



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 7, 2015

Ms. Ann-Marie Sheely
Assistant County Attorney
Transactions Division
Travis County
P.O. Box 1748
Austin, Texas 78767

OR2015-25619

Dear Ms. Sheely:

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# 587594.

The Travis County District Attorney's Office (the "district attorney's office") received three requests from the same requestor for training materials related to a specified topic, the identities of individuals who received this training, and e-mails related to specified presentations. You state the district attorney's office does not have information responsive to the portion of the request seeking the identities of individuals who received the specified training.¹ You state the district attorney's office is releasing some information to the requestor. You claim the submitted information is excepted from disclosure under

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).

sections 552.108 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we must address the district attorney's office's obligations under section 552.301 of the Government Code, which prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure, with regards to the second and third requests. *See* Gov't Code § 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). 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. *See id.* § 552.301(e). You received the second and third requests for information on September 16, 2015. On September 22, 2015, you provided the requestor with a cost estimate for providing the requested records pursuant to section 552.2615 of the Government Code. *See id.* § 552.2615 (providing governmental body shall provide requestor with estimate of charges if charges exceed \$40). You inform us payment was made by the requestor on October 21, 2015. On November 4, 2015, the district attorney's office requested a decision from this office pursuant to section 552.301(b) of the Government Code. *See id.* § 552.301(b).

Section 552.263(e) provides when a governmental body requires a deposit or bond for anticipated costs, the request for information is considered received on the date the governmental body receives the deposit or bond. *See id.* § 552.263(e). Here, the district attorney's office sent an estimate pursuant to section 552.2615, and did not require a deposit or bond from the requestor pursuant to section 552.263. We note section 552.2615 provides the submission of an estimate of charges to the requestor does not toll the governmental body's deadlines to ask for an attorney general decision under section 552.301. *See id.* § 552.2615(g) (providing "[t]he time deadlines imposed by this section do not affect the application of a time deadline imposed on a governmental body under Subchapter G"). Accordingly, we find the district attorney's office's deadlines under section 552.301 were not tolled. As noted above, the district attorney's office received the second and third requests for information on September 16, 2015. Thus, the district attorney's office's ten-

²We assume that 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 that those records contain substantially different types of information than that submitted to this office.

and fifteen-business-day deadlines were September 30, 2015, and October 7, 2015, respectively. In this instance, as noted above, the district attorney's office requested an opinion from this office on November 4, 2015, and submitted the information required by section 552.301(e) on November 12, 2015. Consequently, we find the district attorney's office failed to comply with the requirements of section 552.301 of the Government Code with regard to the second and third requests.

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 information is public and must be released, unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *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 (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. 630 (1994). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Although you assert the information at issue is excepted from disclosure under sections 552.108 and 552.111 of the Government Code, these are discretionary exceptions to disclosure and may be waived. *See* Gov't Code § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions, governmental body may waive section 552.111), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). Therefore, in failing to comply with the requirements of section 552.301, the district attorney's office has waived its claims under sections 552.108 and 552.111 for the second and third requests. Thus, the district attorney's office may not withhold any of the information at issue in these requests under section 552.108 or section 552.111 of the Government Code. However, portions of this information are subject to sections 552.101, 552.117, 552.1175, and 552.137 of the Government Code.³ As these exceptions can provide compelling reasons to overcome the presumption of openness under section 552.302, we will consider their applicability to the information responsive to the second and third requests. Furthermore, we will consider your arguments for the information responsive to the first request, which was timely submitted to this office.

Section 552.108 of the Government Code states in pertinent part the following:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted [from required public disclosure] if:

³The 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).

...

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

...

(b) An 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 is excepted [from required public disclosure] if:

...

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a)(4), (b)(3). A governmental body claiming an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information the governmental body seeks to withhold. *See id.* §§ 552.108, .301(e)(1)(A); *see also* Open Records Decision No. 434 at 2-3 (1986).

You assert the information responsive to the first request consists of training materials for attorneys representing the state in a particular kind of prosecution. You state the information at issue reflects the mental impressions and legal reasoning of the attorneys in these prosecutions. Upon review, we find you have demonstrated the information at issue reflects the mental impression or legal reasoning of attorneys representing the state. Therefore, the district attorney's office may withhold the information responsive to the first request under sections 552.108(a)(4) and 552.108(b)(3) of the Government Code.⁴

⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure of this 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 of the Government Code 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 also found some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Further, 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. 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.⁵ *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. Upon review, we find some of the remaining information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Thus, the district attorney’s office must withhold the information we have marked and indicated, along with any public citizens’ dates of birth, under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home address, home telephone number, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with section 552.024 and 552.1175 of the Government Code.⁶ *See* Gov’t Code. § 552.117(a)(2). Section 552.117(a) is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by

⁵Section 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).

⁶Section 552.117(a)(2) adopts the definition of peace officer found in article 2.12 of the Code of Criminal Procedure.

governmental body and intended for official use). Upon review, we find the district attorney's office must withhold the information we have marked under section 552.117(a)(2) of the Government Code. However, the district attorney's office may not withhold the cellular telephone numbers at issue under section 552.117(a)(2) if a governmental body pays for the cellular telephone service.

Section 552.117(a)(1) of the Government Code 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. Gov't Code § 552.117(a)(1). As noted above, section 552.117(a) is applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* ORD 506 at 5-7. 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 information we have marked must be withheld under section 552.117(a)(1) of the Government Code; however, the marked cellular telephone numbers may only be withheld if the cellular telephone service is not paid for by a governmental body.

Some of the remaining information may be subject to section 552.1175 of the Government Code. Section 552.1175 provides in part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure[.]

...

(b) Information that relates to the home address, home telephone number, emergency contact information, date of birth, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(a)(1), (b). We note section 552.1175 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* ORD 506 at 5-6. Some of the remaining information relates to individuals who were licensed as peace officers at the time the information at issue was created, and the information at issue is not held by the district attorney's office in an employment context. Accordingly, if the information at issue relates to peace officers who elect to restrict access to the information in accordance with section 552.1175(b), the district attorney's office must withhold the cellular telephone numbers we have marked under section 552.1175 of the Government Code if a governmental body does not pay for the cellular telephone service. Conversely, if the individuals whose information is at issue do not elect to restrict access to the information in accordance with section 552.1175(b) or a governmental body pays for the cellular telephone service, the marked information may not be withheld under section 552.1175.

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* Gov't Code § 552.137(a)-(c). Upon review, we find the district attorney's office must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

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 may withhold the information responsive to the first request under sections 552.108(a)(4) and 552.108(b)(3) of the Government Code. The district attorney's office must withhold the information we have marked and indicated, along with any 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 information we have marked under section 552.117(a)(2) of the Government Code; however, the marked cellular telephone numbers may only be withheld if the cellular telephone service is not paid for by a governmental body. If the individuals whose information is at issue

timely requested confidentiality pursuant to section 552.024, the district attorney's office must withhold the information we have marked under section 552.117(a)(1) of the Government Code; however, the marked cellular telephone numbers may only be withheld if the cellular telephone service is not paid for by a governmental body. If the information we have marked relates to peace officers who elect to restrict access to the information in accordance with section 552.1175(b), the district attorney's office must withhold the cellular telephone numbers we have marked under section 552.1175 of the Government Code if a governmental body does not pay for the cellular telephone service. The district attorney's office must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. The district attorney's office must release the remaining information; however, any information subject to copyright may only be released in accordance with copyright law.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.

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,



Tim Neal
Assistant Attorney General
Open Records Division

TN/bhf

⁷We note the remaining information contains an e-mail address to which the requestor has a right of access under section 552.137(b) of the Government Code. *See* Gov't Code § 552.137(b). However, Open Records Decision No. 684 (2009) is a previous determination authorizing all governmental bodies to withhold specific categories of information without the necessity of requesting an attorney general decision, including e-mail addresses of members of the public under section 552.137 of the Government Code. Thus, if the district attorney's office receives another request for this same information from a person who does not have a right of access to it, Open Records Decision No. 684 authorizes the district attorney's office to redact the requestor's e-mail address without the necessity of requesting an attorney general decision.

Ref: ID# 587594

Enc. Submitted documents

c: Requestor
(w/o enclosures)