



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

April 4, 2016

Mr. Andrew J. Decker  
Counsel for the City of Watauga  
Evans, Daniel, Moore, Evans & Biggs  
115 West Second Street, Suite 202  
Fort Worth, Texas 76102

OR2016-07516

Dear Mr. Decker:

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# 604089 (PIA Request No. 16-22).

The City of Watauga (the "city"), which you represent, received a request for all calls, records, reports, and recordings pertaining to incidents on specified dates concerning named individuals. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code.<sup>1</sup> We have considered the exception you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note the requestor seeks all communications and records from a specified date through the date the city complies with the request. It is implicit in several provisions of the Act that the Act applies only to information already in existence. *See id.* §§ 552.002, .021, .227, .351. We note the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ *dism'd*); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983). Consequently, a governmental body is not required to comply with

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<sup>1</sup>Although you do not cite section 552.101 of the Government Code in your brief to this office, we understand you to raise this section based on the substance of your arguments.

a standing request to supply information prepared in the future. *See* Attorney General Opinion JM-48 at 2 (1983); *see also* Open Records Decision Nos. 476 at 1 (1987), 465 at 1 (1987). Thus, the only information encompassed by the present request consists of information the city maintained or had a right of access to as of the date it received the request.

Next, we must address the requestor's assertion the city failed to comply with the procedural obligations of section 552.301 of the Government Code in requesting a decision from this office. Pursuant to section 552.301(b) of the Government Code, a governmental body must request a ruling from this office and state the exceptions that apply within ten business days after receiving the request for information. *See* Gov't Code § 552.301(b). We note this office only counts business days for the purposes of calculating a governmental body's deadlines under the Act and does not count the date the request was received. The city states it received the request for information on January 13, 2016. Thus, the city was required to request a decision from this office pursuant to section 552.301(b) by January 27, 2016. The envelope in which the city provided the information required by section 552.301(b) was postmarked January 25, 2016. *See id.* § 552.308(a)(1) (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Accordingly, we find the city complied with the procedural requirements of section 552.301(b) 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, 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. Generally, only highly intimate information that implicates the privacy of an individual is withheld. However, in certain instances, where it is demonstrated the requestor knows the identity of the individual involved as well as the nature of certain incidents, the entire report must be withheld to protect the individual's privacy. You seek to withhold the entirety of Exhibit B under section 552.101 in conjunction with common-law privacy. However, you have not demonstrated, nor does it otherwise appear, this is a situation in which the entirety of Exhibit B must be withheld on the basis of common-law privacy. Accordingly, the city may not withhold the entirety of the submitted information under section 552.101 of the Government Code in conjunction with common-law privacy. We note, however, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). This office has also found personal financial information not relating to a financial transaction between an individual and a governmental body is generally protected by common-law privacy. *See* Open Records Decision Nos. 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). Additionally, 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. *Indus. Found.*, 540 S.W.2d 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.<sup>2</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. Upon review, we find the types of information we marked, and noted, satisfy the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, the city must withhold the types of information we marked, and noted, under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find you have not demonstrated the remaining information is highly intimate or embarrassing and not of legitimate public concern. Thus, the remaining information may not be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses information protected by other statutes. You state portions of the remaining information are confidential under subchapter C of chapter 56 of the Code of Criminal Procedure. Pursuant to article 56.82(a), the attorney general must create an address confidentiality program to assist victims of certain crimes in maintaining a confidential address. *See* Crim. Proc. Code art. 56.82(a). Article 56.88(a) provides, in relevant part:

(a) Information relating to a participant:

(1) is confidential, except as provided by Article 56.90; and

(2) may not be disclosed under [the Act].

*Id.* art. 56.88(a); *see also id.* art. 56.81(5) (defining "participant" for subchapter C purposes). You state portions of the remaining information reveal the address of an individual who is a participant in the address confidentiality program. Based on your representation, we find portions of the remaining information are generally confidential under article 56.88. However, article 56.88 is intended to protect a participant's privacy. *See* Senate Research Center, Bill Analysis, S.B. 74, 80th Leg., R.S. (2007) (explaining address confidentiality

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<sup>2</sup>Section 552.102(a) exempts 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).

program protects identity of victims). In this instance, the requestor is the individual whose information is subject to article 56.88. Thus, pursuant to section 552.023 of the Government Code, the requestor has a right of access to the information at issue that ordinarily would be withheld to protect his privacy. 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). Therefore, the city may not withhold the information at issue under section 552.101 in conjunction with article 56.88 of the Code of Criminal Procedure.

We note some of the remaining information may be subject to section 552.1175 of the Government Code.<sup>3</sup> Section 552.1175 provides, in part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure[.]

(b) Information that relates to the home address, home telephone number, emergency contact information, date of birth, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(a)(1), (b). The remaining information includes information relating to a peace officer that is not held in an employment capacity. Accordingly, if the peace officer elects to restrict access to this information in accordance with section 552.1175(b), the city must withhold the information we noted under section 552.1175 of the Government Code. Conversely, if the peace officer does not elect under section 552.1175(b), the noted information may not be withheld under section 552.1175 of the Government Code.

Section 552.130 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

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<sup>3</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).

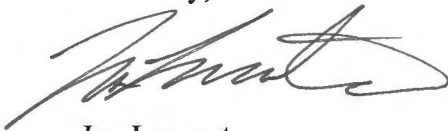
Code § 552.130. Upon review, we find portions of the remaining information contain motor vehicle record information. Accordingly, the city must withhold the motor vehicle record information we marked, and discernible license plate numbers on the submitted video recordings, under section 552.130 of the Government Code.

In summary, the city must withhold the types of information we marked, and noted, under section 552.101 of the Government Code in conjunction with common-law privacy. The city must withhold the information we noted under section 552.1175 of the Government Code, if the peace officer elects to restrict access to the information in accordance with section 552.1175(b) of the Government Code. The city must also withhold the information we marked, and noted, under section 552.130 of the Government Code. The remaining information must be released.

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,



Ian Lancaster  
Assistant Attorney General  
Open Records Division

IML/akg

Ref: ID# 604089

Enc. Submitted documents

c: Requestor  
(w/o enclosures)