



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 23, 2015

Mr. James Kopp
Assistant City Attorney
City of San Antonio
P. O. Box 839966
San Antonio, Texas 78283-3966

OR2015-24639

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# 588045 (COSA File No. W095525).

The City of San Antonio (the "city") received a request for information concerning a specified incident. 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.

We note the city previously received a request for this same information, in response to which this office issued Open Records Letter No. 2015-07393 (2015). In that ruling, we determined the city failed to comply with section 552.301 and, thus, waived its argument under section 552.108 of the Government Code for the submitted information. *See* Gov't Code § 552.301(b). Therefore, we ruled, the city must withhold the information we marked under section 552.130 of the Government Code and release the remaining information. You now seek to withhold information responsive to the prior request, including Peace Officer's Crash Report Forms that you did not submit in response to the earlier request, under section 552.108 of the Government Code. Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See id.* § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open

Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the city may not now withhold any information responsive to the previous request unless its release is expressly prohibited by law or the information is confidential under law. Although the city raises section 552.108, it is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 586 (1991) (governmental body may waive section 552.108). As such, this section does not prohibit the release of information or make information confidential. Thus, the city may not withhold any information responsive to the previous request under section 552.108.

We have no indication the law, facts, or circumstances with respect to the information withheld under section 552.130 of the Government Code in Open Records Letter No. 2015-07393 has changed. Accordingly, the city must rely on Open Records Letter No. 2015-07393 with respect to the information subject to section 552.130 and withhold the information we marked in accordance with that ruling. However, the law has changed with regard to dates of birth that were previously ordered released. Furthermore, we note you have now submitted Peace Officer's Crash Report Forms in response to the instant request. Therefore, the city may not rely on Open Records Letter No. 2015-07393 as a previous determination for the dates of birth or for the submitted Peace Officer's Crash Report Forms. Furthermore, because section 552.101 makes information confidential, we will address the applicability of section 552.101 of the Government Code to that information.¹

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 the doctrine of common-law privacy. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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 dates of birth of member of the public are 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

¹The 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).

the negligible public interest in disclosure.² *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 members of the public, and thus, dates of birth of member of the public are also protected by common-law privacy pursuant to section 552.101. *City of Dallas*, 2015 WL 3394061, at *3. We note the requestor has a right of access to her client’s own date of birth. *See* Gov’t Code § 552.023(b) (governmental body may not deny access to person to whom information relates or person’s agent on ground that information is considered confidential by privacy principles); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). Accordingly, the city must withhold all dates of birth of members of the public, other than the requestor’s client, under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.101 of the Government Code also 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. Transp. Code §§ 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). Here, the requestor is an authorized representative of a person involved in the crash at issue. Thus, the city must release the submitted Peace Officer’s Crash Report Forms to the requestor pursuant to section 550.065(c) of the Transportation Code. We note these forms contain dates of birth of members of the public; and there is a conflict between section 550.065(c) of the Transportation Code, which provides the requestor with a right of access to the forms, and the confidentiality provided to dates of birth of members of the public under common-law privacy. However, a statutory right of access prevails over the common-law. *See Center Point Energy Houston Elec, LLC v. Harris County Toll Rd.*, 436 F.3d 541, 544 (5th Cir. 2006) (common law-controls only where there is no conflicting or controlling statutory law); *Collins v. Tex Mall, L.P.*, 297 S.W.3d 409, 415 (Tex.App.— Fort Worth 2009, no pet.) (statutory provision controls and preempts common law only when statute directly conflicts with common-law principle); ORDs 613, 451. Accordingly, the city must release the Peace Officer’s Crash Report Forms in their entirety pursuant to section 550.065(c) of the Transportation Code.

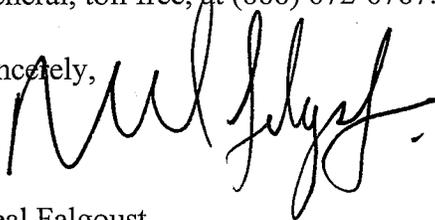
²Section 552.102(a) exempts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a).

In summary, the city must continue to rely on our ruling in Open Records Letter No. 2015-07393 with respect to the information subject to section 552.130 of the Government Code. The city must withhold the dates of birth of members of the public, other than the requestor's client, under section 552.101 of the Government Code in conjunction with common-law privacy and must release the entirety of the Peace Officer's Crash Report Forms to this requestor pursuant to section 550.065(c) of the Transportation Code.

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,



Neal Falgoust
Assistant Attorney General
Open Records Division

NF/eb

Ref: ID# 588045

Enc. Submitted documents

c: Requestor
(w/o enclosures)