



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

June 22, 2016

Mr. John C. West  
General Counsel  
Office of the Inspector General  
Texas Department of Criminal Justice  
4616 West Howard Lane, Suite 250  
Austin, Texas 78728

OR2016-14240

Dear Mr. West:

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# 615465 (OIG ID# 2016-00072).

The Office of Inspector General of the Texas Department of Criminal Justice (the "department") received a request for a specified case. You state you do not have information responsive to a portion of the request.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108, 552.117, 552.1175, 552.130, 552.134, and 552.147 of the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted information.

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<sup>1</sup>The 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).

<sup>2</sup>Although you raise section 552.101 of the Government Code in conjunction with section 552.102 of the Government Code, we note section 552.101 does not encompass other exceptions in the Act. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

Initially, we note 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 expressly made confidential under the Act or other law. Gov’t Code § 552.022(a)(17). Although you raise sections 552.103 and 552.108 of the Government Code for this information, these exceptions are discretionary in nature and do not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived), 663 at 5 (1999) (waiver of discretionary exceptions), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the department may not withhold any of the information subject to section 552.022(a)(17), which we have marked, under section 552.103 or section 552.108 of the Government Code. Additionally, 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). Accordingly, the department may not withhold any of the information subject to section 552.022(a)(17) under section 552.101 of the Government Code in conjunction with common-law privacy. However, the department raises section 552.101 in conjunction with law other than common-law privacy, as well as sections 552.102, 552.117, 552.1175, 552.130, and 552.134 of the Government Code for this information, which make information confidential for purposes of section 552.022. Accordingly, we will consider the applicability of these exceptions to the court-filed documents subject to section 552.022(a)(17). Further, we will address the department’s arguments against disclosure of the remaining information.

Section 552.108(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state the information at issue pertains to a pending criminal investigation. Based on your representation, we conclude the release of the information at issue would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, section 552.108(a)(1) is applicable to the information not subject to section 552.022 of the Government Code.

However, we note, and you acknowledge, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle*. See 531 S.W.2d at 186-88; Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). We note basic information does not include motor vehicle record information protected by section 552.130 of the Government Code or dates of birth. See ORD 127 at 3-4. We note basic information includes an arrestee's name, race, sex, age, occupation, address, physical condition, and social security number, but does not include information related to a witness or to a suspect who was not arrested. See *id.* Thus, with the exception of the information subject to section 552.022 of the Government Code and the basic information, the department may withhold the submitted information under section 552.108(a)(1) of the Government Code.<sup>3</sup>

Section 552.134 of the Government Code relates to information about inmates of the department. This exception provides in relevant part:

(a) Except as provided by Subsection (b) or by Section 552.029 [of the Government Code], information obtained or maintained by the Texas Department of Criminal Justice is excepted from [required public disclosure] if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

Gov't Code § 552.134(a). You assert the remaining information consists of records pertaining to inmates confined in a facility operated by the department. However, the information at issue pertains to the conduct of a former department employee and, therefore, is not "about an inmate" for purposes of section 552.134. Thus, the department may not withhold the remaining information under section 552.134.

You claim some of the basic information is subject to the doctrine of common-law privacy, which is encompassed by section 552.101 of the Government Code. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. Common-law privacy protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. In Open Records Decision No. 393 (1983), this office concluded information that either identifies or

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<sup>3</sup>As our ruling under section 552.108 of the Government Code is dispositive, we need not address your remaining arguments against disclosure of this information, except to note the basic information at issue is not excepted from disclosure under section 552.103 or section 552.134 of the Government Code. See Gov't Code § 552.029(8); Open Records Decision No. 597 (1991).

tends to identify a victim of sexual assault or other sex-related offense must be withheld under common-law privacy. ORD 393 at 2; *see* Open Records Decision No. 339 (1982); *see also Morales v. Ellen*, 840 S.W.2d at 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information). However, we note the requestor is an attorney representing the victim in the case, and thus is his authorized representative. As such, the requestor has a special right of access under section 552.023 of the Government Code to information pertaining to his client that would otherwise be withheld to protect the victim's privacy. *See* Gov't Code § 552.023(b) (governmental body may not deny access to person or person's representative to whom information relates on grounds that information is considered confidential under privacy principles); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Thus, the department may not withhold any of the basic information under section 552.101 of the Government Code in conjunction with common-law privacy.

You also raise section 552.102 of the Government Code for the remaining information. Section 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 Texas Supreme held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). Thus, *Texas Comptroller* applies to only a public employee's birth date maintained by the employer in an employment context. In this instance, the remaining information is not held in an employment context. Therefore, we conclude the department may not withhold any of the remaining information under section 552.102(a) of the Government Code.

You also raise section 552.117(a)(3) of the Government Code for the remaining information. Section 552.117(a)(3) excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee of the department or any division of the department, regardless of whether the current or former employee complies with section 552.1175 of the Government Code. Gov't Code § 552.117(a)(3). We note section 552.117 applies only to information held by a governmental body in an employment capacity. The information at issue is held by the department in a law enforcement capacity. Accordingly, section 552.117(a) does not apply in this situation, and the department may not withhold any of the remaining information section 552.117 of the Government Code.

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 id.* § 552.1175. Section 552.1175 applies, in part, to “current or former employees of the [department] or of the predecessor in function of the department or any division of the department[.]” *Id.* § 552.1175(a)(3). Some of the information subject to section 552.022, which we have marked, relates to a former employee of the department, and the information is not held in an employment capacity. Accordingly, if the individual at issue elects to restrict access to his information in accordance with section 552.1175(b), the department must withhold the information we have marked under section 552.1175 of the Government Code.<sup>4</sup>

Section 552.130 of the Government Code provides information relating to a motor vehicle operator’s or driver’s license or permit, a motor vehicle title or registration, or a personal identification document issued by an agency of Texas or another state or country is excepted from public release. *Id.* § 552.130(a). The department must withhold the information we have marked under section 552.130 of the Government Code.

In summary, with the exception of the information subject to section 552.022 of the Government Code and the basic information, the department may withhold the submitted information under section 552.108(a)(1) of the Government Code. If the individual at issue elects to restrict access to his information in accordance with section 552.1175(b) of the Government Code, the department must withhold the information we have marked under section 552.1175 of the Government Code. The department must withhold the information we have marked under section 552.130 of the Government Code. The department must release the remaining information.<sup>5</sup>

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](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

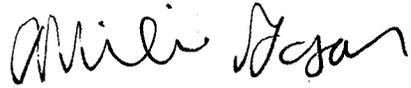
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<sup>4</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information. Moreover, in the event the individual’s social security number is not excepted from disclosure under section 552.1175 of the Government Code, we note 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).

<sup>5</sup>Because the requestor has a right of access beyond that of the general public to some of the information being released, if the department receives another request for this information from an individual other than this requestor or his client, the department must again seek a ruling from this office. *See* Gov’t Code § 552.023(a); ORD 481 at 4.

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 that reads "Mili Gosar". The signature is written in a cursive, flowing style.

Mili Gosar  
Assistant Attorney General  
Open Records Division

MG/akg

Ref: ID# 615465

Enc. Submitted documents

c: Requestor  
(w/o enclosures)