ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 28, 2011

Ms. Jennifer C. Cohen
Assistant General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2011-17475

Dear Ms. Cohen:

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# 436976 (P.I.R. # 11-2167).

The Texas Department of Public Safety (the "department") received a request for all records pertaining to the Fundamentalist Church of Jesus Christ of Latter Day Saints (the "church") since December 21, 2000. You claim some of the requested information is excepted from disclosure under sections 552.101, 552.108, 552.130, 552.136, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.[1]

Initially, we note RE201000116 and RE201100096 are not responsive to the request because they do not pertain to the church. This decision does not address the public availability of the non-responsive information, and that information need not be released.

Next, you inform us some of the submitted information is the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2011-16036

[1]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.

(2011). In that decision we ruled some of the requested information was excepted from disclosure under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code. We also ruled that, with the exception of basic information, the remaining requested information was excepted from disclosure under section 552.108(a)(2) of the Government Code. As we have no indication that the law, facts, or circumstances on which the prior ruling was based have changed, the department must continue to rely on this ruling as a previous determination and continue to withhold or release any previously ruled upon information in accordance with that prior ruling.[2] *See* Open Records Decision No. 673 (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). To the extent the submitted responsive information was not previously ruled upon, we will consider your arguments against disclosure.

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. This section encompasses information protected by other statutes. Part 23 of title 28 of the Code of Federal Regulations was established to regulate intelligence databases pertaining to certain criminal activities, such as drug trafficking and extortion, that involve a large number of participants over a broad geographical area. *See* 28 C.F.R. § 23.2 (providing background of part 23). The policy standards of part 23 are applicable to all criminal intelligence systems operating through support under the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3711, *et seq.* *Id.* § 23.3(a). For purposes of part 23, a criminal intelligence system "means the arrangements, equipment, facilities, and procedures used for the receipt, storage, interagency exchange or dissemination, and analysis of criminal intelligence information," and an intelligence project "means the organizational unit which operates an intelligence system on behalf of and for the benefit of a single agency or the organization which operates an interjurisdictional intelligence system on behalf of a group of participating agencies." *Id.* § 23.3(b)(1), (5).

The release of information within these criminal intelligence databases is governed by section 23.20 of part 23, which provides in relevant part the following:

> (e) A project or authorized recipient shall disseminate criminal intelligence information only where there is a need to know and a right to know the information in the performance of a law enforcement activity.

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[2]We understand the previously ruled upon information includes RE200800100; RE200800113; RE200800126; RE200800129; RE200900003; RE200900012; and RE200900013.

> (f)(1) Except as noted in paragraph (f)(2) of this section, a project shall disseminate criminal intelligence information only to law enforcement authorities who shall agree to follow procedures regarding information receipt, maintenance, security, and dissemination which are consistent with these principles.
>
> (2) Paragraph (f)(1) of this section shall not limit the dissemination of an assessment of criminal intelligence information to a government official or to any other individual, when necessary, to avoid imminent danger to life or property.

Id. § 23.20(e), (f). For purposes of section 23.20, "criminal intelligence information" means "data which has been evaluated to determine that it: (i) [i]s relevant to the identification of and the criminal activity engaged in by an individual who or organization which is reasonably suspected of involvement in criminal activity, and (ii) [m]eets criminal intelligence system submission criteria[.]" *Id.* § 23.3(b)(3). You state the information you have marked was "acquired and maintained as part of a criminal intelligence system operated pursuant to 28 C.F.R. §23.20." Thus, we conclude the marked information is confidential under section 23.20, and may be released only in accordance with that section. You state the requestor is not a member of a law enforcement authority. *See id.* § 23.20(f)(1). You further state the department does not believe disclosure to the requestor is necessary to avoid imminent danger to life or property. *Id.* § 23.20(f)(2). Therefore, we conclude the information you have marked, consisting of C04B080064, must be withheld under section 552.101 of the Government Code in conjunction with section 23.20 of title 28 of the Code of Federal Regulations.

Section 552.101 of the Government Code also encompasses information protected by other statutes, such as section 261.201 of the Family Code, which provides, in relevant part:

> (a) [T]he following information is confidential, is not subject to public release under [the Act], and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:
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> > (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
> >
> > (2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). You assert some of the submitted information is confidential because it relates to the investigation of alleged or suspected child abuse. *See id.* § 261.001 (defining "abuse" for purposes of chapter 261 of the Family Code). Upon review, we agree the information in C04A080095; RA200800197; RA200800201; RA200800202; RA200800237; RA200800245; RA200800263; RA200800274; RA200900006; RB200800219; RB200800224; RB200800225; RB200800240; RB200800525; RB200800631; RB200900007; RC200800203; RC200800204; RC200800214; RC200800223; RC200800421; RC200900400; RC201000215; RC201000219; RD200800119; RD200800123; RD200800126; RD200800198; RE200800125; RE200800130; RE200800133; RE200800135; RE200800142; RE200800154; RE200800179; RE200800189; RE200800209; RE200800217; RE200800266; RE200800286 RE200800292; RE200900002; RE200900019; RE200900072; RE201000038; RE201000101; RE201000106; RE201000139; RE201000224; RE201000225; RE201100008; RE201100015; RE201100035; RE201100041; RE201100050; RE201100063; RE201100068; RE2011-00095; RF200800209; RF200800245; RF200800264; and RF200800550 is subject to section 261.201(a) of the Family Code and must be withheld under section 552.101 on that basis.[3] We find, however, you have failed to adequately demonstrate how the remaining information at issue was used or developed in an investigation under chapter 261 of the Family Code. We therefore conclude section 261.201 is not applicable to this information, and the department may not withhold any of the remaining information at issue under section 552.101 of the Government Code on this basis.

Section 552.101 of the Government Code also encompasses the common-law informer's privilege, which Texas courts have long recognized. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). 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). 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, individuals who provide information in the course of an investigation but do not make the initial report of the violation are not informants for the purposes of claiming the informer's privilege. The privilege excepts the informer's statement only to the extent necessary to protect that informer's identity. Open Records Decision No. 549 at 5 (1990). We note the

[3]As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

informer's privilege does not apply where the informant's identity is known to the individual who is the subject of the complaint. *See* Open Records Decision No. 208 at 1-2 (1978).

You state the information in RE200500321 includes the identity and identifying information of an individual who provided the department with information regarding a fugitive. Upon review, we find the information you have marked pertains to an individual who provided information during the course of the investigation but did not make the initial report of any criminal violation. Accordingly, we conclude you have failed to establish the informer's privilege is applicable to the information you have marked, and the department may not withhold any of the information in RE200500321 under section 552.101 on that basis.

You also claim the marked information in RE200500321 is excepted from required disclosure under section 552.101 in conjunction with the common-law physical safety exception. For many years, this office determined section 552.101 of the Government Code, in conjunction with the common-law right to privacy, protects information from disclosure when "special circumstances" exist in which the disclosure of information would place an individual in imminent danger of physical harm. *See, e.g.*, Open Records Decision Nos. 169 (1977) (special circumstances required to protect information must be more than mere desire for privacy or generalized fear of harassment or retribution), 123 (1976) (information protected by common-law right of privacy if disclosure presents tangible physical danger). However, the Texas Supreme Court recently held freedom from physical harm does not fall under the common-law right to privacy. *Tex. Dep't of Pub. Safety v. Cox Tex. Newspapers, L.P. & Hearst Newspapers, L.L.C.*, 343 S.W.3d 112 (Tex. 2011) (holding "freedom from physical harm is an independent interest protected under law, untethered to the right of privacy"). Instead, in *Cox*, the court recognized, for the first time, a separate common-law physical safety exception to required disclosure that exists independent of the common-law right to privacy. *Id.* at 118. 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 that "vague assertions of risk will not carry the day." *Id.* at 119.

You state the information at issue identifies or tends to identity a confidential police informant. You contend that "revealing the identity of an informant in a case involving a large and far-reaching criminal organization . . . would clearly put the informant in a substantial threat of physical harm from retaliation, not just from the individuals against whom the informant provided information, but also from the organization as a whole." Upon review, we find you demonstrated release of the some of the information at issue would create a substantial threat of physical harm to the individual at issue. Accordingly, the department must withhold identifying information we have marked under section 552.101 of the Government Code in conjunction with the common-law physical safety exception. We find, however, the remaining information does not identify the individual at issue, and this

information may not be withheld under section 552.101 in conjunction with the common-law physical safety exception.

Next, criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center is confidential under federal and state law, and is also encompassed by section 552.101 of the Government Code. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 at 7 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* 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 chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083. 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). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-.127. Similarly, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. The department must withhold the CHRI we have marked in RE200500321under section 552.101 in conjunction with chapter 411 and federal law.

Next, section 552.108 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 that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state some of the remaining reports pertain to open or suspended investigations. You explain that "many of the [Texas] Ranger reports that have been closed actually pertain to investigations that are ongoing but in which the report's authoring Ranger is no longer involved." You further reiterate that "these are ongoing criminal investigations and/or there are charges pending against one or more individuals based on the investigations at issue[.]" Based on these representations and our review, we conclude the department generally may withhold RB201000452; RB201000453; RC201000375; RC201000376; RE201000185; RE201000216; and RE201100006 under section 552.108(a)(1) of the Government Code. *See Houston Chronicle Publ'g Co. v. Department 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).

However, 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). Section 552.108(c) refers to the basic front-page information held to be public in *Houston Chronicle*. *See* 531 S.W.2d at 186-88; Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). With the exception of basic information, the department may withhold the information in RB201000452; RB201000453; RC2010-00375; RC201000376; RE201000185; RE201000216; and RE201100006 under section 552.108(a)(1) of the Government Code.

Next, section 552.130 of the Government Code provides that information relating to a motor vehicle operator's or driver's license or permit or a motor vehicle title or registration issued by an agency of this state or another state or country is excepted from public release. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 4 (to be codified as an amendment to Gov't Code § 552.130(a)(1),(2)). The department must withhold the information you have marked in C04A070112 and RE2005-00321, as well as the additional information we have marked in RE200800265; RE200800267; and RE201000005, under section 552.130.

You also seek to withhold portions of C04A070112 under section 552.136 of the Government Code, which states "[n]otwithstanding any other provision of this chapter, 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). We note section 552.136 is not applicable to information contained in a money order. Therefore, the department may not withhold the money order numbers you have marked in C04A070112 under section 552.136.

Finally, you raise section 552.147 of the Government Code, which provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. *Id.* § 552.147. The department may withhold the social security numbers in the remaining information under section 552.147.[4]

In summary, the department must continue to rely on Open Records Letter No. 2011-16036 as a previous determination and continue to withhold or release any previously ruled upon information in accordance with that ruling. In conjunction with section 552.101 of the Government Code, the department must withhold (1) the information you have marked under 23.20 of title 28 of the Code of Federal Regulations; (2) the reports we have listed above under section 261.201(a) of the Family Code; (3)the identifying information we have marked under the common-law physical safety exception, and (4) the information we have marked under chapter 411 and federal law. With the exception of basic information, the department may withhold RB201000452; RB201000453; RC201000375; RC201000376;

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[4]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).

RE201000185; RE201000216; and RE20000006 under section 552.108(a)(1) of the Government Code. The department must withhold the information marked under section 552.130 of the Government Code and may withhold social security numbers under section 552.147 of the Government Code. The department must release the remaining responsive information.

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.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,

Tamara H. Holland

Tamara H. Holland
Assistant Attorney General
Open Records Division

THH/ag

Ref: ID# 436976

Enc. Submitted documents

c: Requestor
(w/o enclosures)