



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 12, 2016

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

OR2016-03545

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# 598109.

The Office of the Inspector General of the Texas Department of Criminal Justice (the "department") received a request for all information pertaining to the requestor's case. The department claims the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.117, 552.1175, and 552.147 of the Government Code. We have considered the exceptions the department claims and reviewed the submitted information.

Section 552.108(a)(2) 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 . . . it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]" Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). The department states the submitted information pertains to a closed investigation that did not result in conviction or

deferred adjudication. However, the department also states this information relates to an “unresolved” criminal investigation that is “subject to subsequent action.” We note section 552.108(a)(2) is applicable only if the information at issue is related to a concluded criminal case that did not result in conviction or deferred adjudication. Thus, because of these contradictory representations, we find the department has failed to demonstrate the applicability of section 552.108(a)(2) of the Government Code to the information at issue. Therefore, the department may not withhold any of the submitted information on that basis.

Section 552.108(b)(1) of the Government Code excepts from disclosure “[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if . . . release of the internal record or notation would interfere with law enforcement or prosecution[.]” *Id.* § 552.108(b)(1); *see City of Fort Worth v. Cornyn*, 86 S.W.3d at 327 (Tex. App.—Austin 2002, no pet.) (Gov’t Code 552.108(b)(1) protects information that, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws). The statutory predecessor to section 552.108(b)(1) protected information that would reveal law enforcement techniques. *See, e.g.*, Open Records Decision Nos. 531 (1989) (detailed use of force guidelines), 456 (1987) (information regarding location of off-duty police officers), 413 (1984) (sketch showing security measures to be used at next execution). The statutory predecessor to section 552.108(b)(1) was not applicable to generally known policies and procedures. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (Penal Code provisions, common-law rules, and constitutional limitations on use of force not protected), 252 at 3 (1980) (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

The department states the submitted information “contains witness statements that describe staffing staff locations and unit security procedures.” The department further states such information should be withheld under section 552.108(b)(1) of the Government Code in accordance with Open Records Letter No. 2004-6370 (2004). In Open Records Letter No. 2004-6370, we ruled the department may generally withhold shift rosters for its prison units from public disclosure for security reasons under section 552.108(b)(1) of the Government Code. We note, however, the information the department seeks to withhold does not consist of shift rosters. Further, we find the department has failed to demonstrate release of any of the information at issue would interfere with law enforcement. Thus, no portion of the submitted information may be withheld under section 552.108(b)(1) 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.” Gov’t Code § 552.101. Section 552.101 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.¹ *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. We note the requestor has a right of access to her own date of birth information under section 552.023 of the Government Code and it may not be withheld from her under section 552.101 in conjunction with common-law privacy. *See* Gov't Code § 552.023(a) (governmental body may not deny access to person to whom information relates or person's agent on ground that information is considered confidential by privacy principles); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). Thus, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.²

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. Gov't Code § 552.1175. Section 552.1175 applies to current or former employees of the department. *Id.* § 552.1175(a)(3). Some of the remaining information pertains to individuals who are subject to section 552.1175. However, we note section 552.1175 protects personal privacy, and the requestor is one of the individuals whose information is at issue. Thus, the requestor has a right of access to her information pursuant to section 552.023 of the Government Code, and the department may not withhold the information pertaining to her under section 552.1175 of the Government Code. *See id.* § 552.023(a); ORD 481 at 4. Thus, to the extent the individuals whose information is at issue elect to restrict access to their information in accordance with section 552.1175(b), the department must withhold the information we have marked under section 552.1175 of the

¹Section 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).

²As our ruling is dispositive, we need not address the department's remaining arguments against disclosure of this information.

Government Code.³ If the individuals do not elect to restrict access to their information in accordance with section 552.1175(b), the department may not withhold this information under section 552.1175. Further, none of the remaining information is of the type made confidential by section 552.1175 of the Government Code and thus, none of it may be withheld on that basis.

Section 552.117(a)(3) of the Government Code excepts from public disclosure the home address and telephone number, social security number, emergency contact information, and family member information of current or former employees 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). However, we note section 552.117 protects personal privacy, and the requestor is one of the individuals whose information is at issue. Thus, the requestor has a right of access to her information pursuant to section 552.023 of the Government Code, and the department may not withhold the information pertaining to her under section 552.117 of the Government Code. *See id.* § 552.023(a); ORD 481 at 4. Accordingly, the department must withhold the information we have marked under section 552.117(a)(3) of the Government Code. However, none of the remaining information is of the type made confidential under section 552.117(a)(3) of the Government Code and, thus, none of it may be withheld on that basis.

In summary, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the individuals whose information is at issue elect to restrict access to their 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 552.117(a)(3) of the Government Code. The department must release the remaining information.⁴

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/>

³As our ruling is dispositive, we need not address the department's remaining arguments against disclosure of this information.

⁴We note the requestor has 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.

[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,



Rahat Huq
Assistant Attorney General
Open Records Division

RSH/som

Ref: ID# 598109

Enc. Submitted documents

c: Requestor
(w/o enclosures)