



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 28, 2017

Mr. Paul A. Ready
Legal Department
County of Galveston
722 Moody Street, 5th Floor
Galveston, Texas 77550

OR2017-09125

Dear Mr. Ready:

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# 656323.

The Galveston County Sheriff's Office (the "sheriff's office") received a request for a specified report. The sheriff's office states it has released some of the requested information. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code.¹ We have considered the exception you claim and reviewed the submitted information.

Initially, you state some of the submitted information, which you have marked, is not responsive to the present request. This ruling does not address the public availability of the non-responsive information, and the sheriff's office need not release it in response to this request.

¹We note the sheriff's office also claims the informer's privilege under Texas Rule of Evidence 508. The Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); *see also* Gov't Code § 552.022(a). In this instance, section 552.022 is not applicable to the information the sheriff's office seeks to withhold under the informer's privilege and, therefore, we do not address the arguments of the sheriff's office under rule 508.

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. You raise section 552.101 in conjunction with the common-law informer’s privilege, which Texas courts have long recognized. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). The informer’s privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided the subject of the information does not already know the informer’s identity. *See Open Records Decision No. 208 at 1-2 (1978)*. The informer’s privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to “administrative officials having a duty of inspection or of law enforcement within their particular spheres.” *Open Records Decision No. 279 at 1-2 (1981)* (citing 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 2374, at 767 (J. McNaughton Rev. Ed. 1961)). The report must be of a violation of a criminal or civil statute. *See Open Records Decision Nos. 582 at 2 (1990), 515 at 4 (1988)*. However, witnesses who provide information in the course of an investigation are not informants for the purposes of claiming the informer’s privilege. The privilege excepts the informer’s statement only to the extent necessary to protect that informer’s identity. *Open Records Decision No. 549 at 5 (1990)*. We note the informer’s privilege does not apply where the informant’s identity is known to the individual who is the subject of the complaint. *See Open Records Decision No. 208 at 1-2 (1978)*.

You inform us some of the submitted information identifies a complainant who reported a possible violation of the Texas Penal Code to the sheriff’s office. You state you have no indication the accused knows the identity of the informer. Based upon your representations and our review, we conclude the sheriff’s office has demonstrated the applicability of the common-law informer’s privilege to some of the information at issue. Therefore, the sheriff’s office may withhold the information we marked under section 552.101 of the Government Code in conjunction with the common-law informer’s privilege.² However, you have failed to demonstrate the remaining information you marked identifies an individual who reported a criminal violation to the sheriff’s office for purposes of the informer’s privilege. Accordingly, the sheriff’s office may not withhold the remaining information under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses the common-law physical safety exception. The Texas Supreme Court has recognized, for the first time, a separate common-law physical safety exception to required disclosure that exists independent of the common-law right to privacy. *Tex. Dep’t of Pub. Safety v. Cox Tex. Newspapers, L.P. & Hearst Newspapers, L.L.C.*, 343 S.W.3d 112, 118 (Tex. 2011). Pursuant to this common-law physical safety exception, “information may be withheld [from public release] if disclosure

²As our ruling is dispositive, we need not address your remaining argument against disclosure of the information at issue.

would create a substantial threat of physical harm.” *Id.* In applying this new standard, the court noted “deference must be afforded” law enforcement experts regarding the probability of harm, but further cautioned, “vague assertions of risk will not carry the day.” *Id.* at 119. You claim release of the remaining information would create a “substantial threat of physical harm.” However, upon review, we find you have not demonstrated release of the information at issue would create a substantial threat of physical harm to an individual. Therefore, the sheriff’s office may not withhold the remaining information under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.

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. The court of appeals has concluded public citizens’ dates of birth are protected by common-law privacy pursuant to section 552.101. *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.). However, we note the remaining information includes the requestor’s date of birth. The requestor has a right of access to this information under section 552.023 of the Government Code. *See* Gov’t Code § 552.023 (person or person’s authorized representative has special right of access to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person’s privacy interests); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Thus, upon review, we find the dates of birth of all public citizens, other than the requestor, are protected by common-law privacy. Accordingly, the sheriff’s office must withhold the dates of birth of all public citizens, other than the requestor, under section 552.101 of the Government Code in conjunction with common-law privacy.

In summary, the sheriff’s office may withhold the information we marked under section 552.101 of the Government Code in conjunction with the common-law informer’s privilege. The sheriff’s office must withhold the dates of birth of all public citizens, other than the requestor, under section 552.101 of the Government Code in conjunction with common-law privacy. 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 that reads "Kaelan A. Henze". The signature is written in a cursive style with a large initial "K" and a stylized "H".

Kaelan A. Henze
Assistant Attorney General
Open Records Division

KAH/eb

Ref: ID# 656323

Enc. Submitted documents

c: Requestor
(w/o enclosures)