



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 6, 2017

Ms. T. Trisha Dang
Assistant City Attorney
City of Sugar Land
P.O. Box 110
Sugar Land, Texas 77487

OR2017-02648

Dear Ms. Dang:

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# 644807 (ORR# W001079 & W001122).

The Sugar Land Police Department (the "department") received two requests for all information pertaining to a specified case. You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.118, 552.130, 552.136, and 552.137 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

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. This section encompasses information protected by other statutes, including section 11 of article 49.25 of the Code of Criminal Procedure, which provides as follows:

- (a) The medical examiner shall keep full and complete records properly indexed, giving the name if known of every person whose death is

¹We note the department failed to comply with section 552.301(b) of the Government Code in raising sections 552.118, 552.136, and 552.137 of the Government Code within the ten-business day deadline. However, these sections are mandatory exceptions that constitute compelling reasons to withhold information sufficient to overcome the presumption of openness caused by a failure to comply with section 552.301. See Gov't Code §§ 552.007, .301, .302, .352. Accordingly, we will consider the department's arguments under sections 552.118, 552.136, and 552.137.

investigated, the place where the body was found, the date, the cause and manner of death, and shall issue a death certificate. . . . The records may not be withheld, subject to a discretionary exception under [the Act], except that a photograph or x-ray of a body taken during an autopsy is excepted from required public disclosure in accordance with [the Act], but is subject to disclosure:

- (1) under a subpoena or authority of other law; or
- (2) if the photograph or x-ray is of the body of a person who died while in the custody of law enforcement.

Crim. Proc. Code art. 49.25, § 11(a). You state the submitted information includes photographs that are confidential pursuant to section 11 of article 49.25. Upon review, we agree the submitted information includes photographs of a body taken during an autopsy. We understand neither of the statutory exceptions to confidentiality is applicable in this instance. Accordingly, we find the department must withhold the information you indicated under section 552.101 of the Government Code in conjunction with section 11 of article 49.25 of the Code of Criminal Procedure.

Section 552.101 of the Government Code also encompasses Public Law number 111-117. The submitted information includes a Firearms Trace Summary from the National Trace Center of the Department of Justice Bureau of Alcohol, Tobacco, Firearms and Explosives (the "ATF"). Public Law number 111-117 states, in pertinent part,

[B]eginning in fiscal year 2010 and thereafter, no funds appropriated under [the Consolidated Appropriations Act, 2010] or any other [a]ct may be used to disclose part or all of the contents of the Firearms Trace System database maintained by the National Trace Center of the [ATF] or any information required to be kept by licensees pursuant to section 923(g) of title 18, United States Code, or required to be reported pursuant to paragraphs (3) and (7) of such section 923(g), except to: (1) a Federal, State, local, or tribal law enforcement agency or a Federal, State, or local prosecutor . . . unless such disclosure of such data to an[] . . . entit[y] described in (1) . . . of this provision would compromise the identity of any undercover law enforcement officer or confidential informant, or interfere with any case under investigation; and no person or entity described in (1) . . . shall knowingly and publicly disclose such data; and all such data shall be immune from legal process, shall not be subject to subpoena or other discovery, shall be inadmissible in evidence, and shall not be used, relied on, or disclosed in any manner, nor shall testimony or other evidence be permitted based on the data, in a civil action in any State[.]

Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, 123 Stat. 3034, 3128 (2009). We understand Firearms Trace Summaries contain content from the Firearms Trace System database maintained by the National Trace Center. Upon review, we find the submitted Firearms Trace Summary is confidential under Public Law number 111-117. *See Miller v. U.S. Dep't of Justice*, 562 F. Supp. 2d 82, 111 (D.D.C. 2008) (holding Firearms Trace Report properly withheld under Freedom of Information Act exemption 3, which covers records that are exempt from disclosure by statute). Accordingly, the department must withhold the submitted Firearms Trace Summary you marked under section 552.101 of the Government Code in conjunction with Public Law number 111-117.

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 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. Additionally, 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 highly intimate or embarrassing. *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). 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.² *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. However, the right to privacy is a personal right that lapses at death and the common-law right to privacy does not encompass information that relates only to a deceased individual. *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

²Section 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).

TORTS § 652I (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, information pertaining to a deceased individual may not be withheld on common-law privacy grounds.

Upon review, we find the information you marked and the additional information we have marked and indicated satisfy the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the department must withhold the information you marked and the additional information we have marked and indicated under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.108(b) of the Government Code excepts from disclosure “[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if (1) release of the internal record or notation would interfere with law enforcement or prosecution[.]” Gov’t Code § 552.108(b)(1). This section is intended to protect “information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State.” *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.). This office has concluded this provision protects certain kinds of information, the disclosure of which might compromise the security or operations of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 at 3-4 (1989) (detailed guidelines regarding police department’s use of force policy), 508 at 3-4 (1988) (information relating to future transfers of prisoners), 413 (1984) (sketch showing security measures for forthcoming execution). However, to claim this aspect of section 552.108 protection a governmental body must meet its burden of explaining how and why release of the information at issue would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). Further, commonly known policies and techniques may not be withheld under section 552.108. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (former section 552.108 does not protect Penal Code provisions, common-law rules, and constitutional limitations on use of force), 252 at 3 (1980) (governmental body did not meet burden because it did not indicate why investigative procedures and techniques submitted were any different from those commonly known with law enforcement and crime prevention). To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a law-enforcement agency must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. The determination of whether the release of particular records would interfere with law enforcement is made on a case-by-case basis. Open Records Decision No. 409 at 2 (1984).

You seek to withhold serial numbers of firearms pursuant to section 552.108(b)(1). You state release of this information would interfere with law enforcement by divulging firearm serial numbers that could be used on illegal firearms or falsely used in missing weapons

reports. Upon review, we find you have demonstrated release of the information at issue would interfere with law enforcement. Therefore, the department may withhold the firearm serial numbers you marked under section 552.108(b)(1) of the Government Code.

Section 552.1175 protects the home address, home telephone number, emergency contact information, date of birth, social security number, and family member information 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.³ *See* Gov't Code § 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). Some of the remaining information, which we have indicated, relates to a peace officer. Accordingly, if the officer whose information is at issue elects to restrict access to his information in accordance with section 552.1175(b), the department must withhold the information we have indicated under section 552.1175 of the Government Code.

Section 552.118 of the Government Code provides as follows:

Information is excepted from the requirements of Section 552.021 if it is:

(1) information on or derived from an official prescription form filed with the director of the [Texas Department of Public Safety ("DPS")] under [s]ection 481.075, Health and Safety Code;

or

(2) other information collected under [s]ection 481.075 of that code.

Id. § 552.118. You indicate, and the information at issue reflects, the information you marked was derived from an official prescription form filed with the director of DPS or collected under section 481.075 of the Health and Safety Code. *See* Health & Safety Code § 481.075 (providing for the collection of information by DPS from prescriptions of certain controlled substances). Based on your representations and our review, we find the information you marked must be withheld under section 552.118 of the Government Code.⁴

³The 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).

⁴We acknowledge the department raises section 552.101 of the Government Code in conjunction with section 481.076 of the Health and Safety Code. While it appears section 481.076 only applies to certain prescription information maintained by DPS, we need not decide whether this section applies to information maintained by a governmental body other than DPS as the protection of section 552.118 is co-extensive with that afforded by section 481.076. *See* Health & Safety Code § 481.076(i) (information submitted to DPS under

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 a personal identification document issued by an agency of this state or another state or country is excepted from public release. Gov't Code § 552.130. We note the purpose of section 552.130 is to protect the privacy interests of individuals. Because the right of privacy lapses at death, motor vehicle record information that pertains solely to deceased individuals may not be withheld under section 552.130. *See Moore*, 589 S.W.2d at 491; *see also* Attorney General Opinions JM-229, H-917; ORD 272 at 1. Upon review, with the exception of motor vehicle record information pertaining solely to the deceased individual, the department must withhold the motor vehicle record information you marked, and the additional information we have 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.” Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). We note the purpose of section 552.136 is to protect the privacy interests of individuals. Because the right of privacy lapses at death, account information that pertains solely to a deceased individual may not be withheld under section 552.136. *See Moore*, 589 S.W.2d at 491; *see also* Attorney General Opinions JM-229, H-917; ORD 272 at 1. We have marked information that is generally subject to section 552.136. However, we note the information we have marked consists of a bank account number and routing number that belongs to a deceased individual. To the extent the information we have marked pertains to a bank account in which a living individual has an interest, the department must withhold it under section 552.136 of the Government Code. However, if the information we have marked pertains solely to the deceased individual, the department may not withhold it under section 552.136 of the Government Code.

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). The e-mail addresses at issue are not a type specifically excluded by section 552.137(c) of the Government Code. Accordingly, the department must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure.

In summary, the department must withhold the information you indicated under section 552.101 of the Government Code in conjunction with section 11 of article 49.25 of the Code of Criminal Procedure. The department must withhold the submitted Firearms Trace Summary you marked under section 552.101 of the Government Code in conjunction

with Public Law number 111-117. The department must withhold the information you marked and the additional information we have marked and indicated under section 552.101 of the Government Code in conjunction with common-law privacy. The department may withhold the firearm serial numbers you marked under section 552.108(b)(1) of the Government Code. If the officer whose information is at issue elects to restrict access to his information in accordance with section 552.1175(b), the department must withhold the information we have indicated under section 552.1175 of the Government Code. The department must withhold the information you marked under section 552.118 of the Government Code. With the exception of motor vehicle record information pertaining solely to the deceased individual, the department must withhold the motor vehicle record information you marked, and the additional information we have marked and indicated, under section 552.130 of the Government Code. To the extent the information we have marked pertains to a bank account in which a living individual has an interest, the department must withhold it under section 552.136 of the Government Code. The department must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure. The remaining information must be released.⁵

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,



Sidney M. Pounds
Assistant Attorney General
Open Records Division

SMP/sdk

⁵We note the information being released contains social security numbers of living individuals subject to section 552.147 of the Government Code. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this officer under the Act. Gov't Code § 552.147(b).

Ref: ID# 644807

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)