



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 30, 2017

Ms. Rachael M. Maresh
Inside Counsel / Senior Director of Risk & Compliance
Concordia University Texas
11400 Concordia University Drive
Austin, Texas 78726

OR2017-02041

Dear Ms. Maresh:

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# 643521.

The Concordia University Texas Police Department (the "department") received a request for all police reports documenting rape, fondling, incest, statutory rape and/or any other crime of a sexual nature for a specified time period and information pertaining to the disposition of criminal cases associated with the police reports. You claim some of the submitted information is not subject to the Act. You also claim the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.114, 552.130, and 552.137 of the Government Code. Additionally, you provide documentation showing you have notified a third party of her right to submit comments to this office as to why some of the submitted information should not be released.¹ See Gov't Code § 552.304 (interested third party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted information.

Initially, we address your claim some of the submitted information is not subject to the Act. Section 51.212(f) of the Education Code provides:

¹As of the date of this letter, this office has not received comments from the third party explaining why any of the submitted information should not be released.

(f) A campus police department of a private institution of higher education is a law enforcement agency and a governmental body for purposes of [the Act], only with respect to information relating solely to law enforcement activities.

Educ. Code § 51.212(f). We understand the department is a campus police department of a private institution of higher education. *See id.* §§ 51.212(e), 61.003. Further, you acknowledge the department is a governmental body for purposes of the Act with regard to information maintained by the department only to the extent to which such information relates solely to law enforcement activities. You contend a Student Incident Report filed with the Director of Residential Life and a letter to a student from the Director of Student Services do not relate solely to law enforcement activities. Upon review, we are unable to determine if the information at issue was obtained by the department for the purposes of conducting its criminal investigations. To the extent the Student Incident Report filed with the Director of Residential Life and the letter to a student from the Director of Student Services were not obtained by the department for the purposes of conducting its criminal investigations, we agree this information does not relate solely to law enforcement activities and is not subject to the Act. However, to the extent the Student Incident Report filed with the Director of Residential Life and the letter to a student from the Director of Student Services were obtained by the department for the purposes of conducting its criminal investigations, we find this information in the hands of the department relates “solely to law enforcement activities” for purposes of section 51.212(f). In this case, the information at issue is subject to the Act. Any information subject to the Act must be released, unless it falls within an exception to public disclosure under the Act. *See Gov’t Code* §§ 552.006, .021, .301, .302. Accordingly, we will consider your claimed exceptions to disclosure of the information that is subject to the Act.

Next, you claim and we agree, case number 14-154 is not responsive to the instant request for information because it does not pertain to rape, fondling, incest, statutory rape and/or any other crime of a sexual nature. This ruling does not address the public availability of any information that is not responsive to the request, and the department need not release case number 14-154 in response to this request.²

The United States Department of Education Family Policy Compliance Office has informed this office the Family Educational Rights and Privacy Act (“FERPA”), section 1232g of title 20 of the United States Code, does not permit state and local educational authorities to disclose to this office, without parental or an adult student’s consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the

²As we are able to make this determination, we need not address your arguments against disclosure of case number 14-154.

open records ruling process under the Act.³ Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which “personally identifiable information” is disclosed. *See* 34 C.F.R. § 99.3 (defining “personally identifiable information”). We note FERPA is not applicable to law enforcement records maintained by the department that were created by the department for a law enforcement purpose. *See* 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. §§ 99.3, 99.8. In this instance, the responsive information that is subject to the Act consists of information maintained by the department for a law enforcement purpose. Thus, the responsive information that is subject to the Act is not subject to FERPA or section 552.114 of the Government Code. Open Records Decision No. 539 (1990) (determining the same analysis applies under section 552.114 of the Government Code and FERPA). However, we will consider your remaining arguments against disclosure of the responsive information at issue.

Next, you state some of the requested information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2016-07334 (2016). In that ruling, we determined, in part, with the exception of the basic information and the criminal trespass warning, the department may withhold case number 14-037 under section 552.108(a)(1) of the Government Code and case numbers 13-104 and 15-047 under section 552.108(a)(2) of the Government Code. We note basic information includes, among other things, the identification and description of the complainant. *See* Gov’t Code § 552.108(c) (basic information about an arrested person, an arrest, or a crime is not excepted under section 552.108); *see also* Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information considered to be basic information). Accordingly, we presume the complainants’ identifications and descriptions were released in accordance with Open Records Letter No. 2016-07334. The department now seeks to withhold the complainants’ identifying information under section 552.101 of the Government Code in conjunction with the common-law informer’s privilege. Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See* Gov’t Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the department may not now withhold any previously released information unless its release is expressly prohibited by law or the information is confidential under law. The purpose of the common-law informer’s privilege is to protect the flow of information to a governmental body, rather than to protect a third person; thus, the informer’s privilege, unlike other claims under section 552.101, neither prohibits release nor makes information confidential and may be waived. *See* Open Records

³A copy of this letter may be found on the Office of the Attorney General’s website: <https://www.texasattorneygeneral.gov/files/og/20060725usdoe.pdf>.

Decision No. 549 at 6 (1990). Therefore, the department may not now withhold any portion of the previously released information under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. Further, we note the requestor in the prior ruling excluded from her request any identifying information of victims contained in the responsive information; however, in this instance, the requestor did not exclude such information. Thus, we find there is a change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, the department may not rely on Open Records Letter No. 2016-07334 as a previous determination. *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 prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, we will consider your remaining arguments against disclosure of the responsive information that is subject to the Act.

Section 552.108(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime.” Gov’t Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108(a)(1) must explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state, and submit supporting documentation demonstrating, although case numbers 14-037, 14-038, 15-002, and 16-098 are suspended, release of the information would interfere with the detection, investigation, or prosecution of the crimes at issue in these reports. We note case number 15-002 includes a criminal trespass warning. Because the individual who was cited received a copy of the criminal trespass warning, we find release of the criminal trespass warning will not interfere with the detection, investigation, or prosecution of crime. Therefore, the department may not withhold the criminal trespass warning under section 552.108(a)(1). Based upon these representations, we conclude the release of the remaining information in case numbers 14-037, 14-038, 15-002, and 16-098 would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, section 552.108(a)(1) is applicable to the remaining information in case numbers 14-037, 14-038, 15-002, and 16-098.

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. Gov’t Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. You state case numbers 13-104 and 15-047 pertain to concluded criminal investigations that did

investigations that did not result in convictions or deferred adjudications. Therefore, we agree section 552.108(a)(2) is applicable to case numbers 13-104 and 15-047.

However, we note section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. *Id.* § 552.108(c). Basic front-page information refers to the information held to be public in *Houston Chronicle*, and includes, among other items, an identification and description of the complainant and a detailed description of the offense. *See* 531 S.W.2d at 186-87; ORD 127. Basic information in an offense report does not, however, include dates of birth; information related to witnesses or suspects who were not arrested; the identity of the victim, unless the victim is the complainant; or information subject to section 552.130 of the Government Code. *See* ORD 127. Thus, with the exception of the basic information and the criminal trespass warning, the department may withhold the information pertaining to case numbers 14-037, 14-038, 15-002, and 16-098 under section 552.108(a)(1) of the Government Code and the information pertaining to case numbers 13-104 and 15-047 under section 552.108(a)(2) of the Government Code.⁴

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 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 or embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. In Open Records Decision No. 393 (1983), this office concluded information that either identifies or tends to identify a victim of sexual assault or other sex-related offense must be withheld under common-law privacy. ORD 393 at 2; *see* Open Records Decision No. 339 (1982); *see also Morales v. Ellen*, 840 S.W.2d at 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information). Further, 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

⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

disclosure.⁵ *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 basic information for case numbers 14-038, 15-002, and 16-098 contains the identities of sexual assault victims. Thus, we find the department must withhold the identities of the victims within the basic information for case numbers 14-038, 15-002, and 16-098 under section 552.101 of the Government Code in conjunction with common-law privacy. Further, we find the department must withhold the date of birth you have marked in the criminal trespass warning under section 552.101 in conjunction with common-law privacy. However, upon review, we find you have failed to demonstrate the remaining responsive information is information pertaining to an identified individual that is highly intimate or embarrassing and not of legitimate public concern. Therefore, the department may not withhold the remaining responsive information under section 552.101 on that basis.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's or driver's license or permit, a motor vehicle title or registration, or a personal identification document issued by an agency of Texas or another state or country is excepted from public release. Gov't Code § 552.130(a). We conclude the department must withhold the information you have marked in the criminal trespass warning under section 552.130.

In summary, to the extent the Student Incident Report filed with the Director of Residential Life and the letter to a student from the Director of Student Services were not obtained by the department for the purposes of conducting its criminal investigations, we find this information does not relate solely to law enforcement activities and is not subject to the Act. With regards to the responsive information subject to the Act, with the exception of the basic information and the criminal trespass warning, the department may withhold the information pertaining to case numbers 14-037, 14-038, 15-002, and 16-098 under section 552.108(a)(1) of the Government Code and the information pertaining to case numbers 13-104 and 15-047 under section 552.108(a)(2) of the Government Code. In releasing basic information, the department must withhold the identities of the victims for case numbers 14-038, 15-002, and 16-098 under section 552.101 of the Government Code in conjunction with common-law privacy. The department must withhold the date of birth you have marked in the criminal trespass warning under section 552.101 of the Government Code in conjunction with common-law privacy. The department must withhold the information you have marked in the criminal trespass warning under section 552.130 of the Government Code. The department must release the remaining responsive information that is subject to the Act.

⁵Section 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).

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,



Meagan J. Conway
Assistant Attorney General
Open Records Division

MJC/sb

Ref: ID# 643521

Enc. Submitted documents

c: Requestor
(w/o enclosures)

1 Third Party
(w/o enclosures)