



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 31, 2017

Ms. Laura Garza Jimenez
County Attorney
Nueces County Attorney's Office
901 Leopard, Room 207
Corpus Christi, Texas 78401-3680

OR2017-11793

Dear Ms. Jimenez:

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# 660180.

The Nueces County Sheriff's Office (the "sheriff's office") received a request for records relating to the investigation of a named deputy. You state you have released some information to the requestor. You inform us the sheriff's office will redact information pursuant to sections 552.130(c) and 552.147(b) of the Government Code.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.117, 552.1175 and 552.119 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

¹Section 552.130(c) of the Government Code allows a governmental body to redact the information described in section 552.130(a) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). 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 office under the Act. *Id.* § 552.147(b).

²Although you raise section 552.117 of the Government Code, we note section 552.1175 is the proper exception to raise for information not held in an employment context.

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 encompasses laws that make criminal history record information (“CHRI”) confidential. CHRI generated by the National Crime Information Center or by the Texas Crime Information Center is confidential under federal and state law. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI states obtain from the federal government or other states. Open Records Decision No. 565 at 7 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* at 10-12. Section 411.083 of the Government Code deems confidential CHRI the Department of Public Safety (“DPS”) maintains, except DPS may disseminate this information as provided in chapter 411, subchapter F or subchapter E-1 of the Government Code. *See* Gov’t Code § 411.083(a). Sections 411.083(b)(1) and 411.089(a) of the Government Code authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for criminal justice purposes. *See id.* § 411.089(b)(1). Upon review, we find the information you have marked constitutes confidential CHRI. This information must be withheld under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code.³

Section 552.101 of the Government Code also encompasses the informer’s privilege, which has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). 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). 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).

The sheriff’s office states the information it has marked reveals the identities of complainants who reported a violation of criminal law. There is no indication the subject of the complaint knows the identities of the complainants. Based on the sheriff’s office’s representations and our review, we conclude the information we have marked identifies the complainants; thus,

³As our ruling is dispositive, we do not address the remaining arguments against disclosure of this information.

the sheriff's office may withhold the information we have marked under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. However, we find the remaining information the sheriff's office has marked does not identify an individual who reported a violation of law to a law enforcement agency or an appropriate administrative official. Thus, the sheriff's office may not withhold any of the remaining information it has marked under section 552.101 of the Government Code in conjunction with the common-law informer's privilege.

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).

The sheriff's office explains revealing the information it has marked under section 552.108(b)(1) would reveal the identities of Jail Extraction Team ("JET") members involved in security sensitive operation and endanger these officers and their families. The sheriff's office further explains this information "would allow inmates to determine which JET officers are involved in certain shakedowns or would allow anyone from outside to identify JET officers that are involved in security sensitive operations." Upon review, we find the sheriff's office has demonstrated release of the information it has marked would

interfere with law enforcement. Thus, the sheriff's office may withhold the information it has marked under section 552.108(b)(1) of the Government Code.

Section 552.117(a)(2) of the Government Code applies to records a governmental body holds in an employment capacity and excepts from disclosure the home address, home telephone number, emergency contact information, social security number, and family member information of a peace officer, regardless of whether the peace officer complies with sections 552.024 or 552.1175 of the Government Code. Gov't Code § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. In this instance, however, it is unclear whether the individual whose information is at issue is a currently licensed peace officer as defined by article 2.12. If the information you have marked and we have marked is held by the sheriff's office in an employment capacity and the individual at issue is a currently licensed peace officer as defined by article 2.12, then the sheriff's office must withhold the information we marked under section 552.117(a)(2) of the Government Code. Conversely, if the individual at issue is not a currently licensed peace officer as defined by article 2.12, the information at issue may not be withheld under section 552.117(a)(2) of the Government Code.

If the individual at issue is not a currently licensed peace officer, then their personal information may be subject to section 552.117(a)(1) of the Government Code, which applies to records a governmental body holds in an employment capacity and excepts from disclosure the home addresses and telephone numbers, 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. *Id.* § 552.117(a)(1). Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The sheriff's office may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Therefore, if the information you have marked and we have marked is held by the sheriff's office in an employment capacity and the individual whose information is at issue is a current or former city official or employee who timely requested confidentiality under section 552.024 of the Government Code, the sheriff's office must withhold the information we marked under section 552.117(a)(1) of the Government Code. Conversely, if the individual at issue did not timely request confidentiality under section 552.024 or is not held in an employment capacity, the sheriff's office may not withhold the information we marked under section 552.117(a)(1) of the Government Code. We find the remaining information at issue is not subject to section 552.117(a)(1), and the sheriff's office may not withhold it on that basis.

Section 552.1175 of the Government Code 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. Gov't Code § 552.1175(b). Section 552.1175 applies, in part, to "peace officers as defined by Article 2.12, Code of Criminal Procedure[.]" *Id.* § 552.1175(a)(1). Upon review, we find the information we marked consists of personal information of individuals who may be among the types listed in section 552.1175(a) and whose information is held in a non-employment capacity. Thus, if this information relates to individuals to whom section 552.1175 applies and the individuals elect to restrict access to the information in accordance with section 552.1175(b), then the sheriff's office must withhold the information we marked and indicated under section 552.1175. If the individuals at issue are not individuals to whom section 552.1175 applies or if no election is made, the sheriff's office may not withhold the information we marked and indicated under section 552.1175 of the Government Code.

Section 552.119 of the Government Code provides the following:

(a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, the release of which would endanger the life or physical safety of the officer, is excepted from [required public disclosure] unless:

- (1) the officer is under indictment or charged with an offense by information;
- (2) the officer is a party in a civil service hearing or a case in arbitration; or
- (3) the photograph is introduced as evidence in a judicial proceeding.

(b) A photograph excepted from disclosure under Subsection (a) may be made public only if the peace officer gives written consent to the disclosure.

Id. § 552.119. Under section 552.119, a governmental body must demonstrate, if the documents do not demonstrate on their face, that release of the photograph would endanger the life or physical safety of a peace officer. You state one of the photographs you have marked belongs to a police officer and release of his picture may endanger his present assignment. Based on your representations and our review, we have determined release of the photograph at issue would endanger the life or physical safety of the depicted officer. Thus, the sheriff's office must withhold the photograph we have marked under section 552.119 of the Government Code. However, we determine you have not demonstrated, nor is it apparent from our review of the information at issue, that release of the remaining photographs would endanger the life or physical safety of the peace officers depicted. Therefore, the sheriff's office may not withhold the remaining photographs it has marked under section 552.119 of the Government Code.

The sheriff's office asserts the dates of birth are excepted from public disclosure under section 552.101 of the Government Code in conjunction with common-law privacy. Section 552.101 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.). We note two of the dates of birth you seek to withhold on this basis relate to individuals who have been de-identified pursuant to section 552.101 of the Government Code in conjunction with common-law informer's privilege and whose privacy interests are thus protected. Accordingly, the sheriff's office may not withhold the dates of birth of the individuals who have been de-identified under section 552.101 on the basis of common-law privacy. Therefore, with the exception of the dates of birth belonging to the de-identified individuals, the sheriff's office must withhold all identifiable public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy.

In summary, the sheriff's office must withhold the information it has marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code. The sheriff's office may withhold the information we have marked under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. The sheriff's office may withhold the information it has marked under section 552.108(b)(1) of the Government Code. If the individual at issue is a currently licensed peace officer as defined by article 2.12, then the sheriff's office must withhold the information you have marked and we have marked, under section 552.117(a)(2) of the Government Code. If the individual at issue is not a currently licensed peace officer; but made a timely election under section 552.024 and the sheriff's office holds the information in an employment capacity, then the sheriff's office must withhold the information you have marked and we have marked, under section 552.117(a)(1) of the Government Code. If the individual at issue is a currently licensed peace officer to whom section 552.1175 applies and the individual elected to restrict access to the information in accordance with section 552.1175(b), then the sheriff's office must withhold the information we have marked and indicated under section 552.1175. The sheriff's office must withhold the photograph we have marked under section 552.119 of the Government Code. The sheriff's office must withhold all identifiable public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy. The sheriff's office 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,



Kelly McWethy
Assistant Attorney General
Open Records Division

KSM/sb

Ref: ID# 660180

Enc. Submitted documents

c: Requestor
(w/o enclosures)