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ATTORNEY GENERAL OF TEXAS

May 12, 2017

Mr. Michael W. Dixon
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Haley & Olson
100 Ritchie Road, Suite 200
Waco, Texas 76712-8544

OR2017-10300

Dear Mr. Dixon:

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# 660234.

The City of McGregor (the "city"), which you represent, received a request for information pertaining to a specified investigation. The city released some information and claims the submitted information is excepted from disclosure under sections 552.101, 552.107(2), and 552.108 of the Government Code. We have considered the city's claimed exceptions 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. Section 552.101 of the Government Code encompasses laws that make criminal history record information ("CHRI") confidential. CHRI generated by the National Crime Information Center (the "NCIC") or by the Texas Crime Information Center is confidential under federal and state law. CHRI means "information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions." Gov't Code § 411.082(2). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI obtained from the NCIC network or other states. *See* 28 C.F.R. § 20.21. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. Open Records Decision No. 565 at 7 (1990); *see generally* Gov't Code §§ 411.081-.1409. Section 411.083 of the Government Code deems confidential CHRI the Texas Department of Public Safety ("DPS") maintains, except DPS may disseminate this information as provided in chapter 411, subchapter E-1 or F of the

Government Code. See Gov't Code § 411.083(a). Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. See generally *id.* §§ 411.090-.127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. See ORD 565. We note Federal Bureau of Investigation ("FBI") numbers constitute CHRI generated by the FBI. However, criminal history record information does not include driving record information. Cf. Gov't Code § 411.082(2)(B). Accordingly, the city must withhold the CHRI we marked in Exhibit D under section 552.101 in conjunction with federal law and chapter 411 of the Government Code. However, we find the remaining information in Exhibit D does not constitute CHRI because it is driving record information, and the city may not withhold the remainder under section 552.101 of the Government Code on that basis.

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). Finally, the court of appeals has concluded public citizens' dates of birth are protected by common-law privacy pursuant to section 552.101. See *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.). Upon review of the information, we have marked the public citizen's date of birth and the private information in Exhibit D the city must withhold under section 552.101 of the Government Code in conjunction with common-law privacy as the information is highly intimate or embarrassing and is of no legitimate public interest.

We note some of the remaining information in Exhibit D is subject to section 552.130 of the Government Code.¹ 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 Gov't Code § 552.130. Thus, the city must withhold the motor vehicle record information we marked in Exhibit D under section 552.130 of the Government Code.

¹The 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).

Next, we address the city's assertion of section 552.107(2) of the Government Code for Exhibit B. Section 552.107(2) provides information is excepted from disclosure if "a court by order has prohibited disclosure of the information." *Id.* § 552.107(2). Article 18.21 of the Code of Criminal Procedure permits a court to issue an order authorizing the disclosure of contents, records, or other information of a wire or electronic communication. Crim. Proc. Code art. 18.21, § 5(a). Section 2 of article 18.21 states the court "shall seal an application and order granted under this article." *Id.* § 2(g). Exhibit B consists of an application filed and a court order granted under article 18.21. Because article 18.21 requires the sealing of both the application and court order, we conclude the city must withhold Exhibit B under section 552.107(2) of the Government Code.

Lastly, we address the city's assertion of section 552.108(b)(1) to withhold the sample of information submitted as Exhibit C.² Section 552.108(b)(1) 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 . . . release of the internal record or notation would interfere with law enforcement or prosecution[.]" Gov't Code § 552.108(b)(1). Section 552.108(b)(1) 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.). To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a governmental body must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. Instead, the governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. *See* Open Records Decision No. 562 at 10 (1990) (construing statutory predecessor). This office has concluded section 552.108(b) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (section 552.108 of the Government Code is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted).

The city explains its police department used a confidential informant in the multi-jurisdictional undercover operation at issue. The city further asserts an important law enforcement tool of using confidential informants would be lost if the information is released because confidential informants will refuse to cooperate if they know their identities will be released. Upon review of the city's arguments and the information at issue, we agree release

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

of Exhibit C would reveal the informant's identity and interfere with law enforcement. Accordingly, the city may withhold Exhibit C under section 552.108(b)(1).³

In summary, the city must withhold the CHRI we marked in Exhibit D under section 552.101 of the Government Code in conjunction with federal law and chapter 411 of the Government Code. The city must withhold the public citizen's date of birth and the information we marked in Exhibit D under section 552.101 of the Government Code in conjunction with common-law privacy. The city must withhold the motor vehicle record information we marked in Exhibit D under section 552.130 of the Government Code. The city must withhold Exhibit B under section 552.107(2) and may withhold Exhibit C under section 552.108(b)(1). The city must release the remaining information in Exhibit D.

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,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/sdk

Ref: ID# 660234

Enc. Marked documents

c: Requestor
(w/o enclosures)

³Because section 552.108(b)(1) is dispositive, we do not address the city's other argument for this information.