



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 31, 2018

Ms. Ann-Marie Sheely
Assistant County Attorney
Travis County
P.O. Box 1748
Austin, Texas 78767

OR2018-02185

Dear Ms. Sheely:

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# 693568.

The Travis County Sheriff's Office (the "sheriff's office") received a request for a specified internal affairs investigation and all information related to a specified polygraph examination. You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.117, and 552.130 of the Government Code. We have considered the submitted arguments and reviewed the submitted representative sample of information.¹ We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, the requestor argues the sheriff's office failed to comply with section 552.301(b) of the Government Code. The requestor acknowledges the sheriff's office timely submitted its initial briefing but asserts the sheriff's office's invoking of all exceptions to the Act does not comply with the requirements of section 552.301(b). We note pursuant to section 552.301(b), a governmental body need only ask for a decision from this office and *state* the exceptions that apply within ten business days. *Id.* § 552.301(b) (emphasis added).

¹We 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.

Upon review, we find the sheriff's office complied with the procedural requirements mandated by section 552.301(b) of the Government Code. Accordingly, we will address the sheriff's office's arguments against disclosure of 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 encompasses the federal Fair Credit Reporting Act (the "FCRA"), 15 U.S.C. § 1681 *et seq.* Section 1681b of the FCRA permits a consumer reporting agency to furnish a consumer report to a person the consumer reporting agency has reason to believe intends to use the information for employment purposes. *See id.* § 1681b(a)(3)(B); *see also id.* § 1681a(b), (d) (defining "person" and "consumer report"). A criminal history report compiled by a private consumer reporting agency is a "consumer report" under the FCRA. *See id.* § 1681a(d) (defining "consumer report"). Section 1681b further provides "[a] person shall not use or obtain a consumer report for any purpose unless . . . the consumer report is obtained for a purpose for which the consumer report is authorized to be furnished under this section; and . . . the purpose is certified in accordance with section 1681e of this title by a prospective user of the report through a general or specific certification." *Id.* § 1681b(f). Section 1681e provides for the maintenance of procedures by consumer reporting agencies under which prospective users of consumer reports must identify themselves, certify the purposes for which they seek information, and certify that the information will be used for no other purpose. *See id.* § 1681e(a); *see also* Open Records Decision No. 373 at 2 (1983) (stating that federal law strictly limits distribution of consumer credit reports by credit reporting agencies). You state the information you indicated contains consumer reports furnished to the sheriff's office by a consumer agency for purposes of section 1681b of the FCRA. We note the FCRA does not permit the disclosure of information in a consumer report for the purpose of responding to a request for information under the Act. Therefore, the sheriff's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the FCRA. However, we find the remaining information does not contain information from a consumer report subject to the FCRA. Accordingly, the remaining information is not confidential under the FCRA, and the sheriff's office may not withhold this information under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses information made confidential by other statutes, such as section 1703.306 of the Occupations Code. Section 1703.306 provides, in relevant part:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

(1) the examinee or any other person specifically designated in writing by the examinee[.]

(b) The [Texas Department of Licensing and Regulation] or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

Occ. Code § 1703.306(a), (b). We note the information we have marked and indicated contains information acquired from a polygraph examination. However, in this instance, the requestor is the examinee's attorney, and thus is the examinee's authorized representative. If the examinee designates the requestor in writing, then the sheriff's office has the discretion to release the polygraph information we have marked to this requestor pursuant to section 1703.306(a)(1) of the Occupations Code. *See* Open Records Decision No. 481 at 9 (1987) (statutory predecessor to Occ. Code § 1703.306 permitted, but did not require, examination results to be disclosed to polygraph examinees). Otherwise, the sheriff's office must withhold the polygraph information we have marked and indicated under section 552.101 of the Government Code in conjunction with section 1703.306(a) of the Occupations Code. However, we find you have failed to demonstrate any of the remaining information at issue was acquired from a polygraph examination. As such none of the remaining information may be withheld under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.

Section 552.101 of the Government Code also encompasses chapter 411 of the Government Code, which makes confidential criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center. *See id.* § 411.083(a). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual laws with respect to the CHRI it generates. *See id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that DPS may disseminate this information as provided in chapter 411, subchapter E-1 or subchapter F of the Government Code. *See* Gov't Code § 411.083. 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 obtained from DPS or any other criminal justice agency must be withheld under section 552.101 in conjunction with chapter 411, subchapter E-1 or subchapter F of the Government Code. We note Federal Bureau of Investigation ("FBI") numbers constitute CHRI generated by the FBI. We further note CHRI does not include driving record information. *See id.* § 411.082(2)(B). Lastly, we note section 411.083 does not apply to active warrant information or other information relating to one's current involvement with the criminal justice system. *See id.* § 411.081(b) (police department allowed to disclose information pertaining to person's current involvement in the criminal justice system). Upon review, we find some of the submitted information, which we have marked, consists of CHRI that is confidential under section 411.083. Accordingly, the sheriff's office must withhold the information we have marked under section 552.101 of

the Government Code in conjunction with section 411.083 of the Government Code. However, no portion of the remaining information constitutes CHRI for purposes of chapter 411 of the Government Code. Accordingly, the sheriff's office may not withhold any of the remaining information under section 552.101 on that basis.

Section 552.108 of the Government Code provides the following:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

- (1) release of the information would interfere with the detection, investigation, or prosecution of crime;
- (2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(a)(1)-(a)(2). Section 552.108(a)(1) protects information, the release of which would interfere with a particular pending criminal investigation or prosecution. In contrast, section 552.108(a)(2) protects information that relates to a concluded criminal investigation or prosecution that did not result in a conviction or deferred adjudication. A governmental body that claims an exception to disclosure under section 552.108 must explain how and why the exception it claims is applicable to the information the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). We note section 552.108 is generally not applicable to the records of an internal affairs investigation that is purely administrative in nature and does not involve the investigation or prosecution of crime. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.) (section 552.108 generally not applicable to law enforcement agency's personnel records); *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. App.—El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution); *see also* Open Records Decision No. 350 at 3-4 (1982). However, you state the information you have marked and indicated relates to pending criminal investigations. Based upon this representation, we conclude the release of this information would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177, 186-87 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559, 560-61 (Tex. 1976). Accordingly, the sheriff's office may withhold the information you have marked and indicated under section 552.108(a)(1) of the Government Code.²

²As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

The sheriff's office explains the information it seeks to withhold under section 552.108(a)(2) is "criminal in nature and involves an investigation that has been disposed of without resulting in a conviction or deferred adjudication." We note the investigation at issue is purely administrative in nature and pertains to an internal investigation conducted by the sheriff's office and is not information that deals with the detection, investigation, or prosecution of crime only in relation to a criminal investigation or prosecution. Further, the sheriff's office does not explain any portion of the information at issue relates to a closed criminal investigation or prosecution that did not result in conviction or deferred adjudication. Therefore, the sheriff's office has failed to demonstrate the applicability of section 552.108(a)(2) to the information at issue, and the sheriff's office may not withhold this information on that basis.

Section 552.108(b)(1) of the Government Code excepts from disclosure the internal records and notations of law enforcement agencies and prosecutors when their release would interfere with law enforcement and crime prevention. Gov't Code § 552.108(b)(1); *see also* Open Records Decision No. 531 at 2 (1989) (quoting *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977)). A governmental body claiming section 552.108(b)(1) must explain how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706. 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." *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 at 327 (Tex. App.—Austin 2002, no pet.). This office has concluded section 552.108(b)(1) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (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).

You state the information you marked and indicated, if released, would interfere with law enforcement or prosecution of crime. You state the information at issue reveals details of undercover operations and personnel. You argue release of the information at issue could give criminals a tactical advantage and jeopardize officers' safety. Based on your representations and our review, we agree the release of some of the information at issue, which we have marked and indicated, would interfere with law enforcement. Accordingly, the sheriff's office may withhold the information we have marked and indicated under

section 552.108(b)(1) of the Government Code.³ However, we find you have not demonstrated how release of any of the remaining information at issue would interfere with law enforcement or crime prevention. Accordingly, the sheriff's office may not withhold any of the remaining information under section 552.108(b)(1) of the Government Code.

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). A compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (finding significant privacy interest in compilation of individual's criminal history by recognizing distinction between public records found in courthouse files and local police stations and compiled summary of criminal history information). Furthermore, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. We note records relating to routine traffic violations are not considered criminal history information. *Cf. Gov't Code* § 411.082 (2)(B) (criminal history record information does not include driving record information). Further, active warrant information or other information relating to an individual's current involvement in the criminal justice system does not constitute criminal history information for the purposes of section 552.101. *See id.* § 411.081(b) (police department allowed to disclose information pertaining to person's current involvement in the criminal justice system). 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, we find the information we have marked and indicated satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the sheriff's office must withhold the information we have marked and indicated under section 552.101 of the Government Code in conjunction with common-law privacy. However, the sheriff's office has failed to demonstrate the remaining information it has marked and indicated is highly intimate or embarrassing and of no legitimate public interest. Thus, the sheriff's office may not withhold the remaining information it has marked and indicated under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses the constitutional right to privacy. Constitutional privacy protects two kinds of interests. *See Whalen v. Roe*, 429

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

U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first is the interest in independence in making certain important decisions related to the “zones of privacy,” pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. *See Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981); ORD 455 at 3-7. The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. *See Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual’s privacy interest against the public’s interest in the information. *See* ORD 455 at 7. Constitutional privacy under section 552.101 is reserved for “the most intimate aspects of human affairs.” *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492).

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. The information at issue in Open Records Decision No. 185 was the identities of individuals who had corresponded with inmates, and our office found that “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.” ORD 185. 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 which 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 428 and 430. We have determined the same principles apply to an inmate’s recorded conversations from a telephone at a jail. Further, we recognized that inmates had a constitutional right to visit with outsiders and could also be threatened if their names were released. *See also* ORD 185. The rights of those individuals to anonymity was found to outweigh the public’s interest in this information. *Id.*; *see* ORD 430 (list of inmate visitors protected by constitutional privacy of both inmate and visitors). In this instance, the information includes audio recordings of an inmate’s telephone conversations. Upon review, we find this information is confidential under constitutional privacy. Accordingly, the sheriff’s office must withhold the audio recordings of the inmate’s telephone conversations under section 552.101 of the Government Code in conjunction with the constitutional right to privacy.

The sheriff’s office raises section 552.101 of the Government Code 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. *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 but do not make a report of the violation 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 ORD 208 at 1-2.

Upon review, we find the remaining information you marked relates to a witness who provided information in the course of an investigation. Therefore, the sheriff's office has failed to demonstrate the applicability of the common-law informer's privilege with regard to this witness and may not withhold any of the remaining information you marked under section 552.101 of the Government Code in conjunction with the informer's privilege.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's or 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. Gov't Code § 552.130(a). Upon review, we find the sheriff's office must withhold the motor vehicle record information in the submitted information under section 552.130 of the Government Code.

In summary, the sheriff's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the FCRA. If the examinee designates the requestor in writing, then the sheriff's office has the discretion to release the polygraph information we have marked and indicated to this requestor pursuant to section 1703.306(a)(1) of the Occupations Code; otherwise, the sheriff's office must withhold the information we have marked and indicated under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. The sheriff's office must withhold the information we have 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 you have marked and indicated under section 552.108(a)(1) of the Government Code. The sheriff's office may withhold the information we have marked and indicated under section 552.108(b)(1) of the Government Code. The sheriff's office must withhold the information we have marked and indicated under section 552.101 of the Government Code in conjunction with common-law privacy. The sheriff's office must withhold the audio recordings of the inmate's telephone conversations under section 552.101 of the Government Code in conjunction with the constitutional right to privacy. The sheriff's office must withhold the motor vehicle record

information in the submitted information under section 552.130 of the Government Code. The sheriff's office must release the remaining information.⁴

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/som

Ref: ID# 693568

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴We note the information being released contains information to which the requestor has a right of access under section 552.023 of the Government Code. *See* Gov't Code § 552.023; *see also* Open Records Decision No. 481 at 4 (1987). Accordingly, if the sheriff's office receives another request for this same information from a different requestor, the sheriff's office must again seek a ruling from this office. We note the information being released contains social security numbers. 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. *See* Gov't Code § 552.147(b).