



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

October 31, 2016

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OR2016-24163

Dear Ms. Mance:

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# 632288 (ORR #COT16-019).

The Tomball Police Department (the "department"), which you represent, received a request for specified department policies, information pertaining to a complaint involving the requestor, and information pertaining to a named police officer. You state you have released some information. We understand the department is withholding certain information under section 552.117(a)(2) of the Government Code pursuant to Open Records Decision No. 670 (2001), motor vehicle record information pursuant to section 552.130(c) of the Government Code, account numbers pursuant to section 552.136 of the Government Code, and social security numbers pursuant to section 552.147(b) of the Government Code.<sup>1</sup> You claim the

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<sup>1</sup>Open Records Decision No. 670 authorizes all government bodies to withhold a peace officer's home address and telephone number, personal cell phone and pager numbers, social security number, and family member information under section 552.117(a)(2) without requesting a decision from this office. *See* ORD 670. Section 552.130(c) of the Government Code allows a governmental body to redact the information described in section 552.130(a) without the necessity of seeking a decision from the attorney general. Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). Section 552.136 of the Government Code permits a governmental body to withhold the information described in section 552.136(b) without the necessity of seeking a decision from this office. *See id.* § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e). 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. *See id.* § 552.147(b).

submitted information is excepted from disclosure under sections 552.101, 552.102, 552.108, and 552.1175 of the Government Code. Additionally, you provide documentation showing you have notified the named officer of his right to submit comments to this office explaining why the submitted information should not be released.<sup>2</sup> See Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the exceptions you claim and reviewed the submitted information.

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 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 Chapter 552, Government Code, 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:

(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 the submitted information was used or developed in an investigation of alleged or suspected child abuse or neglect. See *id.* §§ 101.003(a) (defining “child” for purposes of chapter 261 of the Family Code), 261.001(1), (4) (defining “abuse” and “neglect” for purposes of chapter 261 of the Family Code). However, upon review, we find none of the information at issue consists of a report of alleged or suspected abuse or neglect of a child made under chapter 261, or information used or developed in an investigation of alleged or suspected child abuse or neglect under chapter 261. See *id.* § 261.201(a). Therefore, the department may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.

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

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<sup>2</sup>As of the date of this letter, this office has not received comments from any third party explaining why any of the submitted information should not be released.

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). 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[.]” *Id.* § 552.108(b)(2). Sections 552.108(a)(2) and 552.108(b)(2) are applicable only if the information at issue relates to a concluded criminal case that did not result in a conviction or deferred adjudication. However, section 552.108 is generally not applicable to records of an internal affairs investigation that is purely administrative in nature and does not involve the criminal investigation or prosecution of alleged misconduct. *See, e.g., Morales v. Ellen*, 840 S.W.2d 519, 526 (Tex. App.—El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution); Open Records Decision No. 350 at 3-4 (1982).

You state the information you have marked under sections 552.108(a)(2) and 552.108(b)(2) pertains to cases that concluded in results other than conviction or deferred adjudication. However, the information at issue consists of administrative records and internal affairs investigations of department officers that are purely administrative in nature. As a result, we find the department has failed to demonstrate the applicability of sections 552.108(a)(2) and 552.108(b)(2) to the remaining information at issue. Accordingly, the department may not withhold any of the information at issue under section 552.108(a)(2) or section 552.108(b)(2) of the Government Code.

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[.]” Gov’t Code § 552.108(b)(1); *see City of Fort Worth*, 86 S.W.3d at 327 (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).

You argue some of the remaining information is subject to section 552.108(b)(1) of the Government Code. You seek to withhold serial numbers of firearms pursuant to

section 552.108(b)(1). You state release of this information would interfere with law enforcement by divulging firearm serial numbers that could be used on illegal firearms or falsely used in missing weapons reports. Upon review, we find you have demonstrated release of the information at issue would interfere with law enforcement. Therefore, the department may withhold the firearm serial numbers you have marked under section 552.108(b)(1) of the Government Code. You further state some of the information at issue consists of assigned duty hours and locations of off-duty officers and reveals the occasions on which certain businesses take extra security measures. You argue release of the information at issue would interfere with law enforcement and may jeopardize officer safety. Upon review, we find the department may withhold the information you have marked under section 552.108(b)(1) of the Government Code. *See, e.g.,* ORD 456 (holding that forms indicating location of uniformed, off-duty police officers are excepted from disclosure under statutory predecessor to section 552.108 due to officer safety concerns).

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.” Gov’t Code § 552.102(a). We understand you to assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 of the Government Code. Section 552.101 of the Government Code encompasses common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court of appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court has expressly disagreed with *Hubert’s* interpretation of section 552.102(a) and held the privacy standard under section 552.102(a) differs from the *Industrial Foundation* test under section 552.101. *See Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The supreme court also considered the applicability of section 552.102(a) and held it excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *See id.* at 348. Accordingly, the department must withhold the date of birth you have marked under section 552.102(a) of the Government Code.<sup>3</sup> However, we find no portion of the remaining information is subject to section 552.102(a) of the Government Code. Accordingly, the department may not withhold any of the remaining information on that basis.

Section 552.101 of the Government Code also encompasses the doctrine of 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. This office has found personal

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

financial information not relating to a financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See, e.g.* Open Records Decision Nos. 545 (1990) (common-law privacy protects mortgage payments, assets, bills, and credit history), 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373(1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). This office has also found common-law privacy generally protects the identities of juvenile victims of abuse or neglect. *Cf.* Fam. Code §261.201. We note, however, the public generally has a legitimate interest in information that relates to public employment and public employees. *See* Open Records Decision Nos. 542 (1990); 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees); 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation or public employees); 432 at 2 (1984) (scope of public employee privacy is narrow).

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. *See Indus. Found.*, 540 S.W.2d at 681-82. 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. *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. Upon review, we find some of the remaining information, which we have marked, satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the department must withhold the information we have marked and all public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find no portion of the remaining information is highly intimate and embarrassing and not of legitimate public interest. Therefore, no portion of the remaining information is confidential under common-law privacy, and the department may not withhold any of the remaining information under section 552.101 on that ground.

As noted above, you state you have redacted some information subject to section 552.117(a)(2) of the Government Code in accordance with Open Records Decision No. 670. We note the remaining information contains additional information subject to section 552.117(a)(2). 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. Therefore, the department must withhold the information you have marked and the additional information we have marked under section 552.117(a)(2) of the Government Code.

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. *See id.* § 552.1175. Section 552.1175 applies, in part, to “peace officers as defined by Article 2.12, Code of Criminal Procedure[.]” *Id.* § 552.1175(a)(1). Upon review, we find none of the remaining information is subject to section 552.1175, and the department may not withhold it on that basis.

You indicate you will redact the e-mail addresses you marked under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).<sup>4</sup> 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). *See id.* § 552.137(a)-(c). Section 552.137 does not apply to an institutional e-mail address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address of a vendor who seeks to contract with a governmental body, an e-mail address maintained by a governmental entity for one of its officials or employees, or an e-mail address provided to a governmental body on a letterhead. *See id.* § 552.137(c). We note the remaining information contains additional e-mail addresses, which we have marked, subject to section 552.137. Accordingly, we find the department must withhold the personal e-mail addresses you marked, and the additional e-mail addresses we have marked, under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

Lastly, you assert some of the remaining information may be excepted from disclosure under section 552.101 of the Government Code in conjunction with federal copyright law. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

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<sup>4</sup>Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. *See* ORD 684.

In summary, the department may withhold the information you have marked under section 552.108(b)(1) of the Government Code. The department must withhold the date of birth you have marked under section 552.102(a) of the Government Code. The department must withhold the information we have marked and all public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy. The department must withhold the information you have marked and the additional information we have marked under section 552.117(a)(2) of the Government Code. The department must withhold the personal e-mail addresses you marked, and the additional e-mail addresses we have marked, under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. The department must release the remaining information, but may only release any copyrighted information in accordance with copyright law.

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,



Paige Lay  
Assistant Attorney General  
Open Records Division

PL/som

Ref: ID# 632288

Enc. Submitted documents

c: Requestor  
(w/o enclosures)