



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 9, 2017

Ms. Molly Cost
Assistant General Counsel
Texas Department of Public Safety
P. O. Box 4087
Austin, Texas 78773-0001

OR2017-00573

Dear Ms. Cost:

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# 640816 (PIR # 16-6142).

The Texas Department of Public Safety (the "department") received a request for the entire investigative report for a named former department trooper.¹ You claim portions of the submitted information are excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, you state some of the requested information was the subject of a previous request for a ruling, as a result of which this office issued Open Records Letter No. 2013-04297 (2013). In that ruling, we determined the department must (1) withhold the information we noted under section 552.101 of the Government Code in conjunction with constitutional privacy; (2) withhold the information we noted under section 552.101 of the Government Code in conjunction with common-law privacy; (3) withhold the information we noted under section 552.1175 of the Government Code, to the extent the officers at issue elected to

¹The department states it sought and received clarification of the request. *See* Gov't Code § 552.222(b) (providing that if request for information is unclear, governmental body may ask requestor to clarify the request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

restrict access to their information in accordance with section 552.1175(b) of the Government Code; (4) withhold the motor vehicle record information we noted, as well as any discernible license plate numbers in the submitted dash cam video recordings, under section 552.130 of the Government Code; and (5) release the remaining information. We have no indication the law, facts or circumstances on which the prior ruling was based have changed. Thus, the department must continue to rely on Open Records Letter No. 2013-04297 as a previous determination and withhold or release the information at issue in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). We will address your arguments against disclosure for the submitted information which is not subject to the prior ruling.

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 of the Government Code encompasses constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual’s interest in avoiding disclosure of personal matters. *See* Open Records Decision No. 455 at 4 (1987). The first type protects an individual’s autonomy within “zones of privacy,” which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual’s privacy interests and the public’s need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the “most intimate aspects of human affairs.” *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

Portions of the submitted information depict the partially unclothed bodies of identifiable individuals. We find these individuals have a constitutional right to the privacy of this information that outweighs any public interest in its release. Therefore, the department must withhold the information at issue, which we have marked and indicated, under section 552.101 in conjunction with constitutional privacy.² However, we find the department has failed to demonstrate that any of the remaining information falls within the zones of privacy or implicates an individual’s privacy interests for purposes of constitutional privacy. Therefore, the department may not withhold any of the remaining information under section 552.101 on the basis of constitutional privacy.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the

²As our ruling is dispositive, we need not address the department’s remaining argument against disclosure for the information at issue.

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. This office has also concluded some kinds of medical information are generally highly intimate or embarrassing. *See* ORD 455. 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.

Upon review, we find some of the submitted information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the department must withhold the information we have marked and indicated and all public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find the department has failed to demonstrate any of the remaining information is highly intimate or embarrassing and of no legitimate public concern. Therefore, the department may not withhold any of the remaining information under section 552.101 of the Government Code on the basis of common-law privacy

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.⁴ *See* Gov't Code § 552.117(a)(2). Section 552.117 also encompasses a personal cellular telephone number, provided a governmental body does not pay for the cellular telephone service. *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). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Accordingly, to the extent the individuals

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).

⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

whose information is at issue are currently-licensed peace officers as defined by article 2.12, the department must withhold the information we have marked and indicated under section 552.117(a)(2) of the Government Code; however, the department may only withhold the cellular telephone number at issue under section 552.117(a)(2) if the cellular telephone service was not provided to the employee at issue at public expense. If the employees are not currently licensed peace officers as defined by article 2.12, then the department may not withhold this information under section 552.117(a)(2).

If the information we have marked under section 552.117 pertains to individuals who are no longer licensed peace officers, then the information at issue may be subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) 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 of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). 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 be withheld under section 552.117(a)(1) only 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. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request under section 552.024 the information be kept confidential. Therefore, to the extent the individuals at issue are no longer peace officers as defined by article 2.12, and to the extent these individuals timely requested confidentiality under section 552.024 of the Government Code, the department must withhold the information we have marked and indicated under section 552.117(a)(1) of the Government Code; however, the department may only withhold the cellular telephone number at issue under section 552.117(a)(1) if the cellular telephone service was not provided to the employee at issue at public expense.

We note some of the remaining information is subject to section 552.130 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 id.* § 552.130. Upon review, we find the remaining information contains motor vehicle record information. Accordingly, the department must withhold the motor vehicle record information we have marked, as well as any discernible license plate numbers in the submitted dash cam video recordings, under section 552.130 of the Government Code.

In summary, the department must withhold the information we marked and indicated under section 552.101 of the Government Code in conjunction with constitutional and common-law privacy. To the extent the individuals whose information is at issue are currently-licensed peace officers as defined by article 2.12, the department must withhold the information we have marked and indicated under section 552.117(a)(2) of the Government Code; however, the department may only withhold the cellular telephone number at issue

under section 552.117(a)(2) if the cellular telephone service was not provided to the employee at issue at public expense. To the extent the individuals at issue are no longer peace officers as defined by article 2.12, and to the extent these individuals timely requested confidentiality under section 552.024 of the Government Code, the department must withhold the information we have marked and indicated under section 552.117(a)(1) of the Government Code; however, the department may only withhold the cellular telephone number at issue under section 552.117(a)(1) if the cellular telephone service was not provided to the employee at issue at public expense. The department must withhold the motor vehicle record information we have marked, as well as any discernible license plate numbers in the submitted dash cam video recordings, under section 552.130 of the Government Code. The department 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,



Kaelan A. Henze
Assistant Attorney General
Open Records Division

KAH/eb

Ref: ID# 640816

Enc. Submitted documents

c: Requestor
(w/o enclosures)