



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 13, 2016

Ms. Amanda Pell
Open Records Specialist
Baytown Police Department
3200 North Main Street
Baytown, Texas 77521

OR2016-15896

Dear Ms. Pell:

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# 618327 (Request Nos. 6496, 6555, 6698, and 6860).

The Baytown Police Department (the "department") received four requests from different requestors for information related to a specified car collision. You state you do not possess some of the requested information.¹ You state you have released some information to the requestors. You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the department's procedural obligations under section 552.301 of the Government Code when requesting a decision from this office under the Act. Pursuant to section 552.301(b), within ten business days after receiving a written request, the governmental body must request a ruling from this office and state the exceptions to disclosure that apply. Gov't Code § 552.301(b). We note the submitted photographs, video recordings, and incident report are responsive to all four requests. You state the department

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

received the first request for information on April 21, 2016 and the third request on May 25, 2016. Accordingly, the department's ten-business-day deadline was May 5, 2016 with respect to the first request and June 9, 2016 with respect to the third request. However, the department did not raise section 552.108 of the Government Code for the photographs until it submitted the second request for a ruling on May 10, 2016, for the video recordings until it submitted the third request for a ruling on June 9, 2016, and for a portion of the incident report, which we have marked, until it submitted the fourth request for a ruling on June 28, 2016. *See id.* § 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). Consequently, we find the department failed to comply with section 552.301 of the Government Code in timely raising section 552.108 for the photographs, video recordings, and the information we marked with respect to the first and third requests.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *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, 381-82 (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); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third-party interests are at stake. Open Records Decision No. 150 at 2 (1977). Section 552.108 is discretionary in nature. This section serves to protect a governmental body's interests and may be waived; as a result, it does not constitute a compelling reason to withhold information. *See Simmons*, 166 S.W.3d at 350 (section 552.108 is not compelling reason to withhold information under section 552.302); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). Accordingly, the photographs and video recordings, with respect to the first request, and the information we have marked for release in the incident report, with respect to the third request, may not be withheld under section 552.108 of the Government Code. We note in waiving section 552.108 for the photographs and video recordings with respect to the first request, the department also waives this claim for this information with respect to the second, third, and fourth requests for information. *See* Gov't Code § 552.007 (prohibiting selective disclosure of information); Open Records Decision No. 463 at 1-2 (1987). Additionally, in waiving section 552.108 for the information we have marked in the incident report, with respect to the third request, the department also waives this claim for this information with respect to the fourth request for information. *Id.* Thus, the department may not withhold the submitted photographs, video recordings, and information we marked for release in the incident report under section 552.108. However, section 552.130 of the Government Code can provide a compelling reason to overcome the presumption of openness. Therefore, we will consider the applicability of section 552.130 for

the photographs and video recordings. Additionally, we will address your arguments against disclosure of the remaining information.

Section 552.101 of the Government Code excepts “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, 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). 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 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.² *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 the department must withhold the public citizens’ dates of birth you have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

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: (1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). Generally, 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.* § 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). The department states the information at issue in the submitted incident report relates to a pending criminal investigation and prosecution. Based on this representation, we conclude, with the exception of the information we marked for release, the release of the information you have marked in the incident report 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). Therefore, with the exception of the information we marked for release, the department may

²Section 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).

withhold the information you have marked in the incident report under section 552.108(a)(1) of the Government Code.

Section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by an agency of this state or an agency of another state or country. Gov't Code § 552.130(a). Upon review, we agree the submitted video recordings contain license plate numbers. You state the department does not possess the technological capability to redact information from the video recordings. Thus, we agree the department must withhold the entire video recordings under section 552.130 of the Government Code. *See* Open Records Decision No. 364 (1983). Further, the department must generally withhold the motor vehicle information we have marked and you have marked and the discernible license plates in the pictures at issue under section 552.130 of the Government Code. We note, however, because section 552.130 is designed to protect the privacy of individuals, the third requestor may have a right of access to his client's motor vehicle record information as his authorized representative under section 552.023 of the Government Code. *See* Gov't Code § 552.023 (person or person's authorized representative has special right of access to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person's privacy interests); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Therefore, to the extent the motor vehicle record information belongs to the third requestor's client, the third requestor has a right of access to this information and it may not be withheld from the third requestor under section 552.130. In that instance, the remaining information must be withheld under section 552.130 of the Government Code.

In summary, the department must withhold the public citizens' dates of birth you have marked under section 552.101 of the Government Code in conjunction with common-law privacy. With the exception of the information we marked for release, the department may withhold the information you have marked in the submitted incident report under section 552.108(a)(1) of the Government Code. The department must withhold the submitted video recordings in their entireties under section 552.130. The department must also withhold motor vehicle information we have marked and you have marked, and the discernible license plate numbers depicted in the submitted photographs under section 552.130 of the Government Code. However, to the extent the third requestor has a right of access to his client's motor vehicle information, it may not be withheld from the third requestor under section 552.130 of the Government Code. The remaining information must be released to all four requestors.³

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.

³We note two of the requestors have a right of access to some information being released pursuant to section 552.023 of the Government Code. *See* Gov't Code § 552.023(a) ORD 481 at 4.

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/bhf

Ref: ID# 618327

Enc. Submitted documents

c: 4 Requestors
(w/o enclosures)