.² *Texas 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. This office has also found personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See, e.g.*, Open Records Decision Nos. 545 (1990) (common-law privacy protects mortgage payments, assets, bills, and credit history), 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).

Upon review, we find the information we have marked, along with all public citizens' dates of birth, satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the city must generally withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy. However, section 552.023(b) of the Government Code states a governmental body may not deny access to information to the person, or the person's representative, to whom the information relates on the ground that the information is considered confidential by privacy principles. Gov't Code § 552.023(b); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual or authorized representative asks governmental body to provide information concerning that individual). The requestor may be the authorized representative of one of the individuals whose private information is at issue. Thus, if the city determines the requestor is the authorized representative of one of the individuals whose private information is at issue, the city may not withhold the information pertaining to that individual from the requestor under section 552.101 on that basis.

²Section 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).

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* Gov't Code § 552.130(a). The city must generally withhold the motor vehicle record information we have marked under section 552.130 of the Government Code. However, as stated above, section 552.023(b) of the Government Code states a governmental body may not deny access to information to the person, or the person's representative, to whom the information relates on the ground that the information is considered confidential by privacy principles. *Id.* § 552.023(b). Section 552.130 protects the privacy interest of the individual whose motor vehicle record information is at issue. Thus, if the city determines the requestor is the authorized representative of the individual whose information we have marked under section 552.130 of the Government Code, the city may not withhold this information from the requestor.

Section 552.136 of the Government Code states "[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." *Id.* § 552.136(b); *see id.* § 552.136(a) (defining "access device"). This office has determined an insurance policy number is an access device number for the purposes of section 552.136. *See* Open Records Decision No. 684 (2009). Upon review, we find the city must generally withhold the information we have marked under section 552.136 of the Government Code. However, as noted above, section 552.023(b) of the Government Code states a governmental body may not deny access to information to the person, or the person's representative, to whom the information relates on the ground that the information is considered confidential by privacy principles. Gov't Code § 552.023(b). Section 552.136 protects the privacy interest of the individual whose information is at issue. Thus, if the city determines the requestor is the authorized representative of the individual whose information we have marked under section 552.136 of the Government Code, the city may not withhold this information from the requestor.

In summary, the city must generally withhold: (1) the information we have marked, along with all public citizens' dates of birth, under section 552.101 of the Government Code in conjunction with common-law privacy, (2) the motor vehicle record information we have marked under section 552.130 of the Government Code, and (3) the information we have marked under section 552.136 of the Government Code. However, if the city determines the requestor is the authorized representative of one of the individuals whose private information is at issue, the city may not withhold such information from this requestor. The city must release the remaining information.³

³To the extent this requestor has a special right of access to some of the information being released in this instance, we note the city must seek another ruling from this office if you receive another request for this information from an individual with no such right of access. *See* Gov't Code § 552.023(b); ORD 481 at 4.

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 'Tim Neal', with a stylized flourish at the end.

Tim Neal
Assistant Attorney General
Open Records Division

TN/bhf

Ref: ID# 585046

Enc. Submitted documents

c: Requestor
(w/o enclosures)