



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

November 8, 2016

Sheriff Danny C. Dominguez  
Presidio County Sheriff's Office  
P.O. Drawer V  
Marfa, Texas 79843

OR2016-21790A

Dear Sheriff Dominguez:

This office issued Open Records Letter No. 2016-21790 (2016) on September 27, 2016. Since that time, we have received new information that affects the facts on which this ruling was based. Consequently, this decision serves as the corrected ruling and is a substitute for the decision issued on September 27, 2016. *See generally* Gov't Code § 552.011 (providing that Office of the Attorney General may issue a decision to maintain uniformity in application, operation, and interpretation of the Public Information Act (the "Act")). This ruling was assigned ID# 638580.

The Presidio County Sheriff's Office (the "sheriff's office") received a request for all information pertaining to named individuals, including specified incidents occurring on a specified property. You state the sheriff's office does not have information responsive to portions of the request.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.117, 552.130, and 552.147 of the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note portions of the submitted information, which we have marked, are non-responsive to the present request because they were created after the date of the sheriff's office's receipt of the request. This ruling does not address the public availability of non-

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<sup>1</sup>The 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).

<sup>2</sup>Although you raise section 552.305 of the Government Code, we note this is not an exception to public disclosure under the Act. *See* Gov't Code §§ 552.301, .305.

responsive information, and the sheriff's office is not required to release such information in response to this request.<sup>3</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." *Id.* § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is 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. A compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Furthermore, we find that a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. In this instance, the request seeks, in part, unspecified law enforcement records involving the named individuals. Thus, this portion of the request requires the sheriff's office to compile the named individuals' criminal history and implicates the privacy interests of the named individuals. Therefore, to the extent the sheriff's office maintains law enforcement records depicting any of the named individuals as a suspect, arrestee, or criminal defendant, the sheriff's office must withhold such information under section 552.101 in conjunction with common-law privacy.<sup>4</sup> We note the sheriff's office has submitted information that pertains to the specified incidents. This information does not constitute a criminal history compilation protected by common-law privacy and may not be withheld on that basis under section 552.101.

Section 552.101 of the Government Code also encompasses laws that make criminal history record information ("CHRI") confidential. CHRI generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center is confidential under federal and state law. CHRI means "information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions." Gov't Code § 411.082(2). Part 20 of title 28 of the Code of Federal Regulations governs the release of CHRI obtained from the NCIC network or other states. *See* 28 C.F.R. § 20.21. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. Open Records Decision No. 565 at 7 (1990). Section 411.083 of the Government

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<sup>3</sup>As we are able to make this determination, we need not address your arguments against disclosure of this information.

<sup>4</sup>As we are able to make this determination, we need not address the sheriff's office's arguments against disclosure.

Code makes CHRI the Texas Department of Public Safety (“DPS”) maintains confidential, except DPS may disseminate this information as provided in chapter 411, subchapter F or subchapter E-1 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 only release CHRI to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Thus, CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with chapter 411, subchapter F or subchapter E-1 of the Government Code. We note section 411.083 does not apply to active warrant information or other information relating to an individual’s current involvement in the criminal justice system. *Id.* § 411.081(b) (police department allowed to disclose information pertaining to person’s current involvement with criminal justice system). Further, CHRI does not include driving record information. *Id.* § 411.082(2)(B). Upon review, we find the information we have marked constitutes confidential CHRI. Therefore, the sheriff’s office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with chapter 411.083 of the Government Code and federal law. However, we find none of the remaining responsive information the sheriff’s office has marked consists of confidential CHRI under chapter 411, and thus, the sheriff’s office may not withhold any of it under section 552.101 of the Government Code on that basis.

As noted above, section 552.101 encompasses common-law privacy, which is subject to the two-part test discussed above. See *Indus. Found.*, 540 S.W.2d at 685. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. See Open Records Decision No. 455 (1987). 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>5</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. We note the requestor has a right of access to his date of birth pursuant to section 552.023 of the Government Code. 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, with the exception of the requestor’s date of birth, the sheriff’s office must withhold

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<sup>5</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).

all public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy. Further, upon review, we conclude the information we have marked meets the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the sheriff's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find the remaining responsive information is either not highly intimate or embarrassing or is of legitimate public interest. Accordingly, the sheriff's office may not withhold any of the remaining responsive information under section 552.101 of the Government Code on the basis of common-law privacy.

Section 552.101 of the Government Code also encompasses constitutional privacy, which protects two kinds of interests. See *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first is the interest in independence in making certain important decisions relating to the "zones of privacy" pertaining to marriage, procreation, contraception, family relationships, and child rearing and education the United States Supreme Court has recognized. See *Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981); ORD 455 at 3-7. The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. See *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual's privacy interest against the public's interest in the information. See ORD 455 at 7. Constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 5 (internal quotations omitted) (quoting *Ramie*, 765 F.2d at 492).

We note the submitted video recording depicts the unclothed or partially unclothed body of an individual. You state the sheriff's office does not have the technological capability to redact information subject to the doctrine of constitutional privacy that is contained within a portion of the submitted video recording. Therefore, we conclude the sheriff's office must withhold the submitted video recording in its entirety under section 552.101 of the Government Code in conjunction with constitutional privacy.<sup>6</sup>

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 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. See Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Therefore, to the extent the cellular telephone service was not paid for by a governmental body, the sheriff's office must withhold the cellular telephone number we have marked under section 552.117(a)(2) of the

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<sup>6</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

Government Code. However, if the cellular telephone service was paid for by a governmental body, then the sheriff's office may not withhold the cellular telephone number we have marked under section 552.117(a)(2) of the Government Code. Further, we find you have failed to establish section 552.117 is applicable to any of the remaining responsive information. Thus, the sheriff's office may not withhold any of the remaining responsive information under section 552.117.

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(a)*. The sheriff's office must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code. However, none of the remaining responsive information is of the type protected by section 552.130. Therefore, the sheriff's office may not withhold the remaining responsive information under section 552.130 of the Government Code.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c).<sup>7</sup> *See id.* § 552.137(a)-(c). We note the requestor has a right of access to his own e-mail address pursuant to section 552.137(b) of the Government Code. *See id.* § 552.137(b). Therefore, the sheriff's office may not withhold the requestor's e-mail address under section 552.137. However, the remaining e-mail addresses at issue are not of a type excluded by subsection (c). Therefore, the sheriff's office must withhold the remaining e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to public disclosure.

In summary, to the extent the sheriff's office maintains unspecified law enforcement records depicting any of the named individuals as a suspect, arrestee, or criminal defendant, the sheriff's office must withhold such information under section 552.101 in conjunction with common-law privacy. The sheriff's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with chapter 411.083 of the Government Code and federal law. The sheriff's office must withhold all public citizens' dates of birth, with the exception of the requestor's date of birth, and the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The sheriff's office must withhold the submitted video recording in its entirety under section 552.101 of the Government Code in conjunction with constitutional privacy. To the extent the cellular telephone service was not paid for by a governmental body, the sheriff's office must withhold the cellular telephone number we have marked under section 552.117(a)(2) of the Government Code. The sheriff's office must withhold the motor

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<sup>7</sup>The 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)*.

vehicle record information we have marked under section 552.130 of the Government Code. The sheriff's office must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to public disclosure. The remaining responsive information must be released.<sup>8</sup>

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](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# 638580

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>8</sup>We 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. Accordingly, if the sheriff's office receives another request for this information from a different requestor, then the sheriff's office should again seek a ruling from this office.