



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 31, 2016

Ms. Molly Cost
Assistant General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2016-12206

Dear Ms. Cost:

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# 612459 (PIR# 16-417).

The Texas Department of Public Safety (the "department") received a request for a specified investigation report. You state you will release some information to the requestor. You inform us you are redacting some information pursuant to sections 552.1175 and 552.130 of the Government Code and e-mail addresses in accordance with Open Records Decision No. 684 (2009).¹ We note you are redacting certain information pursuant to the previous

¹Section 552.1175(f) of the Government Code authorizes a governmental body to redact under section 552.1175(b), without the necessity of requesting a decision from this office, the home addresses and telephone numbers, emergency contact information, social security number, date of birth, and family member information of a peace officer as defined by article 2.12 of the Code of Criminal Procedure who properly elects to keep this information confidential. *See* Gov't Code § 552.1175(b), (f). Section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsection 552.130(a) without the necessity of seeking a decision from the attorney general. *See id.* § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

determination issued in Open Records Letter No. 2001-2047 (2001).² You claim some of the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted 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 informer’s privilege, which has long been recognized by Texas courts. *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). However, witnesses who provide information in the course of an investigation but do not make a report of the violation are not informants for the purposes of the informer’s privilege. Upon review, we find the department has not demonstrated the information you seek to withhold identifies an informer for purposes of the common-law informer’s privilege. Therefore, the department may not withhold the information it marked under section 552.101 on the basis of the common-law informer’s privilege.

Section 552.101 also encompasses the common-law physical safety exception. The Texas Supreme Court has recognized, for the first time, a separate common-law physical safety exception to required disclosure. *Tex. Dep’t of Pub. Safety v. Cox Tex. Newspapers, L.P. & Hearst Newspapers, L.L.C.*, 343 S.W.3d 112, 118 (Tex. 2011). Pursuant to this common-law physical safety exception, “information may be withheld [from public release] if disclosure would create a substantial threat of physical harm.” *Id.* In applying this new standard, the court noted “deference must be afforded” law enforcement experts regarding the probability of harm, but further cautioned, “vague assertions of risk will not carry the day.” *Id.* at 119.

²Open Records Letter No. 2001-2047 authorizes the department to withhold criminal history record information maintained under section 411.083 of the Government Code without the necessity of requesting an attorney general decision. *See* Gov’t Code § 552.301(a); Open Records Decision No. 673 (2001) (previous determinations).

The department informs us the submitted information includes information revealing the identities of cooperating individuals who provided information to the department during a criminal investigation involving a criminal association. You further state the criminal association involved in this report has a long history of violence and reprisals against those who provide information against them. You argue release of the names and identifying information of the cooperating individuals would place their lives in grave danger. Accordingly, with the exception of the information we have marked for release, the department must withhold the information you have marked under section 552.101 of the Government Code in conjunction with the common-law physical safety exception. However, the department has not demonstrated disclosure of the remaining information you marked would subject an individual to substantial risk of physical harm. Thus, the department may not withhold the remaining information at issue under section 552.101 in conjunction with the common-law physical safety exception.

You state the department will redact dates of birth pursuant to a previous determination issued to the department in Open Records Letter No. 2015-27249 (2015).³ Section 552.101 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. 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.⁴ *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.

³Open Records Letter No. 2015-27249 is a previous determination issued to the department authorizing it to withhold, under section 552.101 of the Government Code in conjunction with common-law privacy, the dates of birth of living public citizens without the necessity of requesting an attorney general decision.

⁴Section 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).

The department generally must withhold the dates of birth in the submitted information. However, we find some of the dates of birth you seek to withhold belong to individuals who have been de-identified and whose privacy interest are, thus, protected. Therefore, with the exception of the dates of birth we marked for release, the department must rely on its previous determination issued in Open Records Letter No. 2015-27249 and withhold the dates of birth of public citizens in the submitted information under section 552.101 of the Government Code in conjunction with common-law privacy.

In summary, with the exception of the information we have marked for release, the department must withhold the information you have marked under section 552.101 of the Government Code in conjunction with the common-law physical safety exception. With the exception of the dates of birth we marked for release, the department must withhold all public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy. The remaining information must be released.

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,



Kavid Singh
Assistant Attorney General
Open Records Division

KVS/som

Ref: ID# 612459

Enc. Submitted documents

c: Requestor
(w/o enclosures)