



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 2, 2019

Mr. Kurt Lange
Assistant District Attorney-Civil Division
Hays County
712 South Stagecoach Trail, Suite 2057
San Marcos, Texas 78666

OR2019-00053

Dear Mr. Lange:

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# 744411 (Ref. Nos. 18-0939 & 18-0972).

The Hays County District Attorney's Office (the "district attorney's office") received two requests from different requestors for information pertaining to a specified case number. We understand you have released some information to the first requestor. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. Additionally, you state release of the submitted information may implicate the privacy interests of a named individual. Accordingly, you state the district attorney's office notified the individual of the request for information pursuant to section 552.304 of the Government Code. *See Gov't Code* § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from the requestors. *See id.*

Initially, we address the second requestor's contention the district attorney's office did not comply with the procedural requirements of the Act. The second requestor asserts the district attorney's office failed to properly notify her of the request for a ruling from this office. Pursuant to section 552.301(d) of the Government Code, a governmental body must, within ten business days of receiving the request for information, provide the requestor with (1) a written statement the governmental body wishes to withhold the requested information and has asked for a decision from the attorney general, and (2) a copy of the governmental body's written communication to the attorney general. *Id.* § 552.301(d). The district attorney's office states it received the second request for information on October 23, 2018.

Accordingly, the district attorney's office ten-business-day deadline was November 6, 2018. The envelope in which the district attorney's office sent the request for a ruling bears a postmark of November 5, 2018. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). We note the district attorney's office's letter to this office contains a notation indicating the second requestor was copied on the letter on the aforementioned date. Whether the district attorney's office actually sent the second requestor a copy of the letter to our office by November 6, 2018, is a question of fact. We further note this office is unable to resolve disputes of fact in the open records ruling process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Accordingly, where an issue cannot be resolved as a matter of law, we must rely upon the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernible from the documents submitted for our inspection. *See* ORD 552 at 4. As noted above, the submitted information reflects the second requestor was copied on the letter to our office concurrent with the timely delivery to our office. Thus, we conclude the district attorney's office complied with the requirements of sections 552.301(d) of the Government Code.

Next, we note the district attorney's office received the two requests for information in close temporal proximity. Further, we note the district attorney's office requested rulings from this office under section 552.301 of the Government Code on October 22, 2018, and November 5, 2018. The district attorney's office seeks to withhold the submitted information under section 552.108(a)(2) of the Government Code from only one of the requestors. We note the Act does not permit the selective disclosure of information. *See* Gov't Code §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold that exact information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007; Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988). Although the district attorney's office raises section 552.108(a)(2) for the information at issue, this section is a discretionary exception and does not make information confidential. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law), 177 (1977) (governmental body may waive statutory predecessor to section 552.108). Thus, the district attorney's office may not withhold information from one requestor under section 552.108(a)(2) that it has released to the other requestor. Accordingly, none of the information at issue may be withheld under section 552.108(a)(2) of the Government Code. However, as sections 552.101, 552.1175, 552.130, and 552.137 of the Government Code make information confidential under law, we will consider the applicability of these exceptions to the submitted information.¹

¹The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Section 552.101 of the Government Code exempts 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 section 58.008 of the Family Code, which provides, in part:

(b) Except as provided by Subsection (d), law enforcement records concerning a child and information concerning a child that are stored by electronic means or otherwise and from which a record could be generated may not be disclosed to the public and shall be:

(1) if maintained on paper or microfilm, kept separate from adult records;

(2) if maintained electronically in the same computer system as adult records, accessible only under controls that are separate and distinct from the controls to access electronic data concerning adults; and

(3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subsection (c) or Subchapter B, D, or E.

Fam. Code § 58.008(b); *see id.* § 51.03(a), (b) (defining “delinquent conduct” and “conduct indicating a need for supervision” for purposes of title 3 of Family Code). Section 58.008(b) is applicable to records of juvenile conduct that occurred before, on, or after September 1, 2017. The juvenile must have been at least 10 years old and less than 17 years of age when the conduct occurred. *See id.* § 51.02(2) (defining “child” for purposes of title 3 of Family Code). We note section 58.008(b) applies only to law enforcement records that involve a juvenile as a suspect, offender, or defendant. Section 58.008(b) does not apply to law enforcement records that relate to a juvenile only as a complainant, victim, witness, or other involved party. We understand the district attorney’s office to assert the information at issue is subject to section 58.008(b).² Upon review, however, we find the information at issue does not list a juvenile as a suspect, offender, or defendant. Thus, the district attorney’s office has not demonstrated the information at issue involves juvenile conduct for purposes of section 58.008(b) of the Family Code. Accordingly, the district attorney’s office may not withhold any portion of the submitted information under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses information protected by other statutes, such as laws that make criminal history record information (“CHRI”) confidential. CHRI generated by the National Crime Information Center (the “NCIC”) or by the Texas

²Although the district attorney’s office argues the information at issue is made confidential by section 58.007(c) of the Family Code, we note the 85th Legislature repealed this provision effective September 1, 2017. Act of May 28, 2017, 85th Leg., R.S., ch. 746, § 21, 2017 Tex. Sess. Law Serv. 3173, 3187.

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 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). 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. Accordingly, the district attorney’s office must withhold the CHRI we have marked under section 552.101 in conjunction with federal law and chapter 411 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 “peace officers as defined by Article 2.12, Code of Criminal Procedure[.]” *Id.* § 552.1175(a)(1). We note section 552.1175 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-7 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Thus, to the extent the information we have marked pertains to currently licensed peace officers and the officers elect to restrict access to the information in accordance with section 552.1175(b), the district attorney’s office must withhold the information we have marked under section 552.1175; however, the marked cellular telephone numbers may be withheld only if a governmental body does not pay for the cellular telephone service. If the individuals whose information we have marked are no longer licensed peace officers or no election is made, the district attorney’s office may not withhold this information under section 552.1175.

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) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Furthermore, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. 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.).

You assert the present request requires the district attorney's office to compile unspecified law enforcement records concerning a named individual. We note, however, the request is for certain information pertaining to a specified case. Thus, we find the present request does not implicate any individual's common-law right to privacy, and none of the remaining information may be withheld under section 552.101 on this basis. Nonetheless, we find some of the remaining information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Thus, with the exception of the first requestor's date of birth, to which the first requestor has a right of access pursuant to section 552.023 of the Government Code, the district attorney's office must generally withhold all public citizens' dates of birth and the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. *See* Gov't Code § 552.023(a) ("person's authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and that is 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 herself). However, we note one of the dates of birth at issue pertains to an individual whose identity may be protected under section 552.1175 of the Government Code. In that instance, the information at issue relates to an individual who has been de-identified and whose privacy interest is, thus, protected, and the district attorney's office may not withhold that individual's date of birth under section 552.101 of the Government Code on that ground, but instead, must release it. Further, we find the district attorney's office has not demonstrated any of the remaining information is highly intimate or embarrassing and not of legitimate public concern. Thus, none of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy.

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. We note section 552.130 protects personal privacy. Accordingly, the first requestor has a right of access to his own motor vehicle record information under 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. Accordingly, the district attorney's office must withhold the motor vehicle record information we have marked from the second requestor under section 552.130 of the Government Code.

Section 552.137 of the Government Code 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). *See Gov't Code* § 552.137(a)-(c). We note the first requestor has a right to his own e-mail address under section 552.137(b). *Id.* § 552.137(b). The e-mail address at issue is not excluded by subsection (c). Therefore, the district attorney's must withhold the personal e-mail address we have marked from the second requestor under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.

In summary, the district attorney's office must withhold the information we marked under section 552.101 of the Government Code in conjunction with federal law and chapter 411 of the Government Code. To the extent the information we marked pertains to currently licensed peace officers and the officers elect to restrict access to the information in accordance with section 552.1175(b), the district attorney's office must withhold the information we marked under section 552.1175; however, the marked cellular telephone numbers may be withheld only if a governmental body does not pay for the cellular telephone service. With the exception of the first requestor's date of birth, the district attorney's office must withhold all public citizens' dates of birth and the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy; however, to the extent the date of birth at issue relates to an individual who has been de-identified pursuant to section 552.1175 of the Government Code, the district attorney's office must release that date of birth. The district attorney's office must withhold the motor vehicle record information we marked under section 552.130 from the second requestor of the Government Code. The district attorney's must withhold the personal e-mail address we marked from the second requestor under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure. The remaining information must be released.³

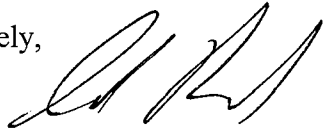
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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/>

³The 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).

[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, appearing to read 'SMP', written in a cursive style.

Sidney M. Pounds
Assistant Attorney General
Open Records Division

SMP/gw

Ref: ID# 744411

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)