



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 23, 2015

Ms. Michele Freeland
Legal Assistant
Office of General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2015-24506

Dear Ms. Freeland:

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# 586400 (DPS PIR No. 15-2199).

The Texas Department of Public Safety (the "department") received a request for the entire investigation file and reports pertaining to a specified incident. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code and privileged under Texas Rule of Civil Procedure 192.5. We have considered your arguments and reviewed the submitted information.

Initially, you acknowledge, and we agree, the department failed to comply with the procedural requirements prescribed by section 552.301 in requesting a decision from our office. *See* Gov't Code § 552.301. Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *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. 319 (1982). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. *See* Open Records

Decision Nos. 630 at 3(1994), 325 at 2 (1982). Although the department seeks to withhold some of the submitted information under Texas Rule of Civil Procedure 192.5, privilege protects a governmental body's interests and may be waived. *See* Open Records Decision Nos. 677 at 10 (attorney work-product privilege under rule 192.5 is not compelling reason to withhold information under section 552.302), 663 at 5 (1999) (waiver of discretionary exceptions). Thus, in failing to comply with section 552.301, the department has waived its claim under Texas Rule of Civil Procedure 192.5. Consequently, the department may not withhold any of the submitted information on the basis of Texas Rule of Civil Procedure 192.5. However, because sections 552.101, 552.1175, 552.130, 552.136, and 552.137 of the Government Code can provide compelling reasons for non-disclosure, we will address their applicability to the submitted information.¹

Next, we note the some of the submitted information includes court-filed documents. Section 552.022(a)(17) of the Government Code provides for required public disclosure of "information that is also contained in a public court record," unless the information is made confidential under the Act or other law. Gov't Code § 552.022(a)(17). Although you seek to withhold some of this information under section 552.101 of the Government Code in conjunction with common-law privacy, we note common-law privacy is not applicable to information contained in public records. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (action for invasion of privacy cannot be maintained where information is in public domain); *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54.57 (Tex. 1992) (law cannot recall information once in public domain). Thus, the department may not withhold any portion of the court-filed documents under section 552.101 in conjunction with common-law privacy. However, the common-law informer's privilege is other law for the purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001); *Tex. Comm'n on Env't'l Quality v. Abbott*, No. GV-300417 (126th Dist. Ct., Travis County, Tex.). Thus, we will address your assertion of section 552.101 of the Government Code in conjunction with the informer's privilege. Further, sections 552.101, 552.1175, 552.130, 552.136, and 552.137 of the Government Code make information confidential under the Act. Therefore, we will also address these exceptions for the information subject to section 552.022(a)(17). We will also address your arguments against disclosure of the remaining 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 section 1703.306 of the Occupations Code, which provides:

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 Nos. 481 (1987), 480 (1987), 470 (1987).

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person[.]

(b) The [Texas Department of Licensing and Regulation] or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

Occ. Code § 1703.306(a), (b). Upon review, we find the information we have marked contains polygraph information. The requestor does not fall within any of the categories of individuals who are authorized to receive the submitted polygraph information under section 1703.306(a). Accordingly, the department must withhold the polygraph information we have marked under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.² However, we find none of the remaining information consists of polygraph information that is confidential under section 1703.306 of the Occupations Code and none of the remaining information may be withheld under section 552.101 of the Government Code on that basis.

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

[T]he following information is confidential, is not subject to public release under [the Act], 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.

Fam. Code § 261.201(a). Upon review, we find the information we have marked pertains to an investigation of alleged or suspected child abuse or neglect by the Child Protective Services Division of the Texas Department of Family and Protective Services. *See id.* § 101.003(a) (defining “child” for purposes of chapter 261.201 of the Family Code); *see id.* § 261.001(1), (4) (defining “abuse” and “neglect” for purposes of Fam. Code ch. 261). Thus,

²As our ruling is dispositive, we need not address your arguments against disclosure of this information.

this information is within the scope of section 261.201 of the Family Code. Therefore, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code.³ However, we find you have failed to demonstrate any portion of the remaining 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 remaining information is a report of alleged or suspected abuse or neglect made under section 261.201(a)(1). Therefore, the department may not withhold any of the remaining 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 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, except that DPS may disseminate this information as provided in chapter 411, subchapter F or subchapter E-1 of the Government Code. *See* Gov’t Code § 411.083(a). 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 F of the Government Code. We note CHRI does not include driving record information. *See id.* § 411.082(2)(B). We also note section 411.083 does not apply to active warrant information or other information relating to one’s current involvement in 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 the information we have marked constitutes confidential CHRI. Therefore, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code.⁴ However, we find the department has failed to demonstrate the remaining information constitutes CHRI for purposes of chapter 411 of the Government

³As our ruling is dispositive, we need not address your arguments against disclosure of this information.

⁴As our ruling is dispositive, we need not address your argument against disclosure of this information.

Code. Accordingly, the department may not withhold any of the remaining information under section 552.101 of the Government Code on that basis.

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); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The informer's privilege protects from disclosure 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 No. 208 at 1-2 (1978). The informer's 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." Open Records Decision No. 279 at 1-2 (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 (1988). The privilege excepts the informer's statement only to the extent necessary to protect that informer's identity. Open Records Decision No. 549 at 5 (1990).

You state portions of the submitted information identifies confidential informants who reported violations of criminal law to the department. Based upon your representations and our review, we conclude the department has demonstrated the applicability of the common-law informer's privilege to some of the information at issue, which we have marked. Therefore, the department may withhold the information we marked under section 552.101 of the Government Code in conjunction with the common-law informer's privilege.⁵ However, you have not demonstrated any of the remaining information identifies an informant for purposes of the informer's privilege. Accordingly, the department may not withhold any of the remaining information under section 552.101 of the Government Code on that basis.

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 concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). This

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

office has also found that personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from disclosure under common-law privacy. *See* Open Records Decision No. 600 (1992) This office has also 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. 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. As previously noted, records relating to routine traffic violations are not considered criminal history information. *Cf. Gov't Code* § 411.082(2)(B) (criminal history record information does not include driving record information). Further, active warrant information or other information relating to one's current involvement in the criminal justice system does not constitute criminal history information for the purposes of section 552.101. *See id.* § 411.081(b) (police department allowed to disclose information pertaining to person's current involvement in the criminal justice system). Additionally, 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 *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. However, this office has noted the public has a legitimate interest in information relating to those who are involved in law enforcement. *See, e.g.,* Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs but in fact touches on matters of legitimate public concern), 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of law enforcement employees), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest), 329 (1982) (reasons for employee's resignation ordinarily not private). We note some of the information at issue relates to individuals whose identities

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).

have been withheld and whose privacy interests are thus protected. The department may not withhold otherwise private information relating to individuals who have been de-identified.

Upon review, we find some of the information at issue satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the department must withhold any identifiable public citizens' dates of birth and the information we have marked and indicated 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 department may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses the doctrine of constitutional privacy, which 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. ORD 455 at 4. 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)).

This office has applied privacy to protect certain information about incarcerated individuals. See Open Records Decision Nos. 430 (1985), 428 (1985), 185 (1978). Citing *State v. Ellefson*, 224 S.E.2d 666 (S.C. 1976), this office held those individuals who correspond with inmates possess a "first amendment right . . . to maintain communication with [the inmate] free of the threat of public exposure" and this right would be violated by the release of information that identifies those correspondents, because such a release would discourage correspondence. ORD 185. The information at issue in Open Records Decision No. 185 was the identities of individuals who had corresponded with inmates, and our office found "the public's right to obtain an inmate's correspondence list is not sufficient to overcome the first amendment right of the inmate's correspondents to maintain communication with him free of the threat of public exposure." *Id.* Implicit in this holding is the fact that an individual's association with an inmate may be intimate or embarrassing. In Open Records Decision Nos. 428 and 430, our office determined inmate visitor and mail logs that identify inmates and those who choose to visit or correspond with inmates are protected by constitutional privacy because people who correspond with inmates have a First Amendment right to do so that would be threatened if their names were released. ORDs 428, 430. Further, we recognized inmates had a constitutional right to visit with outsiders that could also be threatened if their names were released. See also ORD 185. The rights of those individuals to anonymity was found to outweigh the public's interest in this information. *Id.*; see

ORD 430 (list of inmate visitors protected by constitutional privacy of both inmate and visitors). Accordingly, the department must withhold the inmate visitor information we have marked under section 552.101 of the Government Code in conjunction with the constitutional right to 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. *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 [and] officers and employees of a community supervision and corrections department under Chapter 76 who perform a duty described by Section 76.004(b)[.]” *Id.* § 552.1175(a)(1),(6). Section 552.1175 also encompasses a personal cellular telephone number, unless the cellular telephone service is paid for by a governmental body. *See* Open Records Decision No. 506 at 5-7 (1988). We note the remaining information contains information pertaining to individuals that may be subject to section 552.1175. Thus, the information we have marked must be withheld from disclosure under section 552.1175 of the Government Code if it relates to individuals subject to section 552.1175 who elect to restrict access to their information in accordance with section 552.1175(b); however, the department may only withhold the cellular telephone numbers we have marked if the cellular telephone services are not paid for by a governmental body. If the individuals whose information is at issue are not subject to section 552.1175 or do not elect to restrict access to their information in accordance with section 552.1175(b), the information at issue may not be withheld under section 552.1175 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 a 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 and indicated under section 552.130 of the Government Code.

Section 552.136(b) of the Government Code states that “[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”). Therefore, the department must withhold the access device numbers 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). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, or an e-mail address maintained by a governmental entity for one of its officials or employees. The e-mail addresses at issue do not appear to be of a type specifically excluded by subsection (c). Therefore, 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.

In summary, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. The department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. The department must withhold the CHRI we have marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code. The department may withhold the information we have marked under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. The department must withhold any identifiable public citizens' dates of birth and the information we have marked and indicated under section 552.101 of the Government Code in conjunction with common-law privacy. The department must withhold the inmate visitor information we have marked under section 552.101 of the Government Code in conjunction with the constitutional right to privacy. The department must also withhold the information we have marked under section 552.1175 if it relates to individuals subject to section 552.1175 who elect to restrict access to their information in accordance with section 552.1175(b); however, the department may only withhold the cellular telephone numbers we have marked if the cellular telephone services are not paid for by a governmental body. The department must withhold the motor vehicle record information we have marked and indicated under section 552.130 of the Government Code. The department must withhold the access device numbers we have marked under section 552.136 of the Government Code. The department must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their disclosure. The department must release the remaining information.⁷

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.

⁷We note the remaining information contains social security numbers. 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).

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 'Thana Hussaini', with a long horizontal stroke extending to the right.

Thana Hussaini
Assistant Attorney General
Open Records Division

TSH/som

Ref: ID# 586400

Enc. Submitted documents

c: Requestor
(w/o enclosures)