



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 6, 2017

Mr. John C. West
General Counsel
Office of the Inspector General
Texas Department of Criminal Justice
4616 Howard Lane, Suite 250
Austin, Texas 78728

OR2017-22848

Dear Mr. West:

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# 676692 (OIG No. 2017-00152).

The Office of the Inspector General of the Texas Department of Criminal Justice (the "department") received a request for all information pertaining to the requestor's client, an inmate at a department facility. You state the department does not have some of the requested information.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.1175, 552.130, 552.136, and 552.147 of the Government Code.² 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

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

²Although you also raise section 552.117 of the Government Code for information at issue, we note section 552.1175 of the Government Code is the proper exception to raise for information the department holds in a non-employment capacity. *See Gov't Code* §§ 552.117, .1175.

Code § 552.101. Section 552.101 encompasses information protected by other statutes, such as section 411.083 of the Government Code, which pertains to criminal history record information (“CHRI”). CHRI generated by the National Crime Information Center (“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.” *Id.* § 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 §§ 411.081-1410. Section 411.083 of the Government Code deems confidential CHRI the Texas Department of Public Safety (the “DPS”) maintains, except DPS may disseminate this information as provided in chapter 411, subchapter E-1 or subchapter F of the Government Code. *See id.* § 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.* §§ 411.089-1410. Thus, any CHRI obtained from the DPS or any other criminal justice agency must be withheld under section 552.101 in conjunction with Government Code chapter 411, subchapter F. We note Federal Bureau of Investigation (“FBI”) numbers constitute CHRI generated by the FBI. Upon review, we find some of the submitted information consists of CHRI that is confidential under section 411.083. Accordingly, the department must generally withhold the CHRI at issue under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code. However, we find you have not demonstrated the remaining information constitutes confidential CHRI for the purposes of chapter 411. Consequently, the department may not withhold the remaining information under section 552.101 on this basis.

We note the requestor is a representative of the Office of Capital and Forensic Writs (the “OCFW”). Section 411.1272 of the Government Code provides:

The [OCFW] and a public defender’s office are entitled to obtain from the [DPS] [CHRI] maintained by the [DPS] that relates to a criminal case in which an attorney compensated by the [OCFW] or by the public defender’s office has been appointed.

Id. § 411.1272. In addition, section 411.087(a) of the Government Code provides, in pertinent part:

(a) [A] person, agency, department, political subdivision, or other entity that is authorized by this subchapter or Subchapter E-1 to obtain from the [DPS]

criminal history record information maintained by the [DPS] that relates to another person is authorized to:

...

(2) obtain from any other criminal justice agency in this state criminal history record information maintained by that criminal justice agency that relates to that person.

Id. § 411.087(a)(2). The requestor states the OCFW was appointed to represent a client in his post-conviction review proceedings in connection with a criminal case. Accordingly, the requestor is authorized to obtain the CHRI in the submitted information from the department pursuant to sections 411.087(a)(2) and 411.1272 of the Government Code. *See id.* §§ 411.087(a)(2), .1272. Therefore, the department may not withhold the CHRI at issue under section 552.101 in conjunction with section 411.083. Although you raise section 552.108 of the Government Code for such information, a specific statutory right of access prevails over the general exceptions to disclosure found in the Act. *See* Open Records Decision Nos. 613 at 4 (1993) (exceptions in Act cannot impinge on statutory right of access to information), 451 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under the Act). Consequently, the department must release to this requestor the CHRI at issue to the requestor pursuant to sections 411.087(a)(2) and 411.1272 of the Government Code.

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. Section 552.1175 applies, in part, to "current or former employees of the [department] or of the predecessor in function of the [department] or any division of the [department.]" *Id.* § 552.1175(a)(3). Portions of the remaining information, which we marked, relate to employees of the department, and the information is not held in an employment capacity. Accordingly, to the extent the information we have marked relates individuals who have elected to restrict access to the information in accordance with section 552.1175(b) of the Government Code, the department must withhold the information we have marked under section 552.1175 of the Government Code.³ *See* Open Records Decision No. 364 (1983). However, upon review, we find you have failed to demonstrate the remaining information is confidential under section 552.1175, and the department may not withhold it on that basis.

Section 552.101 of the Government Code also encompasses the doctrines of common-law and constitutional privacy. Common-law privacy protects information that is (1) highly

³As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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. Additionally, the Third 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.). However, this office has noted the public has a legitimate interest in information that relates to public employees and their conduct in the workplace. *See, e.g.,* Open Records Decision Nos. 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of government employees), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest), 329 (1982) (reasons for employee's resignation ordinarily not private).

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

This office has applied privacy to protect certain information about incarcerated individuals. *See* Open Records Decision Nos. 430 (1985), 428 (1985), 185 (1978). Citing *State v. Ellefson*, 224 S.E.2d 666 (S.C. 1976) as authority, this office held that those individuals who correspond with inmates possess a "first amendment right . . . to maintain communication with [the inmate] free of the threat of public exposure" and that this right would be violated by the release of information that identifies those correspondents, because such a release would discourage correspondence. ORD 185 at 2. The information at issue in Open Records Decision No. 185 was the identities of individuals who had corresponded with inmates, and our office found "the public's right to obtain an inmate's correspondence list is not sufficient to overcome the first amendment right of the inmate's correspondents to maintain communication with him free of the threat of public exposure." *Id.* Implicit in this holding is the fact that an individual's association with an inmate may be intimate or embarrassing. In Open Records Decision Nos. 428 and 430, our office determined that inmate visitor and mail logs that identify inmates and those who choose to visit or correspond with inmates are protected by constitutional privacy because people who correspond with inmates have a First Amendment right to do so that would be threatened if their names were released. ORDs 430, 428. The right of those individuals to anonymity was found to outweigh the public's

interest in this information. ORD 185; *see* ORD 430 (list of inmate visitors protected by constitutional privacy of both inmate and visitors).

We note some of the remaining information pertains to the requestor's client. The requestor has a special right of access under section 552.023 of the Government Code to information pertaining to his client that would otherwise be withheld to protect his client's privacy and this information may not be withheld under section 552.101 on this basis. *See* Gov't Code § 552.023(b) (governmental body may not deny access to person or person's representative to whom information relates on grounds that information is considered confidential under privacy principles); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). We determine, with the exception of the date of birth of the requestor's client, the department must withhold all public citizens' dates of birth, including the dates of birth we have marked under section 552.1175 of the Government Code if these dates of birth do not pertain to individuals who have elected to restrict access to the information in accordance with section 552.1175(b), under section 552.101 in conjunction with common-law privacy.⁴ With respect to the remaining information at issue, we note the public has a legitimate interest in knowing the details of a crime. *See Lowe v. Hearst Commc'ns, Inc.*, 487 F.3d 246, 250 (5th Cir. 2007) (noting a "legitimate public interest in facts tending to support an allegation of criminal activity" (citing *Cinel v. Connick*, 15 F.3d 1338, 1345-46 (5th Cir. 1994))). Upon our review, we find you have failed to demonstrate the remaining information is highly intimate or embarrassing and of no legitimate public interest. Additionally, we find either the remaining information does not fall within the zones of privacy or implicate an individual's privacy interests for purposes of constitutional privacy, or the public interest in the information at issue outweighs any remaining privacy interests. Therefore, the department may not withhold the remaining information under section 552.101 on the basis of common-law or constitutional privacy.

You also claim the remaining information is excepted from disclosure under section 552.102(a) of the Government Code. Section 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). Upon review, we find none of the remaining information is excepted under section 552.102(a). Accordingly, the department may not withhold the remaining information under section 552.102(a).

Section 552.108(b)(1) 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 . . . release of the internal record or notation would interfere with law enforcement or prosecution[.]" *Id.* § 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

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

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). Section 552.108(b)(1) is not applicable, however, to generally known policies and procedures. *See, e.g.*, ORDs 531 at 2-3 (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known). Upon review, we find you have failed to demonstrate the remaining information would interfere with law enforcement or crime prevention. Consequently, the department may not withhold the remaining information under section 552.108(b)(1).

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 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(a). Portions of the submitted information are subject to section 552.130. Because section 552.130 protects personal privacy, the requestor has a right of access to motor vehicle record information of his client pursuant to section 552.023 of the Government Code and it may not be withheld from him under section 552.130. *See id.* § 552.023(a); ORD 481 at 4. Thus, the department must withhold the motor vehicle record information that does not belong to the requestor’s client, which we have marked, under section 552.130 of the Government Code. However, upon review, we find you have failed to demonstrate the remaining information is confidential under section 552.130. Therefore, the department may not withhold the information at issue under section 552.130.

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”). However, the purpose of section 552.136 is to protect the privacy interests of individuals. Thus, the requestor has a right of access to his client’s access device numbers under section 552.023 of the Government Code and the department may not withhold them from the requestor under

section 552.136. *See id.* § 552.023(a); ORD 481 at 4. Furthermore, we find you have failed to demonstrate the remaining information is confidential under section 552.136(c), and the department may not withhold the remaining information on that basis.

We note Exhibit B contains e-mail addresses of members of the public that are subject to section 552.137 of the Government Code.⁵ Section 552.137 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 within the remaining information are not one of the types specifically excluded by section 552.137(c). *See id.* § 552.137(c). Accordingly, the department must withhold all e-mail addresses of members of the public within the remaining information under section 552.137 of the Government Code unless the owners of the addresses affirmatively consent to their release.

Section 552.147 of the Government Code provides that “[t]he social security number of a living person is excepted from” required public disclosure under the Act. *Id.* § 552.147(a). We note the requestor has a right of access to his client’s social security number. *See generally id.* § 552.023(b). Therefore, with the exception of the social security number pertaining to the requestor’s client, the department may withhold the social security numbers in the remaining information, including the social security numbers marked under section 552.1175 of the Government Code if these social security numbers do not pertain to individuals who have elected to restrict access to the information in accordance with section 552.1175(b) of the Government Code, under section 552.147(a) of the Government Code.

In summary, the department must release to this requestor the CHRI at issue pursuant to sections 411.087(a)(2) and 411.1272 of the Government Code. To the extent the information we have marked relates to individuals who have elected to restrict access to the information in accordance with section 552.1175(b) of the Government Code, the department must withhold the information we have marked under section 552.1175 of the Government Code. Except for the date of birth of the requestor’s client, the department must withhold all public citizens’ dates of birth, including the dates of birth we have marked under section 552.1175 of the Government Code if these dates of birth do not pertain to individuals who have elected to restrict access to the information in accordance with section 552.1175(b) of the Government Code, under section 552.101 of the Government Code in conjunction with common-law privacy. The department must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code. The department must withhold all the e-mail addresses of members of the public within the remaining information under section 552.137 of the Government Code unless the owners of the addresses

⁵The 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, 480 (1987), 470 (1987).

affirmatively consent to their release. With the exception of the social security number of the requestor's client, the department may withhold the social security numbers in the remaining information, including the social security numbers marked under section 552.1175 of the Government Code if these social security numbers do not pertain to individuals who have elected to restrict access to the information in accordance with section 552.1175(b) of the Government Code, under section 552.147(a) of the Government Code. The department must release the remaining information.⁶

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,



Cole Hutchison
Assistant Attorney General
Open Records Division

CH/sb

Ref: ID# 676692

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁶We note the requestor has a right of access beyond that of the general public to some of the information being released. See Gov't Code §§ 411.087(a)(2), .1272, 552.023(a); see also ORD 481 at 4.