



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 26, 2016

Mr. John D. Husted
Counsel for Upshur County Sheriff's Office
Fanning, Harper, Martinson, Brandt & Kutchin, P.C.
4849 Greenville Avenue, Suite 1300
Dallas, Texas 75206

OR2016-16822

Dear Mr. Husted:

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# 619912 (File# 28286).

The Upshur County Sheriff's Office (the "sheriff's office"), which you represent, received two requests from the same requestor for information relating to disciplinary action taken against a named peace officer during a specified time period, as well as 9-1-1 audio recordings for a specified traffic stop. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.111, 552.117, 552.1175, 552.119, 552.130, and 552.152 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, you contend some of the submitted information is not responsive to the present requests for information. You state a portion of the submitted information, consisting of a video recording, is not strictly "documents" or "reports" responsive to the requests at issue. We note a governmental body must make a good faith effort to relate a request to information

¹Although you have marked portions of the submitted information under section 552.024 of the Government Code, we understand you to claim section 552.117 of the Government Code, as this is the proper exception for the information you have marked.

held by the governmental body. *See* Open Records Decision No. 561 at 8 (1990). Upon review, we find the information at issue is responsive to the present requests. Accordingly, we will consider your arguments for all of the submitted information.

Next, we note a portion of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; [and]

Gov't Code § 552.022(a)(1). The information at issue includes a completed investigation that is subject to section 552.022(a)(1) and must be released unless it is excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. *See id.* You raise section 552.111 of the Government Code. However, this section is a discretionary exception and does not make information confidential under the Act. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111 deliberative process). Therefore, the information at issue may not be withheld under section 552.111 of the Government Code. However, because information subject to section 552.022(a)(1) may be withheld under section 552.108, we will address your arguments under that exception. Further, sections 552.101, 552.102, 552.117, 552.1175, 552.119, 552.130, and 552.152 of the Government Code make information confidential under the Act. Therefore, we will consider the applicability of these sections for the information subject to section 552.022(a)(1). Additionally, we will address your arguments for the information not subject to section 552.022(a)(1) of the Government Code.

Section 552.152 of the Government Code provides:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from the requirements of Section 552.021 if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

Gov't Code § 552.152. You state the submitted information relates to the named employee as well as other employees of the sheriff's office. You state release of this information would jeopardize the safety of the employees at issue and endanger their lives and physical

safety. Based on your representations and our review of the submitted information, we find you have demonstrated the release of portions of the information at issue would subject the employees at issue to a substantial threat of harm. Thus, the sheriff's office must withhold the information we marked and indicated under section 552.152 of the Government Code.² However, we find you have not demonstrated the release of the remaining information would subject the employees at issue to a substantial threat of physical harm. Thus, the sheriff's office may not withhold any of the remaining information under section 552.152 of the Government Code.

Section 552.108(b)(1) of the Government Code excepts from disclosure the internal records and notations of law enforcement agencies and prosecutors when their release would interfere with law enforcement and crime prevention. Gov't Code § 552.108(b)(1); *see also* Open Records Decision No. 531 at 2 (1989) (quoting *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977)). A governmental body claiming section 552.108(b)(1) must explain how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706. Section 552.108(b)(1) is intended to protect "information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State." *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 at 327 (Tex. App.—Austin 2002, no pet.). This office has concluded section 552.108(b)(1) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (section 552.108 of the Government Code is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). Section 552.108(b)(1) is not applicable, however, to generally known policies and procedures. *See, e.g.*, ORD Nos. 531 at 2-3 (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known). You assert release of the remaining information would interfere with law enforcement. However, we find you have not demonstrated the release of the remaining information would interfere with law enforcement or crime prevention and, thus, the sheriff's office may not withhold any of the remaining information under section 552.108(b)(1).

Section 552.108(b)(2) of the Government Code excepts from disclosure the internal records and notations of law enforcement agencies and prosecutors if "the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.] *See* Gov't Code § 552.108(b)(2). A governmental body claiming

²As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

section 552.108(b)(2) must demonstrate the requested information relates to a concluded criminal investigation did not result in a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A). You state the submitted information relates to a closed criminal investigation that did not result in conviction or deferred adjudication. Upon review, we find the information at issue is part of an internal investigation conducted by the sheriff's office that was purely administrative in nature. Therefore, we find the sheriff's office has failed to demonstrate the applicability of section 552.108(b)(2) to the information at issue. Accordingly, the sheriff's office may not withhold the submitted information under section 552.108(b)(2) of the Government Code.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses the informer's privilege, which has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). 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) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 2374, at 767 (J. McNaughton rev. ed. 1961)). 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).

You argue portions of the remaining information are protected by the informer's privilege. However, the information at issue concerns a report that was made to the Big Sandy Police Department (the "department"). As the informer's privilege does not make information confidential by law but rather is a discretionary exception that exists to protect the interests of the governmental body that received the report of an alleged violation, the sheriff's office is not the appropriate entity to raise the informer's privilege with regard to the information at issue. Thus, we find you have failed to demonstrate any portion of the remaining information consists of the identifying information of an individual who made the initial report of a civil or criminal violation to the sheriff's office for purposes of the informer's privilege. Accordingly, the sheriff's office may not withhold any portion of the submitted information under section 552.101 of the Government Code in conjunction with the common-law informer's privilege.

Section 552.102(a) of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of

personal privacy[.]”³ *Id.* § 552.102(a). The Texas Supreme Court 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). Accordingly, the sheriff’s office must withhold the named employee’s date of birth, which we marked, under section 552.102(a) of the Government Code.

Section 552.101 of the Government Code also 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). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, 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.⁴ *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 sheriff’s office must withhold the date of birth we marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.111 of the Government Code excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” Gov’t Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, orig. proceeding); Open Records Decision No. 538 at 1-2 (1990).

³The Office of the Attorney General 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).

⁴Section 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).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, orig. proceeding). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. ORD 615 at 5; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995). However, a governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. ORD 615 at 5-6; *see also Dallas Morning News*, 22 S.W.3d at 364 (section 552.111 not applicable to personnel-related communications that did not involve policymaking).

You argue the remaining information should be withheld under section 552.111 of the Government Code. However, as noted above, the information at issue pertains to personnel matters concerning the named employee. Upon review, we find the sheriff's office has not demonstrated this information involves policymaking pertaining to personnel matters of a broad scope. Accordingly, the sheriff's office may not withhold any portion of the remaining information under the deliberative process privilege of section 552.111 of the Government Code.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home address, home telephone number, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code. *See* Gov't Code § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Accordingly, the sheriff's office must withhold the remaining information we marked under section 552.117(a)(2) of the Government Code.⁵

Section 552.119 of the Government Code provides as follows:

- (a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under Section 51.212, Education Code, the release of which would endanger the life or physical safety of the officer, is excepted from [required public disclosure] unless:

⁵As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

(1) the officer is under indictment or charged with an offense by information;

(2) the officer is a party in a fire or police civil service hearing or a case in arbitration; or

(3) the photograph is introduced as evidence in a judicial proceeding.

(b) A photograph exempt from disclosure under Subsection (a) may be made public only if the peace officer or security officer gives written consent to the disclosure.

Gov't Code § 552.119. Under section 552.119 of the Government Code, a governmental body must demonstrate, if the documents do not demonstrate on their face, release of the photograph would endanger the life or physical safety of a peace officer. Although you argue the remaining information is excepted under section 552.119, upon review, we find none of the remaining information includes a photograph. Accordingly, you have failed to demonstrate the remaining information is subject to section 552.119 and none of it may be withheld on that basis.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release. *See* Gov't Code § 552.130. Accordingly, the sheriff's office must withhold the motor vehicle record information we marked and indicated under section 552.130 of the Government Code.

In summary, the sheriff's office must withhold the information we marked under section 552.101 in conjunction with common-law privacy. The sheriff's office must also withhold the information we marked under sections 552.102(a), 552.117(a)(2), 552.130, and 552.152 of the Government Code. The sheriff's office must release the remaining 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.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,

A handwritten signature in black ink that reads "Ramsey Abarca". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Ramsey A. Abarca
Assistant Attorney General
Open Records Division

RAA/dls

Ref: ID# 619912

Enc. Submitted documents

c: Requestor
(w/o enclosures)