



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 13, 2016

Ms. Josi Diaz
Assistant City Attorney
Criminal Law & Police Division
City of Dallas
1400 South Lamar
Dallas, Texas 75215

OR2016-27546

Dear Ms. Diaz:

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# 637526 (ORR 2016-11958).

The Dallas Police Department (the "department") received a request for applicant progression sheets for all department applicants during a specified period of time and personnel adverse impact reports for specified periods of time. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.117 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹We note the department failed to comply with its procedural obligations under the Act. *See* Gov't Code § 552.301(b), (e). However, because sections 552.101 and 552.117 of the Government Code can provide compelling reasons to withhold information, we will address the applicability of these exceptions to the information at issue. *Id.* § 552.302.

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

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 section 1703.306 of the Occupations Code, which provides the following:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member’s agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner’s activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

(b) The [Texas Department of Licensing and Regulation] or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Occ. Code § 1703.306. The submitted information contains polygraph information that is confidential under section 1703.306, and the requestor does not appear to have a right of access to the information under that section. Accordingly, the department must withhold this information, which we have marked, under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. However, we find none of the remaining information constitutes information acquired from a polygraph examination. Accordingly, the department may not withhold any of the remaining information under section 552.101 in conjunction with section 1703.306.

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.³ *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 department must withhold the public citizens' dates of birth in the submitted information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.117(a)(2) of the Government Code excepts from disclosure the home address, home telephone number, emergency contact information, social security number, and family member information of a peace officer, regardless of whether the peace officer complies with sections 552.024 or 552.1175 of the Government Code. 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. However, section 552.117(a)(2) generally does not apply to applicants for employment. *See* Open Records Decision No. 455 (1987) (statutory predecessor to section 552.117 does not except information pertaining to applicants who are not employees). In this instance, we are unable to determine whether the individuals whose information is at issue are currently or were formerly employed by the department as licensed peace officers as defined by article 2.12; therefore, we must rule conditionally. If the individuals at issue are currently employed by the department as licensed peace officers as defined by article 2.12, then the department must withhold the home addresses you have marked, and the additional information we have marked, under section 552.117(a)(2) of the Government Code. Additionally, if the individuals at issue were formerly employed by the department as licensed peace officers, and are currently licensed peace officers, the department must withhold the home addresses you have marked, and the additional information we have marked, under section 552.117(a)(2) of the Government Code. Conversely, if the individuals at issue are not currently or were never employed by the department as licensed peace officers as defined by article 2.12, the department may not withhold the information at issue under section 552.117(a)(2) of the Government Code. Regardless, the remaining information you have marked is not subject to section 552.117(a)(2) and it may not be withheld on that basis.

³Section 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).

If the individuals at issue were formerly employed by the department but are not currently licensed peace officers, then their personal information may be subject to section 552.117(a)(1) of the Government Code, which excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024. Gov't Code § 552.117(a)(1). Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See id.* § 552.117(a)(1). We note the protections of section 552.117 only apply to information that the governmental body holds in its capacity as an employer. *See* Gov't Code § 552.117(a)(1) (providing that employees of governmental entities may protect certain personal information in the hands of their employer); ORD 455 (statutory predecessor to section 552.117 does not except information pertaining to applicants who are not employees). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information or not later than the 14th day after the date on which the employee began employment with the city. *See* Gov't Code § 552.024(b). Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. Upon review, we conclude that, if the individuals at issue were formerly employed by the department but are not currently licensed peace officers, then to the extent the individuals at issue were employed by the department and timely requested confidentiality under section 552.024 of the Government Code, then the department must withhold the home addresses you have marked, and the additional information we have marked, under section 552.117(a)(1) of the Government Code. Conversely, to the extent the individuals were never employed by the department or if the individuals at issue did not timely request confidentiality under section 552.024, the department may not withhold this information under section 552.117(a)(1). Regardless, the remaining information you have marked is not subject to section 552.117(a)(1) and it may not be withheld on that basis.

If the individuals at issue were never employed by the department but are currently licensed peace officers, their information may be protected by section 552.1175 of the Government Code.⁴ Section 552.1175 protects the home address, home telephone number, emergency contact information, date of birth, social security number, and family member information

⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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. *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). Thus, if the individuals at issue were never employed by the department but are currently licensed peace officers, and if the individuals at issue elect to restrict access to their information in accordance with section 552.1175(b), then the department must withhold the home addresses you have marked, and the additional information we have marked, under section 552.1175 of the Government Code. If the individuals at issue are not licensed peace officers or do not elect to restrict access to the information in accordance with section 552.1175(b), this information may not be withheld under section 552.1175.

In summary, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. The department must withhold the public citizens’ dates of birth in the submitted information under section 552.101 of the Government Code in conjunction with common-law privacy. If the individuals at issue are currently employed by the department as licensed peace officers as defined by article 2.12, then the department must withhold the home addresses you have marked, and the additional information we have marked, under section 552.117(a)(2) of the Government Code. Additionally, if the individuals at issue were formerly employed by the department as licensed peace officers, and are currently licensed peace officers, the department must withhold the home addresses you have marked, and the additional information we have marked, under section 552.117(a)(2) of the Government Code. If the individuals at issue were formerly employed by the department but are not currently licensed peace officers, then, to the extent the individuals at issue were employed by the department and timely requested confidentiality under section 552.024 of the Government Code, the department must withhold the home addresses you have marked, and the additional information we have marked, under section 552.117(a)(1) of the Government Code. If the individuals at issue were never employed by the department but are currently licensed peace officers, and if the individuals at issue elect to restrict access to their information in accordance with section 552.1175(b), the department must withhold the home addresses you have marked, and the additional information we have marked, under section 552.1175 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, 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, appearing to read 'Kenny Moreland', with a stylized flourish at the end.

Kenny Moreland
Assistant Attorney General
Open Records Division

KJM/som

Ref: ID# 637526

Enc. Submitted documents

c: Requestor
(w/o enclosures)