



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

September 19, 2016

Ms. Ann-Marie Sheely  
Assistant County Attorney  
Travis County Attorney's Office  
P.O. Box 1748  
Austin, Texas 78767

OR2016-21139

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# 626940.

The Travis County Attorney's Office (the "county attorney's office") received a request for all information pertaining to a specified prosecution, including all information pertaining to the Deferred Prosecution Agreement (the "agreement") in that case. You claim the submitted information is excepted from disclosure under section 552.108 of the Government Code. We have considered the exception you claim and reviewed the representative sample of information.<sup>1</sup> We have also received and considered comments from an interested party. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, you state the agreement was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2016-10351 (2016). In that ruling, we determined the county attorney's office may withhold the agreement under

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<sup>1</sup>We 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.

section 552.108(a)(1) of the Government Code. However, we note the law, facts, and circumstances on which the previous ruling was based have changed. Accordingly, the county attorney's office may not rely on Open Records Letter No. 2016-10351 as a previous determination in regard to the agreement. *See* Open Records Decision No. 673 at 7-8 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). Thus, we will consider your arguments against disclosure of the agreement as well as the remaining submitted 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). The interested party asserts the criminal case at issue has been dismissed and provides the related motion to dismiss, signed on April 6, 2016, indicating the case was dismissed due to the agreement. You acknowledge the submitted information relates to a criminal case which is subject to the agreement, which was entered into on April 1, 2016. However, you state the term of the agreement has not concluded and, if at the end of the agreement term the subject fails to comply with the terms of the agreement, the criminal case will be re-filed. Therefore, you claim the submitted information pertains to a pending criminal case. Generally, the release of information pertaining to an open case is presumed to interfere with the criminal investigation. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). We note, however, the information at issue includes the agreement. The defendant signed the agreement, acknowledging his receipt of the agreement. Thus, because a copy of the agreement has previously been released to the defendant, we find you have not shown release of the agreement will interfere with the detection, investigation, or prosecution of crime; thus, the agreement may not be withheld under section 552.108(a)(1). *See* Gov’t Code § 552.108(a)(1). However, we agree release of the remaining information would interfere with the detection, investigation, or prosecution of crime. Thus, we find section 552.108(a)(1) is applicable to the remaining information at issue.

However, we note that 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 dates of birth. *See* ORD 127

at 3-4. Thus, with the exception of the basic information, the county attorney's office may withhold the remaining submitted information under section 552.108(a)(1) of the Government Code.

We note portions of the agreement are subject to section 552.101 of the Government Code.<sup>2</sup> 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. *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.<sup>3</sup> *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. Thus, the county attorney's office must withhold the public citizen's date of birth under section 552.101 of the Government Code in conjunction with common-law privacy.

In summary, the county attorney's office must release the submitted agreement; however, in releasing this document, the county attorney's office must withhold the date of birth of a member of the public under section 552.101 of the Government Code in conjunction with common-law privacy. With the exception of the basic information, the county attorney's office may withhold the remaining information under section 552.108(a)(1) of the Government Code.

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.

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<sup>2</sup>This office will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

<sup>3</sup>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).

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 providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Sidney M. Pounds  
Assistant Attorney General  
Open Records Division

SMP/bhf

Ref: ID# 626940

Enc. Submitted documents

c: Requestor  
(w/o enclosures)