



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 15, 2015

Ms. Leslie O. Haby
Assistant Criminal District Attorney
Civil Section
Bexar County District Attorney's Office
101 West Nueva Street, 7th Floor
San Antonio, Texas 78205

OR2015-26325

Dear Ms. Haby:

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# 590737.

The Bexar County District Attorney's Office (the "district attorney's office") received a request for information related to a specified automotive accident. You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.111 of the Government Code and privileged pursuant to Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. We have considered your arguments and reviewed the submitted representative sample of information.¹

Initially, we note some of the submitted information, which we have marked, was created after the date of the request and is not responsive to the request. This ruling does not address

¹We assume 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 those records contain substantially different types of information than that submitted to this office.

the public availability of information that is not responsive to a request, and the district attorney's office is not required to release non-responsive information.

Next, we must address the obligations of the district attorney's office 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. 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 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. *See id.* § 552.301(e). You state the district attorney's office received the request for information on September 18, 2015. You claim the district attorney's office sought clarification of the information requested pursuant to section 552.222 of the Government Code on September 21, 2015. *See id.* § 552.222; *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). However, we note section 552.222 permits a governmental body to request clarification if "the information requested is unclear to the governmental body" or to discuss how to narrow the scope of a request where "a large amount of information has been requested[.]" *See Gov't Code* § 552.222(b). In this case, the submitted information reveals the district attorney's office sought to determine whether the request for information was made pursuant to the Act or pursuant to discovery rules. Therefore, we find this inquiry on September 21, 2015 was not a request for clarification made pursuant to section 552.222 of the Government Code.

Furthermore, this office has held a written communication that reasonably can be judged to be a request for public information constitutes a request for information under the Act. *See Open Records Decision Nos. 497 at 3 (1988), 44 at 2 (1974)*. In this regard, we note that a request for information need not refer to the Act or be addressed to the officer for public information. ORDs 497 at 3, 44 at 2. In this case, you state the request was received by the Bexar County Public Information Officer and we note the request was submitted through Bexar County's online open records request form. Further, the request sought information the requestor believed to be in the district attorney's office's custody or control. Additionally, the request specifically directs the district attorney's office to timely deliver any responsive information in its possession to the requestor and requests that the requestor be notified in writing of any objections the district attorney's office may have to disclosure of the information at issue. Thus, we find the instant request to be a valid information request

under the Act to the district attorney's office, which was received on September 18, 2015. You do not inform us the district attorney's office was closed for any business days between September 18, 2015, and October 9, 2015. Accordingly, you were required to provide the information required by section 552.301(b) by October 2, 2015. Moreover, you were required to provide the information required by section 552.301(e) by October 9, 2015. However, the envelope in which you provided the information required by section 552.301(b) was meter marked October 5, 2015, and the envelope in which you provided the information required by section 552.301(e) does not bear a postmark but was received by this office on October 15, 2015. *See Gov't Code* § 552.308(a)(1) (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Accordingly, we conclude the district attorney's office failed to comply with the procedural requirements mandated by section 552.301 of the Government Code.

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. Information that is presumed public 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); *see also* Open Records Decision No. 630 (1994). Generally, a governmental body may demonstrate a compelling reason to withhold information by showing that the information is made confidential by another source of law or affects third party interests. *See* ORD 630. Although you claim the submitted information is excepted from disclosure under sections 552.108 and 552.111 of the Government Code and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, these are discretionary exceptions and privileges that protect a governmental body's interests and do not provide compelling reasons to withhold information. *See* Open Records Decision Nos. 677 at 10 (2002) (attorney work-product privilege under section 552.111 or rule 192.5 is not compelling reason to withhold information under section 552.302), 676 at 12 (2002) (claim of attorney-client privilege under rule 503 does not provide compelling reason to withhold information under section 552.302 if it does not implicate third-party rights), 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (waiver of discretionary exceptions), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). Therefore, the district attorney's office may not withhold any portion of the submitted information under section 552.108, section 552.111, Texas Rule of Evidence 503, or Texas Rule of Civil Procedure 192.5. However, you also claim section 552.101 of the Government Code for the submitted information. We also note portions of the submitted information are subject to

sections 552.1175, 552.130, 552.136, and 552.137 of the Government Code.² Because these exceptions provide compelling reasons to overcome the presumption of openness, we will address their applicability to the responsive 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 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. *Id.* §§ 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 a person listed under section 550.065(c). Thus, the district attorney’s office must release the submitted accident report to the requestor pursuant to section 550.065(c).

Section 552.101 of the Government Code also encompasses section 411.083 of the Government Code which pertains to criminal history record information (“CHRI”). CHRI generated by the National Crime Information Center (“NCIC”) or by the Texas Crime Information Center is confidential under federal and state law. CHRI means “information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions.” Gov’t Code § 411.082(2). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI obtained from the NCIC network or other states. *See* 28 C.F.R. § 20.21. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. Open Records Decision No. 565 at 7 (1990). *See generally* Gov’t Code ch. 411 subch. F. Section 411.083 of the Government Code deems confidential CHRI the Texas Department of Public Safety (“DPS”) maintains, except DPS may disseminate this information as provided in subchapter F or subchapter E-1 of chapter 411 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). Thus, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

conjunction with Government Code chapter 411, subchapter F. We note records relating to routine traffic violations are not considered criminal history information. *Cf. Id.* § 411.082(2)(B) (criminal history record information does not include driving record information). Upon review, we find the information we have marked constitutes confidential CHRI the district attorney's office must withhold under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code. However, none of the remaining responsive information constitutes confidential CHRI; thus, the district attorney's office may not withhold any portion of the remaining information under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code.

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 also found personal financial information not relating to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. *See* Open Records Decision Nos. 600 (1992) (personal financial information includes choice of particular insurance carrier), 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). Additionally, this office has concluded 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. *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.³ *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. We note the requestor has a right of access to her client's private information, including his date of birth, pursuant to

³Section 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).

section 552.023 of the Government Code. *See* Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). 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 the dates of birth of all public citizens other than the requestor's client, under section 552.101 of the Government Code in conjunction with common-law 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[.]" *Id.* § 552.1175(a)(1). The remaining submitted information contains personal information relating to peace officers of another governmental body. Thus, to the extent the individuals whose information we have marked and indicated elect to restrict access to this information in accordance with section 552.1175(b), the district attorney's office must withhold the information we have marked and indicated under section 552.1175 of the Government Code. If no election is made, the district attorney's office may not withhold this information 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 personal identification document issued by an agency of this state or another state or country is excepted from public release. *See id.* § 552.130. We note, the requestor has a right of access to her client's motor vehicle record information pursuant to section 552.023 of the Government Code. *See id.* § 552.023(a); ORD 481 at 4. Accordingly, the district attorney's office must withhold the motor vehicle record information we have marked and indicated, as well as any discernible license plates that do not belong to the requestor's client in the submitted photographs and video recordings, under section 552.130 of the Government Code.

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." Gov't Code § 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). We note, the requestor has a right of access to her client's insurance policy number pursuant to section 552.023 of the Government Code. *See* Gov't Code § 552.023(a); ORD 481 at 4. Upon review, we find the district attorney's

office must withhold the insurance policy number we have marked and indicated 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). Gov’t Code § 552.137(a)-(c). The e-mail addresses we have marked are not of the types specifically excluded by section 552.137(c). *See id.* § 552.137(c). Accordingly, 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 of the e-mail addresses affirmatively consent to their release.

In summary, the district attorney’s office must release the submitted accident report to the requestor pursuant to section 550.065(c) of the Transportation Code. The district attorney’s office must withhold: (1) the information we have marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code, (2) the information we have marked and indicated, along with the dates of birth of all public citizens other than the requestor’s client, under section 552.101 of the Government Code in conjunction with common-law privacy, (3) the information we have marked and indicated under section 552.1175 of the Government Code, to the extent the individuals whose information is at issue elect to restrict access to this information in accordance with section 552.1175(b), (4) the motor vehicle record we have marked and indicated, as well as any discernible license plates that do not belong to the requestor’s client in the submitted photographs and video recordings, under section 552.130 of the Government Code, (5) the insurance policy number we have marked and indicated under section 552.136 of the Government Code, and (6) the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release. The district attorney’s office must release the remaining responsive information.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.

⁴We note the requestor has a right of access to some of the information being released. *See* Gov’t Code § 552.023(a); ORD 481 at 4. Accordingly, if the district attorney’s office receives another request for this same information from a different requestor, the district attorney’s office must again seek a ruling from this office. We also note the information being released 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. However, the information contains the requestor’s client’s social security number, which may not be withheld in this instance. *See generally* Gov’t Code § 552.023(b) (governmental body may not deny access to person to whom information relates, or that person’s representative, solely on grounds that information is considered confidential by privacy principles).

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". The signature is fluid and cursive, with the first name "Tim" being more prominent than the last name "Neal".

Tim Neal
Assistant Attorney General
Open Records Division

TN/bhf

Ref: ID# 590737

Enc. Submitted documents

c: Requestor
(w/o enclosures)