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ATTORNEY GENERAL OF TEXAS

November 14, 2016

Mr. Paul Fletcher
Counsel for the City of Eagle Pass
Langley & Banack, Inc.
745 East Mulberry, Suite 900
San Antonio, Texas 78212-3166

OR2016-25311

Dear Mr. Fletcher:

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# 634137 (CoEP RR Nos. 2016-139, 2016-140, 2016-144, and 2016-148).

The City of Eagle Pass (the "city"), which you represent, received four requests from four different requestors for information pertaining to a specified incident. You inform us the city has released some information to the requestors. You state the city does not have information responsive to portions of the requests.¹ You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.130, 552.136, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

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 made confidential by other

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

²We assume 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 those records contain substantially different types of information than that submitted to this office.

statutes, such as chapter 772 of the Health and Safety Code, which authorizes the development of local emergency communication districts. Section 772.318 of the Health and Safety Code applies to an emergency communication district for a county with a population of more than 20,000 and makes confidential the originating telephone numbers and addresses of 9-1-1 callers that are furnished by a 9-1-1 service supplier. *See* Open Records Decision No. 649 (1996). We note this section is not applicable to information furnished by a 9-1-1 caller. *Id.* at 2; *see* ORD 649 at 3 (language of confidentiality provision controls scope of its protection). You assert the submitted information contains the originating addresses and telephone numbers of 9-1-1 callers that are confidential under section 772.318. However, the information at issue was provided by the 9-1-1 callers themselves, and not by a service provider. Accordingly, you have not established any of the submitted information is confidential under chapter 772 of the Health and Safety Code, and the city may not withhold any of it under section 552.101 of the Government Code on that ground.

Section 552.101 of the Government Code also encompasses information protected by section 773.091 of the Health and Safety Code, which provides in part:

(a) A communication between certified emergency medical services [(“EMS”)] personnel or a physician providing medical supervision and a patient that is made in the course of providing [EMS] to the patient is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) Records of the identity, evaluation, or treatment of a patient by [EMS] personnel or by a physician providing medical supervision that are created by the [EMS] personnel or physician or maintained by an [EMS] provider are confidential and privileged and may not be disclosed except as provided by this chapter.

...

(g) The privilege of confidentiality under this section does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services.

Health & Safety Code § 773.091(a)-(b), (g). The submitted information contains records made and maintained by EMS personnel. Upon review, we find section 773.091 is applicable to the information we have marked. Thus, with the exception of the information subject to section 773.091(g), which is not confidential, the city must generally withhold the

marked EMS records under section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code.³

Section 552.101 of the Government Code also 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.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. Nevertheless, because "the right of privacy is purely personal[.]" that right "terminates upon the death of the person whose privacy is invaded[.]" *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); see also *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 147 (N.D. Tex. 1979) ("action for invasion of privacy can be maintained only by a living individual whose privacy is invaded" (quoting Restatement (Second) of Torts § 6521 (1977))); Attorney General Opinions JM-229 (1984) ("the right of privacy lapses upon death"), H-917 (1976) ("We are . . . of the opinion that the Texas courts would follow the almost uniform rule of other jurisdictions that the right of privacy lapses upon death."); Open Records Decision No. 272 (1981) ("the right of privacy is personal and lapses upon death"). Accordingly, the city must generally withhold all living public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy. However, we conclude the remaining information, including the date of birth of a deceased individual in the documents at issue, is not confidential under common-law privacy, and the city may not withhold it under section 552.101 on that ground.

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. Upon review, we find a portion of the information you marked does not constitute motor vehicle record information. Therefore, the city may not withhold this information under section 552.130 of the

³As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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).

Government Code. Accordingly, with the exception of the information we have marked for release, the city must generally withhold the motor vehicle record information you marked and indicated under section 552.130 of the Government Code.

Section 552.136 of the Government Code provides, “[n]otwithstanding any other provision of [the Act], 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.” *Id.* § 552.136(b). Section 552.136(a) defines “access device” as “a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to . . . obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument.” *Id.* § 552.136(a). Accordingly, the city must generally withhold the account number we have marked under section 552.136 of the Government Code. However, we find you have not demonstrated the remaining information you indicated consists of access device numbers for purposes of section 552.136. Accordingly, the city may not withhold the remaining information you indicated under section 552.136 of the Government Code.

Section 552.147(a) of the Government Code excepts the social security number of a living individual from public disclosure. Gov’t Code § 552.147(a). Accordingly, the city may generally withhold the social security number you marked under section 552.147 of the Government Code.

However, the fourth requestor is an investigator with the United States Department of Transportation (“DOT”) Office of Hazardous Materials Safety. Accordingly, we will consider whether federal law permits this requestor to obtain information that is otherwise protected by the exceptions discussed above.

Section 30166(b)(1)(B) of title 49 of the United States Code provides:

(b) Authority to inspect and investigate.—

(1) The Secretary of Transportation may conduct an inspection or investigation—

...

(B) related to a motor vehicle accident and designed to carry out [chapter 301 of title 49 of the United States Code].

49 U.S.C. § 30166(b)(1)(B).⁵ Motor vehicle accident is defined as “an occurrence associated with the maintenance or operation of a motor vehicle or motor vehicle equipment resulting in personal injury, death, or property damage.” *Id.* § 30166(a). The incident at issue concerns a motor vehicle accident as defined in this chapter. Therefore, DOT has the authority to conduct an investigation concerning the motor vehicle accident at issue pursuant to section 30166(b)(1)(B) of title 49.

Further, section 30166(c) of title 49 states in part:

(c) Matters that can be inspected and impoundment.— In carrying out this chapter, an officer or employee designated by the Secretary of Transportation—

(1) at reasonable times, may inspect and copy any record related to this chapter[.]

Id. § 30166(c)(1). The requestor at issue seeks the requested information for the purpose of “determining the effects of [DOT’s] regulations on the emergency response community.” Therefore, we conclude this requestor has the right to inspect and copy records related to motor vehicle accidents pursuant to an investigation under chapter 301 of title 49 of the United States Code. As discussed above, the report at issue concerns a motor vehicle accident as defined by section 30166(a) of title 49 of the United States Code. Therefore, under federal law, the requestor has the right to inspect and copy the information at issue.

Thus, there is a conflict between this requestor’s right of access under section 30166(a) of title 49 of the United States Code and the confidentiality requirements in section 773.091 of the Health and Safety Code and the common-law right to privacy under Texas law. As federal law, section 30166 of title 49 preempts any conflicting state laws, including section 773.091 of the Health and Safety Code and common-law privacy, as well as sections 552.130, 552.136, and 552.147 of the Government Code. *See English v. General Elec. Co.*, 496 U.S. 72, 79 (1990) (noting that state law is preempted to extent it actually conflicts with federal law); *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 369 (1986) (noting that federal agency acting within scope of its congressionally delegated authority may preempt state regulation); *see also* U.S. Const. art. VI, cl. 2 (Supremacy Clause); *Delta Airlines, Inc. v. Black*, 116 S.W.3d 745, 748 (Tex. 2003) (discussing federal preemption of state law). Thus, although portions of the information at issue are confidential or excepted from disclosure under the provisions you claim, this requestor’s right of access under federal law preempts these state laws. Therefore, the city must allow the fourth requestor to inspect and copy the entirety of the submitted information pursuant to section 30166(c)(1) of title 49 of the United States Code.

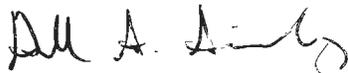
⁵We note the purpose of Chapter 301 of the United States Code is “to reduce traffic accidents and deaths and injuries resulting from traffic accidents” and (1) to prescribe motor vehicle safety standards for motor vehicles and motor vehicle equipment in interstate commerce; and (2) to carry out needed safety research and development. 49 U.S.C. § 30101.

In summary, the city must allow the fourth requestor to inspect and copy the entirety of the submitted information pursuant to section 30166(c)(1) of title 49 of the United States Code. Regarding the remaining requestors, (1) with the exception of the information subject to section 773.091(g), the city must withhold the marked EMS records under section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code; (2) the city must withhold all living public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy; (3) with the exception of the information we have marked for release, the city must withhold the motor vehicle record information you marked and indicated under section 552.130 of the Government Code; (4) the city must withhold the account number we have marked under section 552.136 of the Government Code; and (5) the city may withhold the social security number you marked under section 552.147 of the Government Code. The city 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,



Gerald A. Arismendez
Assistant Attorney General
Open Records Division

GAA/som

Ref: ID# 634137

Enc. Submitted documents

c: 4 Requestors
(w/o enclosures)